

ARTICLES

THE SUPREME COURT'S TWO CONSTITUTIONS: A FIRST LOOK AT THE "REVERSE POLARITY" CASES

Arthur D. Hellman

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ARTICLES

THE SUPREME COURT’S TWO CONSTITUTIONS: A FIRST LOOK AT THE “REVERSE POLARITY” CASES

Arthur D. Hellman*

ABSTRACT

In the traditional approach to ideological classification, “liberal” judicial decisions are those that support civil liberties claims; “conservative” decisions are those that reject them. That view—particularly associated with the Warren Court era—is reflected in numerous academic writings and even an article by a prominent liberal judge. Today, however, there is mounting evidence that the traditional assumptions about the liberal-conservative divide are incorrect or at best incomplete. In at least some areas of constitutional law, the traditional characterizations have been reversed. Across a wide variety of constitutional issues, support for claims under the Bill of Rights or the Reconstruction Amendments is now regarded as the conservative position.

This Article presents the first comprehensive examination of this phenomenon; it also supplies a label—“reverse polarity.” Relying on a case classification system designed to promote transparency, the Article provides a detailed taxonomy of reverse-polarity issues. Three are defined by provisions of the Bill of Rights (the Second Amendment, the Takings Clause, and the Free Exercise Clause), the others

* Professor of Law Emeritus, University of Pittsburgh School of Law. For helpful comments and suggestions, I thank Mike Berger, Dana Berliner, Josh Fischman, Andy Hessick, Stephanie Lindquist, Stephen Wasby, and, especially, Lawrence Baum and James Weinstein. For logistical assistance that enabled me to complete a research-intensive project during the COVID-19 lockdown, I am grateful to LuAnn Driscoll, Karen Knochel, Barbara Salopek, Marc Silverman, and Linda Tashbook at the University of Pittsburgh School of Law.

by lines of precedent, primarily involving freedom of expression. The Article also discusses other constitutional issues that may be evolving in the direction of reverse polarity.

*Beyond taxonomy, the Article explores three ways of looking at reverse polarity. It considers reverse-polarity liberalism as a throwback to the Progressive Era and as an embrace of Justice Felix Frankfurter's vision of judicial self-restraint. It examines reverse-polarity conservatism as an application of the theory of judicial review associated with Justice Harlan Fiske Stone's famous Footnote Four in *United States v. Carolene Products Co.* More broadly, the Article calls attention to an unusual feature of the Roberts Court: conservative as well as liberal Justices support "a generous or expansive interpretation of the Bill of Rights"—but in different cases. It is almost as though each group of Justices has found its own copy of the Constitution, with some rights printed in boldface and italics and others grayed out and indistinct on the page.*

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INTRODUCTION

Ideological classification of judges and judicial decisions has generated much writing by academics and other commentators over the last 60 years or so, but the judges themselves have generally given the subject a wide berth.¹ One noteworthy exception is an article published in 1997 by the late Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals.² Judge Reinhardt set out to answer the question, “what is a liberal judge?” Making clear that he included himself in the category, he wrote:

Liberal judges believe in a generous or expansive interpretation of the Bill of Rights. . . . We believe that the Founding Fathers used broad general principles to describe our rights, terms such as “due process of law,” “life, liberty, and property,” “unreasonable search and seizure,” “freedom of speech,” because they were determined not to enact a narrow, rigid code that would bind and limit generations to come. . . .

Liberal judges tend to take very seriously the idea that the Constitution protects the rights of individuals against arbitrary and oppressive state action, as well as the rights of minorities against a tyrannical majority. . . . [Laws and voter initiatives] must be strictly tested against the limitations and guaranties contained in the Constitution.³

Although Judge Reinhardt was describing liberal *judges*, his analysis necessarily incorporated a definition of liberal judicial *decisions*. Liberal decisions are those that reflect “a generous or expansive interpretation of the Bill of Rights”

¹ For a useful review of the literature on ideology and judicial decision-making, see LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 65–100 (2013); see also Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It*, 29 WASH. U. J.L. & POL’Y 133 (2009) (reviewing definitions of ideology and critiquing methods of measuring it).

² Stephen Reinhardt, *Liberal Judges*, FED. LAW, Feb. 1997, at 46. Judge Reinhardt was appointed to the Ninth Circuit by President Jimmy Carter in 1980. He remained an active judge until his death in March 2018. Judge Reinhardt was often referred to as the “liberal lion” because of his championship of liberal views. See, e.g., Nicholas Sonnenburg, *‘Liberal Lion’ Defined 9th Circuit’s Progressive Jurisprudence*, L.A. DAILY J., Mar. 30, 2018.

³ Reinhardt, *supra* note 2, at 47–48. Judge Reinhardt did signal, albeit obliquely, one departure from this general approach. He said that liberal judges “sometimes have trouble interpreting [the post-Civil War constitutional] amendments as barriers to minority advancement.” *Id.* at 48. The implication is that liberal judges do not apply “strict” tests to government programs that they regard as promoting affirmative action for minorities. For discussion, see *infra* Section III.B.3.

and eschew narrow or rigid readings of “broad general principles” such as “due process of law” and “freedom of speech.”⁴

Judge Reinhardt’s characterization accords with the typology developed by political scientists in the Warren Court era and used by commentators for decades after the Warren Court ended. For example, Professor Glendon Schubert, in his landmark book *The Judicial Mind*, looked at “civil liberties” cases—primarily cases involving claims under the Bill of Rights and the Reconstruction Amendments—and applied the “liberal” label to votes that responded positively to the claim.⁵ “Conservative” votes were those that responded negatively.

Today, in the era of the Roberts Court, characterizing decisions (or judges) as “liberal” or “conservative” is not nearly as straightforward. Consider, for example, an editorial published in the *Wall Street Journal* in December 2019. The editorial predicted that a “new wave of *conservative* judges” was “*more* likely to protect such core liberties as religious freedom, political speech and assembly”⁶ That observation reflects a view directly contrary to Judge Reinhardt’s statement in 1997 that “[l]iberal judges believe in a generous or expansive interpretation of the Bill of Rights.”⁷

The *Journal* editorial and similar commentaries⁸ suggest that the traditional assumptions about the liberal-conservative divide reflected in Judge Reinhardt’s article and the Schubert book are incorrect or at best incomplete. In at least some areas of constitutional law, the traditional characterizations have been reversed. Across a wide variety of constitutional issues, support for the civil liberties claim is now viewed as the conservative position.

⁴ Judge Reinhardt also discussed how “the liberal judge” decides cases outside the realm of constitutional law. See *infra* Section I.B.

⁵ GLENDON SCHUBERT, *THE JUDICIAL MIND* 103 (1965). Schubert excluded “property” rights cases from his definition of civil liberties. For more on Schubert’s typology, see *infra* Section I.B.

⁶ Editorial, *Revitalizing the Federal Courts*, WALL STREET J., Dec. 28, 2019 (emphasis added). The editorial was comparing “the new wave of judges” appointed by President Donald J. Trump to the “Democratic appointees” who “made up a majority on nine of the 13 circuit courts” when he took office. *Id.* The editorial also referred to “gun and property rights.” *Id.*

⁷ Reinhardt, *supra* note 2, at 47 (emphasis added).

⁸ E.g., David E. Bernstein, *Liberals, Conservatives, and Individual Rights*, CATO INST. (June 27, 2008), <https://www.cato.org/publications/commentary/liberals-conservatives-individual-rights> (noting numerous instances in which conservative Justices have been more supportive than liberal Justices of “individual rights and civil liberties against assertions of government power”).

This development has not gone unnoticed,⁹ but until now there has not been a comprehensive examination of the apparent shift in the positions associated with liberal and conservative judicial ideologies. That is the purpose of this Article. A label is needed; I shall use the term “reverse polarity” to characterize cases in which support for the constitutional claim is regarded as the conservative rather than the liberal position, reversing the ideological alignment that generally prevailed during the Warren Court era and for decades thereafter.¹⁰ The term derives from the case classification protocols that I developed for empirical studies of other aspects of the work of federal appellate courts, including the Supreme Court.¹¹

The Article is in five parts. Part I examines the meaning of “liberal” and “conservative” as those terms have been used to characterize judicial decisions during three periods: the Progressive Era, the Warren Court era, and the Roberts Court era. Part II describes the method used in this Article for classifying modern-day judicial positions as liberal or conservative. That method relies primarily on an examination of the ideological alignments in the Supreme Court over the past twenty-five years—a period in which there was a liberal bloc of four Justices that retained its unity and its position on the ideological scale. Part III provides a taxonomy of reverse-polarity issues. Three are defined by provisions of the Bill of Rights (the Second Amendment, the Takings Clause, and the Free Exercise Clause), the others by lines of precedent, primarily involving freedom of expression. Part IV discusses other cases that exemplify the phenomenon.

Part V offers provisional thoughts about three ways of looking at reverse polarity. It considers reverse-polarity *liberalism* as a throwback to the Progressive Era and as an embrace of Justice Felix Frankfurter’s vision of judicial self-restraint. And it examines reverse-polarity *conservatism* as an application of the theory of judicial review associated with Justice Harlan Fiske Stone’s famous Footnote Four in *United States v. Carolene Products Co.*¹² The Article concludes by noting an unusual feature of the Roberts Court: conservative as well as liberal Justices support “a generous or expansive interpretation of the Bill of Rights”¹³—but in different cases. It is almost as though each group of Justices has found its own copy of the

⁹ See, e.g., Lee Epstein & Jeffrey A. Segal, *Trumping the First Amendment?*, 21 WASH. U. J.L. & POL’Y 81 (2006); Bernstein, *supra* note 8; see also Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019).

¹⁰ A more precise definition will be outlined in Section I.C and developed in Part II.

¹¹ See *infra* Section II.A.

¹² 304 U.S. 144, 152 n.4 (1938).

¹³ See *supra* text accompanying note 3.

Constitution, with some rights printed in boldface and italics and others grayed out and indistinct on the page.

Before turning to these matters, a cautionary note is in order—more than one, in fact. Just because decisions in a particular issue area can be characterized as liberal or conservative does not mean that the Justices will divide along liberal/conservative lines or indeed that they will divide at all. And when Justices do divide along ideological lines, that is not necessarily *because* they are liberal or conservative.

I do not want to overstate the cautionary notes. Although the Article does not seek to explain why the Justices vote as they do, the analytical framework and the findings lay a necessary foundation for something that I think is more important: fruitful exploration of the many-faceted relationship between Supreme Court decisions and the socio-political world of which they are a part. In particular, the research reported in these pages shows that no understanding of judicial ideologies in the modern era can be complete without taking account of the complexities introduced by the phenomenon of reverse polarity and the emergence of what I have called the Supreme Court's two Constitutions.

I. IDEOLOGY AND JUDICIAL DECISIONS: THREE ERAS

Classifying judicial decisions (and judges) as “liberal” or “conservative” goes back a long way. But the meaning of the terms has changed over time. For present purposes, it will be sufficient to consider three periods: the Progressive Era, the Warren Court era, and the Roberts Court era.

A. *The Progressive Era*

As early as 1929, Professor Ray A. Brown of the University of Wisconsin wrote about liberal and conservative decisions in an article in the *Harvard Law Review*:

[C]onservative Justices often render so-called liberal opinions, and *vice versa*. Mr. Justice Brewer, one of the staunchest of conservatives, wrote the Court's opinion in *Muller v. Oregon*, which paved the way to the factual and scientific consideration of police power cases. On the other hand Mr. Justice Brown, whose opinion in *Holden v. Hardy* is a monument of liberalism, was found with the majority in the much criticized *Lochner v. New York*. And often the Court's

opinion is unanimous, including on one side both those denominated liberal and those conservative.¹⁴

Four features of this passage are noteworthy. First, Professor Brown does not define or explain the terms “liberal” and “conservative”; he assumes that his readers will understand what he means in using them. Second, his examples are drawn from a previous generation of judges; Justice Brewer died in 1910, and Justice Brown retired in 1906. Third, Professor Brown distinguishes between liberal (or conservative) *decisions* and liberal (or conservative) *judges*. I shall return to this point later.¹⁵ Finally and most important, Professor Brown characterizes decisions as “liberal” or “conservative” based on whether they uphold or invalidate economic and social legislation supported by the Progressive movement. Justice Brown’s opinion in *Holden v. Hardy* “is a monument of liberalism” because it upheld a state law limiting employment in underground mines and smelters to eight hours a day. Justice Brewer is “the staunchest of conservatives” because, as Professor Brown noted in the previous paragraph of the article, in his twenty-one years on the bench he participated in forty-six cases “involving the conflict between individual rights and the police power” and voted against the constitutionality of the state legislation in forty-one percent of the cases.¹⁶ Professor Brown contrasted Justice Brewer’s record with that of Justice Holmes; the latter voted against the state law in only ten percent of the cases in which he participated.¹⁷

Professor Brown’s assumptions exemplify the Progressive Era’s view of what “liberal” and “conservative” mean when applied to judicial decisions. In a similar vein, a few years earlier, then-Professor Felix Frankfurter commented that “[Theodore] Roosevelt’s vigorous challenge of judicial abuses [in 1912] was mainly responsible for a *temporary period of liberalism* which followed in the interpretation of the due process clauses.”¹⁸ The context makes clear that Frankfurter, like

¹⁴ Ray A. Brown, *Police Power—Legislation for Health and Personal Safety*, 42 HARV. L. REV. 866, 869 (1929) (footnotes omitted). The references are to *Muller v. Oregon*, 208 U.S. 412 (1908); *Holden v. Hardy*, 169 U.S. 366 (1898); and *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁵ See *infra* Section II.B.

¹⁶ Brown, *supra* note 14, at 867–68. Here, of course, Professor Brown is characterizing the ideological position of a *judge*. But that characterization is based solely on how the judge voted in the class of case Brown is concerned with.

¹⁷ *Id.* at 868.

¹⁸ Felix Frankfurter, *The Red Terror of Judicial Reform*, NEW REPUBLIC (Oct. 1, 1924), reprinted in FELIX FRANKFURTER ON THE SUPREME COURT 156, 166 (Philip B. Kurland ed., 1970) (emphasis added).

Professor Brown, applied the label “liberal” to decisions upholding economic and social legislation against challenges based on the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Progressive Era approach to ideology persisted at least until the last years of the 1930s when President Franklin D. Roosevelt appointed Hugo Black, William O. Douglas, and Felix Frankfurter to the Supreme Court. As Professor Noah Feldman has put it, the “constitutional liberalism [of the three Justices] was defined in opposition to the property-protecting doctrines that had dominated the Court’s jurisprudence for three decades.”¹⁹ “The conservative Supreme Court,” by couching those doctrines “in terms of individual rights,” had “given judicial rights activism a bad name.”²⁰

B. *The Warren Court Era*

Earl Warren took office as Chief Justice in 1953 and served until 1969. The Warren Court revolutionized American law through expansive interpretations of the Bill of Rights and the Reconstruction Amendments (particularly the Equal Protection Clause) in areas including race, reapportionment, freedom of speech, and criminal procedure.²¹ And, the terms “liberal” and “conservative” came to have very different connotations from their use in the Progressive Era.²²

The most extensive discussion of judicial ideology during this period is found in the work of political scientists. Many of the studies adopted what has been called the “attitudinal model.” Under this model, the Justices “were hypothesized to cast their judicial votes on the basis of their personal political ideologies.”²³ The attitudinal model has no bearing on the present project, but the writings of these

¹⁹ NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREATEST SUPREME COURT JUSTICES 177 (2020). Feldman was also describing the liberalism of Robert H. Jackson, who was appointed to the Court by Roosevelt in 1941.

²⁰ *Id.* at 179. See also Laura Weinrib, *The Limits of Dissent: Reassessing the Legacy of the World War I Free Speech Cases*, 44 J. SUP. CT. HIST. 278, 291 (2019) (“New Deal liberals . . . were convinced that the judicial enforcement of free speech would eventually undermine democratic gains.”).

²¹ Citation of authority is hardly necessary, but for a thorough and lively account, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

²² How, and when, the shift took place are interesting questions that are beyond the scope of this Article. For some clues, see *id.*; see also Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

²³ EPSTEIN, LANDES & POSNER, *supra* note 1, at 69.

scholars give us a window into the meaning of “liberal” and “conservative” in the Warren Court era.

Three of the most prominent expositors of ideological classification during that period were Glendon Schubert, S. Sidney Ulmer, and Harold J. Spaeth. I begin with Professor Schubert.²⁴ Rather than focusing on a single area of constitutional adjudication, as did Professor Brown, Schubert perceived a liberal/conservative divide on a wide variety of issues, both constitutional and non-constitutional. In his often-cited book *The Judicial Mind*, Schubert separately identified the characteristics of “political liberalism” and “economic liberalism.”²⁵

Writing about political liberalism, Schubert first defined “civil liberties” to encompass pretty much all claims under the Bill of Rights and the Reconstruction Amendments (excepting “property” rights).²⁶ He also included “claims of personal freedom and of procedural right” based on statutory law, such as those raised by aliens seeking to avoid deportation.²⁷ In Schubert’s summary:

[A]ny case for which the major question that the Court purported to decide related to a claim of personal freedom was classified as a civil liberties case. Such cases included . . . both claims to freedom as a substantive value, and claims relating to the procedures according to which claims of the substantive value were determined.²⁸

“Liberal” votes were those which responded positively to a civil liberties claim; “conservative” votes responded negatively.²⁹

To identify “economic liberalism,” Schubert “grouped together sets of cases which involved disputes between unions and employers; governmental regulation of business activities; fiscal claims of workers against employers; and disputes between

²⁴ See LAWRENCE BAUM, *IDEOLOGY IN THE SUPREME COURT* 9 (2017) (describing Schubert’s work as “classic and influential”).

²⁵ SCHUBERT, *supra* note 5, at 99.

²⁶ *Id.* at 101 (“I defined civil liberties to consist of claims to personal (as distinguished from property) rights and freedoms.”). The parenthetical exclusion of “property” rights will be discussed *infra* Part III.

²⁷ *Id.* at 101.

²⁸ *Id.* at 102.

²⁹ *Id.* at 103.

small businessmen and their large corporate competitors.”³⁰ Liberal decisions “would support the claims of the economically underprivileged, while the conservative would stand pat and resist economic change that would benefit the have-nots.”³¹ For example, “the economic liberal would uphold the fiscal claims of injured workers (or their widows); he would support unions . . . ; [and] he would support government regulation of business”³²

Professor S. Sidney Ulmer followed a similar approach, although he limited himself to “civil liberties” cases. His definition of the category corresponded closely to Schubert’s: “a civil liberties case is one involving a claimed right of the type covered by the Bill of Rights and Civil War Amendments to the Constitution.”³³ Ulmer ranked the Justices “in terms of favorableness toward civil liberties claims” and found that the ranking “probably coincides with prevailing impressions regarding the relative attitudes of liberals and conservatives on the Court.”³⁴ For example, in the 1961 term, Chief Justice Warren, Justice Hugo Black, and Justice William O. Douglas voted in favor of the civil liberties claim in every one of the seventeen non-unanimous civil liberty decisions.³⁵ Justice William J. Brennan voted in favor of the claim in fifteen of seventeen cases. At the other end of the spectrum, Justice Tom C. Clark cast only three “favorable” votes, and Justice John M. Harlan only five. Warren, Black, Douglas, and Brennan were the liberals; Clark and Harlan were the conservatives.³⁶

Ulmer also presented data on a narrower group of cases from the 1955 through 1960 terms—those involving “aliens, Communists, and Negroes.”³⁷ His data showed

³⁰ *Id.* at 127.

³¹ *Id.* at 128. The tendentiousness of this passage (“the conservative would stand pat . . .”) makes clear that Schubert’s own sympathies were with the liberals. Nevertheless, no one would disagree that economic liberals support claims of injured workers, government regulation of business, etc.

³² *Id.*

³³ S. Sidney Ulmer, *Supreme Court Behavior and Civil Rights*, 13 W. POL. Q. 288, 288 (1960). Like Schubert, Ulmer included statutory claims that fit within his definition, which encompassed rights “of the type covered by the Bill of Rights and the Civil War Amendments.” *Id.* (emphasis added).

³⁴ S. Sidney Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, 28 LAW & CONTEMP. PROBS. 164, 169 (1963) [hereinafter Ulmer, *Quantitative Analysis*].

³⁵ *Id.* at 170. Justice Black took no part in one case.

³⁶ *See id.* at 167 (referring to “the Justices usually identified as ‘liberals’”).

³⁷ *Id.*

that “the Justices usually identified as ‘liberals’” overwhelmingly voted in favor of the “alien, communist, or Negro claim.”³⁸

Professor Harold J. Spaeth built on the work of Schubert and Ulmer. Like Schubert, he looked at the ideology of Supreme Court Justices by considering both “civil liberties” and “economic” cases.³⁹ The civil liberties component included “all formally decided cases invoking the Bill of Rights or involving criminal proceedings, excepting only tax, business, or labor-union cases where criminal sanctions are employed.”⁴⁰ In classifying the Justices’ votes in civil liberties cases, Spaeth used a “C-scale” that he credited to Ulmer.⁴¹ Under that scale, “[a] pro-C vote is one which upholds the claims of the individual . . . against government.”⁴² Such votes are considered “liberal.”⁴³

Spaeth also sought to identify “economic liberalism.” He created an “E-Scale” and included “all cases involving regulation of business or business activity and labor unions, plus employee-injury suits.”⁴⁴ For these cases, Spaeth defined the “pro-E vote” as “one which is pro-union, anti-business, pro-competition, pro-employee in damage suits against employers, or pro-small business in a conflict between a large and small business not concerning antitrust action.”⁴⁵ A “pro-E vote” put a Justice in the “liberal” camp.⁴⁶ That typology corresponded very closely to Schubert’s version of “economic liberalism.”

In a later article, dealing only with “the area of civil liberties,” Spaeth criticized Schubert and Ulmer (and his own earlier work) for failing to consider possible distinctions among Justices’ responses to different categories of civil liberties

³⁸ *Id.*

³⁹ Harold J. Spaeth, *Unidimensionality and Item Invariance in Judicial Scaling*, 10 BEHAV. SCI. 290, 290–91 (1965).

⁴⁰ *Id.* at 291. It is not clear why Spaeth excluded cases invoking under the Reconstruction Amendments, but an examination of his case lists confirms that he did not include them. *See, e.g., id.* at 295 (listing civil liberties cases in the 1961 Term but not including *Baker v. Carr*, 369 U.S. 186 (1962)).

⁴¹ *Id.*

⁴² *Id.* at 291.

⁴³ *Id.* at 296–97.

⁴⁴ *Id.* at 291.

⁴⁵ *Id.*

⁴⁶ *See id.* at 296–97.

claims.⁴⁷ But he continued to use the C-scale in the same way. The article analyzed “the formally decided nonunanimous civil liberties decisions of the Warren Court for the five terms 1960-1964.”⁴⁸ Spaeth identified eleven categories of civil liberties cases; the categories included “religious freedom,” “First Amendment non-religion,”⁴⁹ “race relations,” and “internal security.”⁵⁰ He found that the Justices’ votes in seven of the eleven categories were “highly correlated.”⁵¹

The Schubert/Ulmer typology⁵²—which I shall refer to as the “traditional” approach—retained much of its descriptive force long after the Warren Court departed the scene.⁵³ In the late 1980s, Professor Spaeth created the original version of the widely used U.S. Supreme Court Database, which classifies each decision and each Justice’s vote as liberal or conservative.⁵⁴ In a 1993 book co-authored with Jeffrey A. Segal, Spaeth explained how the Database defined “liberal” and “conservative” judicial positions.⁵⁵ The authors said that their specification “accords with common usage,”⁵⁶ and indeed it largely tracked the earlier works. For example,

⁴⁷ Harold J. Spaeth & David J. Peterson, *The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision Making*, 15 *MIDWEST J. POL. SCI.* 415, 416–18 (1971).

⁴⁸ *Id.* at 418.

⁴⁹ All of the cases in this category involved freedom of expression—speech, press, assembly, and association. *See id.* at 439.

⁵⁰ The “internal security” category included half a dozen First Amendment cases, several involving the Due Process Clauses, and some non-constitutional cases. *Id.* at 440.

⁵¹ *Id.* at 434.

⁵² I shall use the term “Schubert/Ulmer” rather than “Schubert/Ulmer/Spaeth” for simplicity and to avoid confusion with the Spaeth Database discussed below.

⁵³ That is not to say that there were no changes in the perception of “liberal” and “conservative” ideologies. *See infra* note 68.

⁵⁴ For the current version, see *The Supreme Court Database*, WASH. U. L., <http://supremecourtdatabase.org> (last visited Jan. 16, 2021).

⁵⁵ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 243 (1993) [hereinafter SEGAL & SPAETH, *ATTITUDINAL MODEL*]. In a later book, Segal and Spaeth presented a much compressed (and slightly revised) version of this typology, limited to civil liberties issues. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 322–23 (2002) [hereinafter SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*].

⁵⁶ SEGAL & SPAETH, *ATTITUDINAL MODEL*, *supra* note 55, at 243.

“support of those alleging deprivation of First Amendment freedoms” was a liberal position.⁵⁷

In 2013, three prominent scholars of judicial behavior discussed the ideological coding in the Spaeth Database.⁵⁸ They noted that Spaeth’s classifications of Court decisions (and of the votes of individual Justices) “mostly comport with conventional understandings” of the terms “liberal” and “conservative.”⁵⁹ And they provided examples of those “conventional understandings”:

“Liberal” votes [include] those in favor of defendants in criminal cases; of women and minorities in civil rights cases; of individuals in suits against the government in First Amendment, privacy, and due process cases; of unions and individuals over businesses; and of government over businesses. “Conservative” votes are the reverse.⁶⁰

These “conventional understandings” reflect the approach of Schubert, Ulmer, and of course Spaeth himself during the Warren Court era.

I return now to Judge Stephen Reinhardt’s description of the “liberal judge” as of 1997. For ease of reference I will repeat the passage already quoted:

Liberal judges believe in a generous or expansive interpretation of the Bill of Rights. . . . We believe that the Founding Fathers used broad general principles to describe our rights, terms such as “due process of law,” “life, liberty, and property,” “unreasonable search and seizure,” “freedom of speech,” because they were determined not to enact a narrow, rigid code that would bind and limit generations to come. . . .

⁵⁷ *Id.* Consistent with Schubert’s treatment of property claims, Segal and Spaeth said that in Takings Clause cases, a vote opposing government action is a conservative vote. *Id.*; see also SCHUBERT, *supra* note 5, at 101. For discussion see *infra* Section III.A.

⁵⁸ EPSTEIN, LANDES & POSNER, *supra* note 1, at 76.

⁵⁹ *Id.*

⁶⁰ *Id.* The authors questioned some of the Database classifications of individual cases, but they appear to have generally accepted the “conventional understandings” of what “liberal” and “conservative” mean when applied to judicial decisions or votes. *Id.* at 76–77. However, they rejected Spaeth’s treatment of two types of civil liberties cases—those involving commercial speech and those involving requirements of “accountability in campaign spending.” *Id.* at 150. For discussion of these issue areas, see *infra* Part III.

Liberal judges tend to take very seriously the idea that the Constitution protects the rights of individuals against arbitrary and oppressive state action, as well as the rights of minorities against a tyrannical majority. . . . [Laws and voter initiatives] must be strictly tested against the limitations and guaranties contained in the Constitution.⁶¹

As is evident, Judge Reinhardt’s description of the “liberal judge” closely tracked what Professor Schubert had written about “political liberalism” thirty years earlier. And, even more than Schubert, Judge Reinhardt declined to draw distinctions among “Bill of Rights” protections.⁶²

Judge Reinhardt also identified some “nonconstitutional areas where you can spot the liberal judge at work.”⁶³ The liberal judge, he said, more readily rules in favor of “the injured worker or the disabled individual” rather than the insurance company or employer or government agency. Liberal judges “are frequently a fairly soft touch” for aliens seeking asylum.⁶⁴ “In all types of cases, including tax cases, you’re more likely to find the liberal judge voting for the individual while his conservative colleagues tend to uphold the position advocated by the government.”⁶⁵ Here there is a close match with Schubert and Spaeth and their depiction of “economic liberalism.”

When Judge Reinhardt died in March 2018, Dean Erwin Chemerinsky of the UC Berkeley School of Law—a prominent liberal academic—summarized the judge’s jurisprudence in terms that hearkened back to the Schubert-Ulmer concept of judicial liberalism in the Warren Court era. Chemerinsky said, “Reinhardt was an unabashed liberal. He was a judge whose opinions consistently protected civil rights and civil liberties; he usually favored the individual over the government and the

⁶¹ Reinhardt, *supra* note 2, at 47–48.

⁶² Schubert excluded “property” rights, see SCHUBERT, *supra* note 5, but Judge Reinhardt referred to constitutional protection of “life, liberty, and property,” without distinguishing among the three. Reinhardt, *supra* note 2. As already noted, Judge Reinhardt did signal that he took a different approach to laws and voter initiatives when affirmative action plans are challenged under the Reconstruction Amendments. For discussion, see *infra* Section III.C.

⁶³ Reinhardt, *supra* note 2, at 48.

⁶⁴ *Id.*

⁶⁵ *Id.*

government over business.”⁶⁶ Yet by 2018, Chemerinsky’s description of the “unabashed liberal” was, at best, incomplete.⁶⁷

C. *The Roberts Court Era*

In the era of the Roberts Court, classifying decisions as “liberal” or “conservative” presents complications that the academic analysts of the Warren Court era did not have to confront.⁶⁸ To be sure, the Schubert/Ulmer typology has not become obsolete. On the contrary, it remains valid across a wide range of federal-law issues. In the area of criminal procedure, for example, a vote for the defendant’s constitutional claim is still a liberal vote.⁶⁹ So is a vote in favor of an alien or class of aliens, whether the claim is based on a statute or the Constitution. No change would be required in Schubert’s classification of economic cases; for example, although Congress has vastly expanded the range of “fiscal claims” available to workers against their employers,⁷⁰ a vote in favor of the claim is still a liberal decision. But in the broad realm of constitutional litigation, a more nuanced approach is required.

The difficulty comes into sharp focus in an article published shortly after the conclusion of the Roberts Court’s 2017–2018 Term by Adam Liptak, the Supreme Court correspondent of the *New York Times*. The online version of the article ran under the provocative and telling headline, *How Conservatives Weaponized the First Amendment*.⁷¹ Liptak wrote that “[t]he Court’s five conservative members” had given “a stunning run of victories [to] a conservative agenda that has increasingly been built on the foundation of free speech.”⁷² These “victories” included the two most recent cases, *Janus v. AFCSME*, which held that the state’s extraction of agency

⁶⁶ Nicholas Sonnenberg, *Reinhardt Was Last of the Carter Court Transformation*, L.A. DAILY J., Apr. 2, 2018, at 1.

⁶⁷ I do not fault Chemerinsky; a brief comment to a reporter could not capture nuances that he would undoubtedly incorporate into a scholarly article.

⁶⁸ There were of course some shifts in the “conventional understanding” of liberal and conservative ideologies between the Warren Court era and the Roberts Court. For present purposes it is unnecessary to explore that history. For a detailed and thoughtful analysis, see BAUM, *supra* note 24. See *infra* Part III for discussion of some particular issues.

⁶⁹ For a brief discussion, see *infra* Section IV.E.

⁷⁰ See *supra* text accompanying note 31.

⁷¹ Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>.

⁷² *Id.*

fees from nonconsenting public-sector employees violates the First Amendment,⁷³ and *NIFLA v. Becerra*, which struck down a California law requiring facilities that provide pregnancy-related services to disseminate notices with content supplied by the government.⁷⁴

Janus and *NIFLA*, like the earlier decision in *Citizens United*,⁷⁵ would probably have been classified as “liberal” decisions in the Schubert/Ulmer typology because the rulings supported claims under the First Amendment.⁷⁶ But it would seem anomalous to identify them as such today, if only because all of the “liberal” Justices on the Court opposed them. It would be equally jarring to apply the term to the Court’s most recent decisions sustaining claims under the Free Exercise Clause. For example, in *Espinoza v. Montana Department of Revenue*, the Court held that the state violated the First Amendment by excluding religious schools from a program that provided tuition assistance to parents who send their children to private schools.⁷⁷ All four members of the Court’s liberal bloc dissented.⁷⁸ And these decisions do not stand alone. The Second Amendment, although never considered by the Warren Court Justices, is part of the Bill of Rights; but when the Court has found violations of the right “to keep and bear arms,” only the liberal Justices (indeed, all of them) have voted to reject the claims.⁷⁹

Janus, *Espinoza*, and the other decisions cited above are examples of the phenomenon that I am calling *reverse polarity*. They are civil rights cases in which support for the constitutional claim is regarded as the *conservative* position, in part because support for the claim comes primarily or entirely from Justices viewed as

⁷³ 138 S. Ct. 2448 (2018).

⁷⁴ 138 S. Ct. 2361 (2018).

⁷⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁷⁶ I say “probably” because recharacterizing the nature of the issue could change the ideological direction of the outcome. *Janus*, for example, might have been regarded as an “economic” issues case, with a liberal vote being a vote in favor of the union. But that too is questionable, because the party opposing the union was not the employer but an individual employee. In any event, as the Liptak article makes clear, *Janus* and *Citizens United* are characterized as “conservative” rather than “liberal” by today’s commentators.

⁷⁷ 140 S. Ct. 2246 (2020).

⁷⁸ *Id.* at 2278 (Ginsburg, J., joined by Kagan, J., dissenting); *id.* at 2281 (Breyer, J., joined in part by Kagan, J., dissenting); *id.* at 2292 (Sotomayor, J., dissenting); see also *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1748 (Ginsburg, J., joined by Sotomayor, J., dissenting).

⁷⁹ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008).

“conservative.”⁸⁰ That is the reverse of the ideological alignment that prevailed during the Warren Court era and for decades thereafter, when support for civil rights claims was viewed as the *liberal* position.

In Parts III and IV of this Article, I present a comprehensive taxonomy of reverse-polarity issues and cases. Before doing so, I outline the method that I used to characterize modern-day judicial positions as liberal or conservative.

II. IDENTIFYING REVERSE POLARITY

To study reverse polarity, it is necessary to devise a method for determining whether support for a particular kind of constitutional claim is to be characterized as “liberal” or “conservative.” For this Article, I relied primarily on the identity of the Supreme Court Justices on each side of an issue, supplemented by information about what Professor Lawrence Baum has called “the broad consensus”—particularly among “political elites”—“on the identities of conservative and liberal positions on a wide range of issues.”⁸¹

I was able to implement this method because I could use the database of decisions that I compiled and maintained for my studies of case selection in the Supreme Court. In that database I coded each case for (among other characteristics) issue and outcome—more precisely, how the Court ruled on the issue in question. For this study, I compiled information about the ideological scaling of the Justices who have served on the Supreme Court during the past quarter-century. That step enabled me to identify liberal and conservative blocs on the Court. I then looked at how the members of each bloc voted, both in individual decisions and in the cluster of decisions on each issue. Based on what I found, I determined whether to identify a reverse-polarity *issue*, a reverse-polarity *case*, or neither. Here I provide a brief account of the two components of the method.

A. Issue Classifications and Decisional Polarity

The case classification system I used in my Supreme Court docket studies is built upon three key elements:

- Four broad (macro) issue categories, each corresponding to one of the major functions of the Supreme Court in the life and law of America, and

⁸⁰ The relationship between Justices’ votes and perceptions of what constitutes a “liberal” or “conservative” position is a complex one. For a thorough discussion, see BAUM, *supra* note 24. *See also supra* Section II.B.

⁸¹ BAUM, *supra* note 24, at 15.

rank-ordered to reflect the hierarchy in the legal effect of decisions in each area.⁸²

- Particularized (micro) issue categories defined by reference to the source of authority for the legal rule in dispute.
- Plus/minus (polarity) codes that are keyed to the issue and describe case outcomes, with a “plus” generally signifying that the court ruled in favor of the claim or defense based on the source of the legal rule in dispute.

1. The Macro Category: Civil Rights

For the study of reverse polarity, only one of the four macro categories is relevant: civil rights.⁸³ This category corresponds to the Supreme Court’s function of delineating the limits of governmental authority as against claims of individual liberty.⁸⁴ It includes cases in which litigants seek redress for, or protection against, some act of government (state or federal) that they claim is depriving them of rights guaranteed by those provisions of the Constitution that directly protect individual rights—primarily the Bill of Rights and the Fourteenth Amendment, but also including provisions of the original Constitution such as the Ex Post Facto Clauses.⁸⁵

The category also encompasses remedial and jurisdictional issues associated with civil rights litigation, e.g., the interpretation of Section 1983 and AEDPA. It does not include cases where individuals claim that the government has violated their rights, but invoke a statute or doctrine of general applicability, not requiring a finding of state action.⁸⁶

⁸² See Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970’s*, 91 HARV. L. REV. 1709, 1790 (1978) (explaining the categories) [hereinafter Hellman, *Plenary Docket*].

⁸³ The other broad categories are federalism and separation of powers, general federal law, and jurisdiction and procedure. *See id.*

⁸⁴ *See id.* at 1739. In this Article, the terms “civil rights,” “civil liberties,” and “individual rights” will be used interchangeably to refer to the category.

⁸⁵ I specify “direct” protection of individual rights because, as the Supreme Court has often noted, the principles of federalism and separation of powers embodied in the Constitution also serve to protect individual liberty. *See, e.g.,* *Bond v. United States*, 564 U.S. 211, 222 (2011) (Bond I); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202–03 (2020).

⁸⁶ Such cases are placed in the category of “general federal law.” *E.g., Fort Bend Cty. v. Davis*, 139 S. Ct. 1843 (2019) (Title VII).

2. Defining the Micro Categories

Within the broad category of civil rights (as with the other macro categories), particular issues or issue areas are defined by reference to *the source of authority for the legal rule in dispute*. This approach derives from the basic precept that the national government is a government of limited powers.⁸⁷ Because that is so, any rule of federal law must be grounded in a specific source of authority—ordinarily, the Federal Constitution or an Act of Congress. It follows that all issues of federal law can be classified in accordance with the constitutional or statutory provision that most immediately gives rise to the legal question in dispute.

In the realm of civil rights litigation, issues may be defined by a clause in the Bill of Rights (e.g. the Takings Clause) or by a line of precedent interpreting a particular provision of the Constitution (e.g. *Miranda v. Arizona*). As these examples suggest, issues can be defined at different levels of specificity. For my previous Supreme Court studies, where I sought to identify the forces that influenced the shifts in the composition of the plenary docket, the level of specificity depended primarily on the volume of decisions to be analyzed. For example, there was only one category for the Confrontation Clause, but I identified half a dozen different kinds of claims by criminal defendants asserting a denial of due process.⁸⁸

For the reverse-polarity study, I broke out some additional categories where there was reason to think that ideological alignment might be in play—for example, affirmative action. But I limited the categories to those that could be justified within the Court’s doctrinal framework; thus, there is no category of “abortion-related speech.”⁸⁹

Now and then, there are cases in which the Justices disagree as to which line of precedents provides the controlling legal authority. When this occurred, I generally based my classifications on the view of the case taken by the Court. For example, in *United States v. United Foods, Inc.*, the dissent argued that the case involved economic regulation or perhaps at most commercial speech.⁹⁰ But the majority relied

⁸⁷ See, e.g., *Bond v. United States*, 572 U.S. 844, 854 (2014) (Bond II).

⁸⁸ See Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 534 tbl.III (1983) [hereinafter Hellman, *National Law*].

⁸⁹ I recognize, of course, that some members of the Court believe that the Court *has* created “an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.” *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., concurring). But such assertions, in opinions that do not speak for the Court, do not create a doctrine-based category.

⁹⁰ 533 U.S. 405, 428–29 (2001) (Breyer, J., dissenting).

on “[o]ur precedents concerning compelled contributions to speech.”⁹¹ I therefore classified the case as one involving compelled subsidy, though I noted the overlay of the commercial speech doctrine.⁹²

3. The Plus/Minus Codes: Issue Polarity

After classifying the issue in a case in accordance with the principles set forth above, the next step was to assign a plus/minus or polarity code. This code depends on the nature of the issue, but for most cases, the “plus” signifies that the court ruled in favor of the claim or defense *based on the source of the legal rule in dispute*.

In civil rights cases, by definition, the legal rule in dispute is grounded in one of the provisions of the Constitution that directly protect individual rights against government action—most often, one of the first eight amendments. If the decision sustained the constitutional claim, the case is coded as a +C. If the decision rejected the claim, the case is a –C. The nature of the claim and the identity of the claimant are irrelevant.

Also irrelevant are the values and purposes invoked by the government in defense of its action. That is so even if, in other contexts, those values might support a different kind of civil rights claim. For example, in *Espinosa*, the case from Montana challenging the exclusion of religious schools from a program of tuition assistance,⁹³ the state relied on a state constitutional provision that in some respects parallels the Establishment Clause.⁹⁴ But the state did not argue that the Establishment Clause *required* the exclusion of religious schools.⁹⁵ Only one constitutional claim was before the Court, and the Court upheld that claim. The case is therefore coded as +C.⁹⁶

⁹¹ *Id.* at 410 (majority opinion).

⁹² The case is discussed *infra* Section III.F.

⁹³ *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020), discussed *supra* Section I.C; *see also infra* Section III.H.

⁹⁴ *See Espinoza*, 140 S. Ct. at 2264 (Breyer, J., dissenting) (noting “Montana’s antiestablishment interests”).

⁹⁵ *See id.* at 2254 (majority opinion) (“[T]he parties do not dispute that the scholarship program is permissible under the Establishment Clause.”).

⁹⁶ In rare instances, both sides may argue that the Constitution requires a decision in their favor. For discussion, see *infra* Section IV.A.

More generally, issue (or decisional) polarity is distinct from ideological direction, and indeed the separation of the two is a defining feature of the system that makes for greater transparency. Here, it provides the grounding for the investigation of reverse polarity. In the traditional typology of civil rights litigation, liberal decisions are those that support claims under the Bill of Rights and the Reconstruction Amendments (with a possible exception for “property” rights).⁹⁷ That approach remains valid today across a wide spectrum of constitutional issues, and in those cases the plus code corresponds to a liberal decision.⁹⁸ The purpose of this research is to identify the instances where a +C decision should instead be characterized as conservative.

B. *Voting Blocs and Reverse Polarity*

To identify the issues and cases that reflect reverse polarity, I relied primarily on the positions taken by the liberal and conservative blocs on the Supreme Court. That approach was facilitated by one of the most striking developments in modern constitutional law: for a full quarter-century—the 1994 through 2018 Terms—the Court was divided along ideological lines, and during the entirety of that time there was a liberal bloc of four Justices that retained its unity and its position on the ideological scale. That twenty-five-year period is the focus of this study.⁹⁹

1. Defining the Liberal and Conservative Blocs

To define the two blocs, I made use of the widely cited ideological scores for Supreme Court Justices developed by Andrew Martin and Kevin Quinn.¹⁰⁰ These scores “place each justice in each Court term on an ideological scale.”¹⁰¹ They

⁹⁷ For discussion of the property rights cases, see *infra* Section III.A.

⁹⁸ See, e.g., *United States v. Davis*, 139 S. Ct. 2319 (2019) (vagueness); *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (Fourth Amendment); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (abortion); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage).

⁹⁹ The same ideological division continued in the 2019 Term, but the 2018 Term was the cutoff for the study.

¹⁰⁰ See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimates via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). The authors include only non-unanimous cases in the analysis that generates the scores. See *id.* at 137 n.3. They do not examine ideology directly; rather, they consider votes to reverse or affirm the decision of the lower court. See *id.*; see also Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79, 111 (2010) (explaining how the scores are calculated). For current versions of the scores, see *Martin-Quinn Scores: Measures*, U. MICH. C. LITERATURE, SCI., & ARTS, <https://mqscores.lsa.umich.edu/measures.php> (last visited Feb. 10, 2020).

¹⁰¹ BAUM, *supra* note 24, at 211.

“measure[] judicial ideology in terms of deviation from a median of zero, with more liberal Justices having negative scores and more conservative Justices having more positive scores.”¹⁰² As Professor Baum has explained, the scores allow “comparison of votes for one side or the other on a particular issue . . . with the overall ideological structure of voting in the Court.”¹⁰³ That, in essence, is the course I have followed in this study.

The Martin-Quinn scores have been criticized on various grounds, but even if valid, those criticisms have little bearing on the limited purpose for which I am using the scores here.¹⁰⁴ For example, Professor Baum points out that the scores’ “placement of justices on an interval scale is inexact”; in particular, it exaggerates “the distances between justices . . . at the far end of the ideological spectrum and their colleagues on the same side of that spectrum.”¹⁰⁵ But that is problematic only if one is considering the relative positions of individual Justices, and that is not part of this study.

More generally, the criticisms come from scholars who are, in one way or another, trying to understand “what led the Justices to their decisions.”¹⁰⁶ That too is not part of this study. I am not trying to discover “the extent to which [cases are] decided on the basis of ideology,”¹⁰⁷ nor am I comparing ideology with other possible elements of the decisional process. I am using the scores only to identify the *cohorts* on each side of the ideological divide during the twenty-five-year period that is the focus of the study.

The positions of the two cohorts are vividly depicted in Figure 1. The lines at the bottom represent the liberal Justices; the lines at the top, the conservatives. Note that none of the lines in the top group ever crosses any of the lines in the bottom group, and vice versa. In other words, there was not a single Term in which any

¹⁰² Eduardo M. Peñalver, Tribute, *Memoriam: Justice John Paul Stevens*, 133 HARV. L. REV. 765, 765 n.75 (2020).

¹⁰³ BAUM, *supra* note 24, at 211–12.

¹⁰⁴ For discussion of the criticisms, see BAUM, *supra* note 24, at 211–14; Shapiro, *supra* note 100, at 110–20.

¹⁰⁵ BAUM, *supra* note 24, at 212.

¹⁰⁶ Shapiro, *supra* note 100, at 120.

¹⁰⁷ *Id.* at 119.

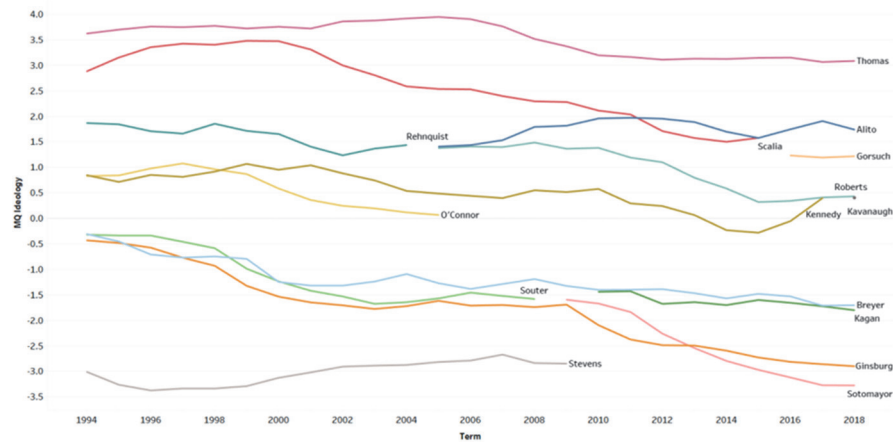


Figure 1. Justices' Ideology Scores, 1994–2018 Terms¹⁰⁸

member of one bloc joined the other bloc.¹⁰⁹ Here I explain the underlying data and their significance.

The study period began in 1994 when President Clinton made the second of his two appointments to the Court, inaugurating what turned out to be a “natural Court” that lasted for eleven Terms.¹¹⁰ The two Clinton appointees—Justice Ruth Bader Ginsburg and Justice Stephen Breyer—served for all twenty-five Terms. A third position was occupied by Justice David Souter for fifteen Terms; he was replaced by Justice Sonia Sotomayor. Justice John Paul Stevens served for sixteen Terms; he was replaced by Justice Elena Kagan. Justice Sotomayor and Justice Kagan were both appointed by President Obama. Justice Breyer, of course, continues to serve. Justice Ginsburg died in September 2020, shortly before the start of the 2020 Term.

In every one of the twenty-five Terms, the Martin-Quinn scores of the four liberals put them together at one end of the ideological spectrum, generally with a

¹⁰⁸ The graph in Figure 1 was created by Adam Feldman. It was originally published in *Interesting Meetings of the Minds of Supreme Court Justices*, EMPIRICAL SCOTUS (June 11, 2020), <https://empiricscotus.com/2020/06/11/interesting-meetings-of-the-minds/>. It is reproduced with permission.

¹⁰⁹ Of course there were individual *cases* in which Justices voted with the other bloc. But such cases were few and far between.

¹¹⁰ “The term natural court refers to the Supreme Court during a period in which there are no personnel changes.” Shapiro, *supra* note 100, at 84 n.9.

sharp break between the least liberal of the four (usually Justice Breyer) and the adjoining Justice. There is not a single Term in which even one of the four had a positive score, i.e., a score above the baseline of zero.¹¹¹ After 1999, there is not a single Term in which any of the four had a score above minus 1.0.¹¹²

All of the other Justices who served on the Court during this period can be characterized as conservatives, although the conservative bloc did not have the unity manifested by the liberal Justices. In all twenty-five Terms, there were always three Justices with scores above 1.0; sometimes there were four. Justice Clarence Thomas, who served during the entire period, was always in that group, and indeed he was ranked as the most conservative Justice in every Term. Justice Antonin Scalia, who died early in the 2015 Term, had a score of 2.0 or above from 1994 through 2011; in his last four Terms, his score was between 1.0 and 2.0. Chief Justice William H. Rehnquist, who served through the 2004 Term, always had a score between 1.0 and 2.0. So did Justice Samuel A. Alito, who joined the Court in the middle of the 2005 Term.

Justice Sandra Day O'Connor, who served through early 2006, generally had a score between zero and 1.0. That was also the pattern with Chief Justice John G. Roberts, Jr.—but only starting in 2013; from the time he took office in 2005 through the 2012 Term, his score was between 1.0 and 2.0. Justice Anthony M. Kennedy, who served through the 2017 Term, was the only conservative Justice ever to have a score below zero, and that was for three Terms very late in his tenure.¹¹³ Otherwise,

¹¹¹ As recommended by Martin and Quinn, I use the “posterior mean” scores for each Justice for each Term. All scores used in this Article are taken from the Excel spreadsheet of the 2018 Justice Data Files as posted on *Martin-Quinn Scores: Measures*, *supra* note 100. I sorted the scores by Term and “posterior mean” and created a new file (on file with the author).

¹¹² Or, as summarized in a recent book about ideology and the Supreme Court, “Since 1991, . . . all [Democratic appointees] have been liberals.” NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 3 (2019).

¹¹³ Justice Kennedy had scores between -0.3 and zero in the three Terms 2014, 2015, and 2016. Those were the Terms in which he joined with the liberal Justices in several important cases. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (takings); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (abortion); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (affirmative action); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage). In Justice Kennedy’s final Term, 2017, he again had a positive score—and he again joined the conservatives in the closely divided high-profile cases. *See, e.g.*, *Janus v. AFSCME*, 31, 138 S. Ct. 2448 (2018) (public-sector agency fees); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (entry restrictions for aliens).

his scores generally ranged between zero and 1.0. The two Trump appointees who served during the study period have positive scores.¹¹⁴

2. Identifying Reverse-Polarity Issues

The existence of these two blocs—particularly the liberal bloc—over a twenty-five-year period provides a valuable tool for identifying reverse-polarity issues. If a particular type of constitutional claim consistently receives more support from conservative Justices than from liberal Justices, the issue can be characterized as a reverse-polarity issue. So, too, if *opposition* to the claim comes primarily or exclusively from *liberal* Justices.

In identifying reverse-polarity issues, I have also considered the “shared understandings among political elites about which positions are liberal and which are conservative.”¹¹⁵ For that information, I have drawn heavily on Professor Baum’s recent book.¹¹⁶

This description of the method calls attention to the relationship between ideological classification of *judges* and ideological classification of *decisions*. Justice Sotomayor is labeled a liberal Justice because academic and other commentators universally regard her as such, and quantitative measures like the Martin-Quinn scores reinforce that characterization.¹¹⁷ If, in a given era, a particular position consistently receives more support from liberal Justices like Justice Sotomayor than from conservative Justices, it is fair to call that the liberal position. And decisions favoring that position are liberal decisions. The same can be said, *mutatis mutandis*, on the conservative side.

Of course, judges are not automatons. As Professor Brown noted nearly a century ago, “conservative Justices often render so-called liberal opinions, and *vice versa*.”¹¹⁸ But rendering an occasional liberal opinion does not turn a conservative

¹¹⁴ Justice Neil Gorsuch, who joined the Court in the middle of the 2016 Term, had a score above 1.0 in each of his three Terms. Justice Brett M. Kavanaugh had a score between zero and 1.0 in his single completed Term during the study period.

¹¹⁵ BAUM, *supra* note 24, at 13.

¹¹⁶ *Id.*, *passim*.

¹¹⁷ There is something almost comical about using scores calculated to the third decimal place to show that Justice Sotomayor and the other three Democrat-appointed Justices are liberals, and that the other Justices are conservatives. Nevertheless, it is helpful that objective measures accord with universally shared assumptions.

¹¹⁸ Brown, *supra* note 14, at 869; *see supra* text accompanying note 14.

Justice into a liberal Justice, or vice versa.¹¹⁹ Nor does a conservative *opinion* become liberal because rendered by a liberal Justice, or vice versa. The two classifications are separate, and they are defined in accordance with the preceding paragraph.

I believe that this method, used for this particular line of inquiry, avoids the problem of circularity that several writers have noted.¹²⁰ If there is universal agreement among those who study the Court that a bloc of Justices is liberal—as there is—and that assessment is supported by quantitative measures like Martin-Quinn scores—as it is—then it is not circular to label the positions taken by those Justices as liberal.¹²¹

Two final points. First, the principal object is to identify *issues* and *issue positions* that fall within the domain of reverse polarity. The characterization is warranted if the particular type of constitutional claim consistently receives more support from conservative Justices than from the liberals. That is a demanding standard, but given the novelty of the concept, I prefer to err on the side of caution. For example, if most of the decisions in a particular area during the twenty-five-year period of the study reflect reverse polarity, but one or two of equal importance do not, I will refrain from identifying a reverse-polarity issue.

Second, ideological polarity is a dynamic, not a static, phenomenon. Part III provides a taxonomy of issues that warrant the characterization today. Part IV examines issues on which the evidence, at this writing, is weak or equivocal. Additional decisions over the next few years may enable a clearer picture to emerge. Even without them, readers can decide for themselves whether one or more of the issues discussed should be added to the compendium in Part III.

III. EVOLUTION OF REVERSE-POLARITY ISSUES

When Professor Schubert explained the “concept of civil liberties” that defined the domain of “political liberalism,” he recognized one exclusion explicitly and

¹¹⁹ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (liberal opinion by Scalia, J.); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (conservative opinion by Stevens, J.). For discussion of *Kyllo*, see *infra* Section IV.E.

¹²⁰ See, e.g., Fischman & Law, *supra* note 1, at 183.

¹²¹ The method used here might not work as well for earlier periods, in which the ideological divisions were not as clear-cut, or for studies of other aspects of ideology. I need not consider those questions here.

another implicitly.¹²² Those exclusions are reflected in the initial reverse-polarity issues. Others followed.

A. Takings Clause Claims

As noted earlier, Schubert distinguished between “property” rights and “personal” rights, and he included only the latter in his category of “civil liberties.”¹²³ This is perhaps not surprising. In drawing the line as he did, Schubert followed a practice that was widely accepted,¹²⁴ though there were also those who questioned its soundness; for example, as early as 1946, Judge Learned Hand observed: “Just why property itself was not a ‘personal right’ nobody took the time to explain.”¹²⁵ A quarter-century later, the Supreme Court endorsed this view, declaring that “the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.”¹²⁶ Nevertheless, it remains true in the Roberts Court era that sympathy for property rights is generally not an element of political liberalism.¹²⁷

Property rights can include claims under the Due Process Clauses of the Fifth and Fourteenth Amendments, but more contentious today are claims under the Takings Clause of the Fifth Amendment, made applicable to the states by the Fourteenth. Professor Baum has carefully traced the treatment of Takings Clause claims by liberal and conservative members of the Supreme Court. He found that

¹²² See *supra* note 26; *infra* note 137.

¹²³ See *id.* at 101.

¹²⁴ See Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 302 (2014) (noting “categorical distinction” drawn by post-New Deal jurisprudence between “fundamental personal rights” and “property rights”). The Justices themselves may not have drawn such a sharp distinction. See Conclusion *infra*.

¹²⁵ Learned Hand, *Chief Justice Stone’s Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946). Although Judge Hand purported to be describing Justice Stone’s jurisprudence, his commentary is generally regarded as expressing his own views. Judge Hand advocated restraint by courts, whether “personal” or “property” rights were at issue. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 565 (1994).

¹²⁶ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

¹²⁷ See Ilya Somin, *Two Steps Forward for the “Poor Relation” of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–2013 CATO SUP. CT. REV. 215, 242 (asserting that “most liberal jurists are unwilling to support anything more than extremely limited judicial enforcement of constitutional property rights”).

over the last several decades, “conservative justices [have] been considerably more favorable to takings claims than the Court’s liberals.”¹²⁸

My own review of the decisions confirms this. If anything, it is an understatement. Over a quarter-century, there were eleven Takings Clause cases in which the Court was closely divided (generally with four dissents).¹²⁹ There was one case in which one liberal Justice supported the claim.¹³⁰ In every one of the other cases, every liberal Justice supported the government.¹³¹

The pattern was reinforced in 2019 with the decision in *Knick v. Township of Scott*.¹³² The conservative majority, overruling a 1985 precedent, held that “a government violates the Takings Clause when it takes property without compensation, and . . . pursuit of a remedy in federal court need not await any subsequent state action.”¹³³ Justice Kagan, joined by the Court’s other three liberals,

¹²⁸ BAUM, *supra* note 24, at 132.

¹²⁹ Lists of the cases included in the various categories discussed in this Article are on file with the author. In the interest of saving space, I have generally not identified the cases discussed, except where no more than one or two were involved.

There were seven other Takings Clause cases during this period. Six were unanimous; one had a single dissent. Four decisions ruled in favor of the property owner; three supported the government position. Professor Somin has suggested that two of the unanimous rulings in favor of the property owner “were in part a result of the extreme nature of the positions adopted by the federal government” during the Obama administration. Somin, *supra* note 127, at 241–42.

In one of the cases rejecting the constitutional claim, there was no opinion for the Court. Four conservative Justices joined an opinion endorsing the proposition that the Takings Clause applies to action by the judiciary. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 718 (2010) (Scalia, J.). Four other Justices, including all of the participating liberals, saw no need to decide that issue. See *id.* at 733–34 (Kennedy, J., concurring); *id.* at 742–43 (Breyer, J., concurring). Justice Stevens took no part in the case.

¹³⁰ In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), Justice Stevens joined a five to four majority in affirming a judgment in favor of the property owner. Justice O’Connor joined the dissent. The case primarily concerned the right to trial by jury.

¹³¹ This tally does not include *Bennis v. Michigan*, 516 U.S. 442 (1996). The majority in *Bennis*—four conservative Justices joined by Justice Ginsburg—rejected a due process challenge to a forfeiture order that penalized an innocent owner. The petitioner also argued that the order violated the Takings Clause, but in a single paragraph the Court held that that claim fell with rejection of the due process claim. *Id.* at 453. The dissent joined by three liberal Justices did not even mention the Takings Clause. *Id.* at 458–72. Nor did the separate dissenting opinion by Justice Kennedy. *Id.* at 472–73. The decision thus sheds no light on the Justices’ positions on Takings Clause claims.

¹³² 139 S. Ct. 2162 (2019).

¹³³ *Id.* at 2177.

delivered a sharp dissent, asserting that “today’s opinion smashes a hundred-plus years of legal rulings to smithereens.”¹³⁴

The division among the Justices in *Knick* and earlier cases accords with the ideological split outside the Court.¹³⁵ I have no hesitation in classifying the Takings Clause as a reverse-polarity issue; a +C decision is coded as conservative.

B. *Personal Jurisdiction*

A century and a half ago, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment limits the authority of state courts to adjudicate the rights of residents of other states.¹³⁶ The Court strongly reaffirmed this proposition in its 1958 decision in *Hanson v. Denckla*.¹³⁷ Powerful arguments have been made that federalism-based limits on state-court power should be drawn from other provisions of the Constitution,¹³⁸ but the Supreme Court remains committed to grounding the doctrine in the Due Process Clause.¹³⁹ And the Court has emphasized that the requirement of personal jurisdiction that flows from the Due Process Clause “recognizes and protects an *individual liberty interest*.”¹⁴⁰

In the last decade, the Court has decided six cases on personal jurisdiction.¹⁴¹ Without exception, the decisions have held that the state courts violated the due process rights of the out-of-state defendants. Most of the decisions have been unanimous or almost so, but to the extent there were dissents, they came from the

¹³⁴ *Id.* at 2183 (Kagan, J., dissenting). Two years earlier, the four liberal Justices, joined by Justice Kennedy, rejected a Takings Clause claim. *See Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

¹³⁵ *See* BAUM, *supra* note 24, at 150, 158 (noting identity of groups filing amicus briefs on the two sides of takings cases).

¹³⁶ *Pennoyer v. Neff*, 95 U.S. 714 (1878).

¹³⁷ 357 U.S. 235 (1958) (5-4 decision). Schubert did not include this case in his list of non-unanimous civil liberties decisions in the 1957 Term. *See* SCHUBERT, *supra* note 5, at 109.

¹³⁸ *See, e.g.*, James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004).

¹³⁹ *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)) (“[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”).

¹⁴⁰ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (emphasis added).

¹⁴¹ There were no cases from 1994 through the 2009 Term.

Court's liberals.¹⁴² In earlier eras, too, opposition to constitutional limits on state power came primarily from liberal judges.¹⁴³ I classify this as a reverse-polarity issue.

For completeness, I note that there is a parallel line of cases holding that the Due Process Clause limits state powers of *taxation*. This line of cases is typically invoked when a state seeks in some way to tax “wealth created beyond its borders.”¹⁴⁴ The Court has held that “the Due Process Clause limits States to imposing only taxes that bear fiscal relation to protection, opportunities and benefits *given by the state*.”¹⁴⁵ Cases invoking this doctrine have rarely come to the Court in recent years, and the ideological divide seen in some of the personal jurisdiction cases plays no role.¹⁴⁶

C. Challenges to Affirmative Action Programs

When Judge Stephen Reinhardt described the “liberal judge” in his 1997 article, he said that, as a general matter, liberal judges believe that statutes and voter initiatives “must be strictly tested against the limitations and guaranties contained in the Constitution.”¹⁴⁷ But in the next paragraph, he commented that liberal judges “sometimes have trouble interpreting [the post-Civil War constitutional] amendments as barriers to minority advancement.”¹⁴⁸ The implication was that when litigants challenge government programs that promote affirmative action for minorities, liberal judges do *not* apply “strict[] test[s];” rather, their inclination is to uphold the programs.¹⁴⁹

¹⁴² See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 893 (2011) (Ginsburg, J., joined by Sotomayor & Kagan, JJ., dissenting).

¹⁴³ For example, in *World-Wide Volkswagen v. Woodson*, the Court held that the state court violated due process by exercising jurisdiction over two out-of-state defendants, an automobile retailer and its wholesale distributor, in a products liability suit. 444 U.S. 286 (1980). The four dissenting Justices were the four most liberal Justices in the 1979 Term, as shown by their negative scores in the Martin-Quinn ranking. Martin & Quinn, *supra* note 100.

¹⁴⁴ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 453 (2d ed. 1988).

¹⁴⁵ *N.C. Dep’t of Rev. v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2219 (2019) (cleaned up) (emphasis added).

¹⁴⁶ The most recent case, decided in 2019, was unanimous. See *id.*

¹⁴⁷ Reinhardt, *supra* note 2, at 48.

¹⁴⁸ *Id.*

¹⁴⁹ That was the approach Judge Reinhardt took. See, e.g., *Monterey Mech. Co. v. Wilson*, 138 F.3d 1270, 1273 (9th Cir. 1998) (Reinhardt, J., dissenting) (following denial of en banc rehearing, attacking the panel

When challenges to affirmative action programs first came to the Supreme Court, the polarity of the issue was in doubt. The question arose initially in the 1973 Term in a case involving law school admissions.¹⁵⁰ A five to four majority found that the case was moot. Only Justice Douglas—the most liberal member of the Court—expressed a view of the merits. Justice Douglas argued that “consideration of race as a measure of an applicant’s qualification normally introduces a capricious and irrelevant factor working an invidious discrimination.”¹⁵¹ The next affirmative action case did not come before the Court until 1978, after Justice Douglas had retired. The two most liberal members of the Court joined an opinion stating that “a state government may adopt race-conscious programs” under specified circumstances.¹⁵² But Justice Stevens, also a liberal, found the particular program invalid on statutory grounds.¹⁵³ It was not until 1990 that the liberal Justices were unanimous in rejecting challenges to affirmative action programs.¹⁵⁴

The pattern in recent decades has been clear. In the twenty-five Terms starting in 1994, the Court decided six cases in which “benign” race-conscious government programs were challenged under the Equal Protection Clause.¹⁵⁵ There was one case in which one member of the Court’s liberal bloc voted to strike down the program,¹⁵⁶ and one in which two of the liberal Justices agreed to a remand.¹⁵⁷ In the remaining

for “striking down a benign governmental outreach program that is intended to ensure a modicum of fairness to minorities and women”).

¹⁵⁰ See *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

¹⁵¹ *Id.* at 333 (Douglas, J., dissenting).

¹⁵² *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (opinion of Brennan, White, Marshall, & Blackmun, JJ.).

¹⁵³ *Id.* at 421 (opinion of Stevens, J.).

¹⁵⁴ See *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

¹⁵⁵ This tally does not include cases on race and redistricting, which have generated a separate line of precedent. For a brief discussion, see *infra* Section IV.C. In one additional case, the Court held that a Hawaii state constitutional provision limiting the right to vote in certain elections to “Hawaiians” was “an explicit, race-based voting qualification” that violated the Fifteenth Amendment. *Rice v. Cayetano*, 527 U.S. 495, 498 (2000). Two liberal Justices would have rejected the constitutional claim. See *id.* at 528 (Stevens, J., joined in part by Ginsburg, J., dissenting). The alignment is thus consistent with the pattern in the equal protection cases discussed in the text.

¹⁵⁶ See *Gratz v. Bollinger*, 539 U.S. 244, 281–82 (2003) (Breyer, J., concurring in judgment).

¹⁵⁷ See *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013). Justices Breyer and Sotomayor joined the Court’s opinion that remanded the case. One member of the liberal bloc, Justice Ginsburg, voted to uphold the plan without a remand. *Id.* at 334 (Ginsburg, J., dissenting). Justice Kagan was recused. When the case returned to the Court, all three participating liberals joined Justice Kennedy in rejecting the constitutional

cases, the liberal Justices uniformly voted to reject the constitutional claims, sometimes in strong language.¹⁵⁸

The pattern in the Justices' votes is consistent with the ideological alignment outside the Court. As Professor Baum has written, "in the world of political elites, support for affirmative action and similar programs is seen as a liberal position."¹⁵⁹ In the judiciary, challenges to affirmative action programs fall within the domain of reverse polarity.¹⁶⁰

D. Campaign Finance Regulation

In the 1989 Term, the Supreme Court decided twelve cases on freedom of speech, nine of them by a divided vote. The cases ranged widely over First Amendment issues, including defamation,¹⁶¹ child pornography,¹⁶² political patronage,¹⁶³ public forums,¹⁶⁴ and even flag burning.¹⁶⁵ At that time, the two most liberal members of the Court were Justices William J. Brennan and Thurgood Marshall.¹⁶⁶ Consistent with what we would expect of liberal jurists, Justices Brennan and Marshall voted in favor of the free-speech claim in eight of the nine cases in which the Court was divided. The one exception was *Austin v. Michigan*

challenge. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016). The three other conservative Justices dissented. (Justice Scalia's seat was still vacant).

¹⁵⁸ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (Stevens, J., dissenting); *id.* at 803 (Breyer, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting).

¹⁵⁹ BAUM, *supra* note 24, at 166 (punctuation altered).

¹⁶⁰ Although the 2002 book by Segal and Spaeth presented only a condensed version of the delineation of "liberal" and "conservative" positions included in their 1993 collaboration, the authors were careful to specify that "a pro-affirmative action outcome is defined as liberal." SEGAL & SPAETH, *ATTITUDINAL MODEL REVISITED*, *supra* note 55, at 323 n.40.

¹⁶¹ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

¹⁶² *Osborne v. Ohio*, 495 U.S. 103 (1990).

¹⁶³ *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

¹⁶⁴ *United States v. Kokinda*, 497 U.S. 720 (1990).

¹⁶⁵ *United States v. Eichman*, 496 U.S. 310 (1990). This was a follow-up to the better-known case of *Texas v. Johnson*, 491 U.S. 397 (1989).

¹⁶⁶ In fact, based on the Martin-Quinn scores, Justices Brennan and Marshall were the two most liberal Justices in every Term from 1976, the first after the retirement of Justice Douglas, through 1989, Justice Brennan's last. *Measures*, MARTIN-QUINN SCORES, <https://mqscores.lsa.umich.edu/measures.php> (last visited Nov. 10, 2020).

Chamber of Commerce.¹⁶⁷ In *Austin*, Justice Marshall wrote, and Justice Brennan joined, an opinion upholding a state law that prohibited corporations from using corporate treasury funds for independent expenditures supporting or opposing candidates for state office.¹⁶⁸ Three of the Court's four most conservative Justices dissented, protesting the Court's "value-laden, content-based speech suppression."¹⁶⁹

The alignment in *Austin* suggests that campaign finance regulation had become a reverse-polarity issue by 1990. But arguments can also be made for an earlier or a later date. Earlier, based on what we now know about the drafting of the seminal 1976 opinion in *Buckley v. Valeo*,¹⁷⁰ Professor Richard Hasen's account shows that, from the start, Justices Brennan and Marshall were sympathetic to legislation that seeks to "limit[] the role of money in politics."¹⁷¹ Later, in that it was not until 2003 that Chief Justice William H. Rehnquist, whose name is virtually synonymous with conservative ideology, unequivocally rejected the approach taken by the *Austin* majority.¹⁷²

What can be said with confidence is that in the era of the Roberts Court, campaign finance regulation is another reverse-polarity issue. Over the last decade and a half, the Court has decided six campaign finance cases on the merits.¹⁷³ In every one of those cases, the five conservative Justices voted in favor of the First Amendment claim, with the result that the regulations were held unconstitutional. In five of the six cases, all four liberal Justices voted in dissent against the claim. There

¹⁶⁷ 494 U.S. 652 (1990).

¹⁶⁸ *Id.* at 654–55.

¹⁶⁹ *Id.* at 695–96 (Kennedy, J., dissenting). Justices O'Connor and Scalia joined Justice Kennedy's dissent; Justice Scalia also dissented separately, accusing the Court of endorsing "Orwellian" censorship. *Id.* at 679. As discussed *infra* note 172, Chief Justice Rehnquist joined the majority opinion.

¹⁷⁰ 424 U.S. 1 (1976).

¹⁷¹ Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 243 (2003). At the other end of the spectrum, Justice Rehnquist was one of the First Amendment "hawks." *Id.*

¹⁷² Chief Justice Rehnquist not only joined the *Austin* opinion in 1990; as Chief Justice, he assigned the case to Justice Marshall, who had long been supportive of campaign finance regulation. But in *McConnell v. FEC*, 540 U.S. 93 (2003), the Chief Justice joined Justice Kennedy's dissenting opinion, including an extended and emphatic denunciation of *Austin*. See *id.* at 323–30 (describing *Austin* as "unfaithful to our First Amendment precedents" and in "conflict . . . with fundamental First Amendment principles.>").

¹⁷³ This tally does not include the remand order in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006).

was one case in which one liberal Justice—Justice Breyer—found a First Amendment violation.¹⁷⁴

It is almost unnecessary to say so, but the same alignment can be seen outside the Court. As Professor Baum has observed, the division among the Justices on campaign finance regulation has “mirrored the division among political elites as a whole.”¹⁷⁵ Liberals view the Court’s decisions—particularly *Citizens United*¹⁷⁶—as a threat to democracy,¹⁷⁷ while conservatives believe that the threat to democracy comes from those who seek to overturn the decisions.¹⁷⁸ Campaign finance regulation is the paradigm of a reverse-polarity issue.

E. Commercial Speech Regulation

For more than three decades the Supreme Court took the position that the First Amendment imposes “no . . . restraint on government as respects purely commercial advertising.”¹⁷⁹ Starting in 1975, the Court repudiated that “notion” and held that the First Amendment does give some protection to commercial speech.¹⁸⁰ In those initial cases, the only dissent came from the Court’s most conservative member, Justice

¹⁷⁴ See *Randall v. Sorrell*, 548 U.S. 230 (2006). Not surprisingly, Chief Justice Roberts assigned the opinion (a plurality opinion, as it turned out) to Justice Breyer.

¹⁷⁵ BAUM, *supra* note 24, at 67.

¹⁷⁶ 558 U.S. 310 (2010).

¹⁷⁷ E.g., Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS (May 13, 2010), <https://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy/>. However, outside the Court, the liberal position is not uniform. For example, the American Civil Liberties Union submitted an amicus brief in *Citizens United* urging the Court to strike down the “broad prohibition on ‘electioneering communications’” added by the Bipartisan Campaign Reform Act of 2002, and it has opposed legislation targeting a broadly defined category of independent expenditures relating to elections. Brief for ACLU as Amicus Curiae at 2, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08–205), 2009 WL 2365203, at *2 (July 31, 2009); Letter from ACLU to Representatives Jim McGovern and Tom Cole of the House Rules Comm., ACLU (Mar. 1, 2019), https://www.aclu.org/sites/default/files/field_document/2019-03-01_aclu_letter_to_house_rules_committee_on_h.r._1.pdf.

¹⁷⁸ E.g., Bradley A. Smith, *The Academy, Campaign Finance, and Free Speech Under Fire*, 25 J.L. & POL’Y 227, 250 (2016).

¹⁷⁹ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

¹⁸⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“Last Term, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the notion of unprotected ‘commercial speech’ all but passed from the scene.”).

Rehnquist.¹⁸¹ Justice Rehnquist argued that “by labeling economic regulation of business conduct as a restraint on ‘free speech,’ [the Court has] gone far to resurrect the discredited doctrine of cases such as *Lochner*”¹⁸²

Over the next two and a half decades, the Court decided numerous commercial speech cases. Several of the decisions were unanimous,¹⁸³ but when the Court was divided, the disagreements closely tracked traditional ideological lines, with liberal Justices supporting the First Amendment claim and conservative Justices voting to uphold the government regulation. Justice Marshall was the most consistent defender of commercial speech; Justice Brennan and Justice Blackmun were not far behind. On the other side, Justice (later Chief Justice) Rehnquist was the most consistent opponent, but he was often joined by Justice O’Connor.¹⁸⁴

Although there were no changes in the Court’s membership from 1994 through 2005, the new century brought shifts in the alignments in commercial speech cases. The turning point came with *Lorillard Tobacco Co. v. Reilly*, decided in 2001.¹⁸⁵ The case involved a challenge to Massachusetts regulations governing the advertising and sale of tobacco products. A five-Justice majority held that two of the regulations violated the First Amendment.¹⁸⁶ Justice O’Connor wrote the Court’s opinion, joined in relevant part by Chief Justice Rehnquist and Justices Scalia, Kennedy, and

¹⁸¹ *Id.* at 781 (Rehnquist, J., dissenting). Other Justices joined him when attorney advertising was at issue. *See, e.g.,* *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

¹⁸² *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 591 (1980) (Rehnquist, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

¹⁸³ *E.g.,* *Rubins v. Coors Brewing Co.*, 514 U.S. 476 (1995).

¹⁸⁴ Justice O’Connor joined Justice Rehnquist’s majority opinion in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). The rationale of that decision was later repudiated in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 508–10 (1996).

¹⁸⁵ 533 U.S. 525 (2001). Professors Post and Shanor argue that the shift in the “valence of commercial speech doctrine” occurred earlier, in the 1990s. *See* Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 168 (2015). They point out that “[i]n 1995, Chief Justice Rehnquist joined an opinion by Justice Thomas invalidating a statute prohibiting beer labels from displaying alcohol content.” *Id.* (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)). But that decision was unanimous in result, as was the later decision in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996). It was not until *Lorillard* that a claim for protection of commercial speech received more support from conservative Justices than from liberal Justices.

¹⁸⁶ *Lorillard*, 533 U.S. 534–36. The two regulations limited outdoor and point-of-sale advertising of smokeless tobacco and cigars. The state had also restricted the advertising of cigarettes, but the same five-Justice majority held that that element of the regulations was preempted by federal law. *Id.*

Thomas. Those were the five conservative members of the Court.¹⁸⁷ Three of the Court's liberals—Justice Stevens, joined by Justices Ginsburg and Breyer—voted to uphold one of those regulations and to send the other one back to the lower court for trial.¹⁸⁸ Justice Souter agreed with the other dissenters on the latter point.

The following Term brought another commercial speech case, *Thompson v. Western States Medical Center*.¹⁸⁹ In *Thompson*, a group of licensed pharmacies challenged provisions of federal law that prohibited them from advertising or promoting particular “compounded drugs.”¹⁹⁰ The case was in several respects a replay of *Lorillard*. The Court applied its commercial speech doctrine and held that the laws violated the First Amendment; the vote was five to four; and Justice O'Connor wrote the Court's opinion.¹⁹¹ But the lineup was not quite the same as in *Lorillard*. Justice Souter joined four conservative Justices in striking down the statutory provisions, while Chief Justice Rehnquist joined the other three liberal Justices in dissent.

Thompson was the last commercial speech case decided on the merits by the Rehnquist Court.¹⁹² In the fifteen years of the Roberts Court, there have been only three commercial speech cases, two of which were unanimous as to result.¹⁹³ The

¹⁸⁷ In every Term of the “natural Court” from 1994 through 2004, those five Justices—and only those five—had positive scores on the Martin-Quinn scale. See *supra* Section II.B.

¹⁸⁸ *Lorillard*, 533 U.S. at 599–605 (Stevens, J., dissenting).

¹⁸⁹ 535 U.S. 357 (2002).

¹⁹⁰ “Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient.” *Id.* at 360–61.

¹⁹¹ *Id.* at 359–60.

¹⁹² In *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), the California Supreme Court, relying on the commercial speech doctrine, allowed a private citizen to sue Nike for alleged deception in communications defending the working conditions under which Nike products were manufactured. The United States Supreme Court granted certiorari, but after argument dismissed the writ as improvidently granted, without explanation. *Id.* at 655. Justice Stevens, joined by Justice Ginsburg and (in part) by Justice Souter, defended the dismissal without expressing a view on the merits. *Id.* at 656. Justice Kennedy dissented without explanation. *Id.* at 665. Justice Breyer, joined by Justice O'Connor, dissented. *Id.* He made clear that in his view, the speech in question should be treated not as commercial speech but as speech on a matter of public concern. Under that approach, the regulations would be subjected to heightened scrutiny, which they would fail. *Id.* at 676. Because only two Justices addressed the merits of the First Amendment claim, I am reluctant to classify the case from an ideological perspective.

¹⁹³ *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

one divided ruling was *Sorrell v. IMS Health, Inc.*, decided in 2011.¹⁹⁴ In *Sorrell*, pharmaceutical manufacturers challenged a state law that restricted the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors. A six-Justice majority held that the law was “content-based and, in practice, viewpoint discriminatory,” and that it could not meet even the “special” level of scrutiny required of commercial speech.¹⁹⁵ Justice Breyer, joined by Justices Ginsburg and Kagan, dissented strongly. He quoted the warning of then-Justice Rehnquist that applying a “heightened” First Amendment standard to regulatory programs that burden speech would risk a return to “the bygone era of *Lochner*.”¹⁹⁶

The pattern in the commercial speech cases is not as strong as the pattern in the area of campaign finance. But the evidence of reverse polarity is more than suggestive. What stands out, first, is that over the last two decades, opposition to protecting commercial speech has come overwhelmingly from the liberal Justices, while conservative Justices have been largely supportive. It is striking, too, that in 2011 three liberal Justices would endorse the admonition that protection of commercial speech risks a “return to the bygone era of *Lochner*”¹⁹⁷—an admonition uttered three decades earlier in a solo dissent by the Justice who was then the most conservative member of the Court.¹⁹⁸ Outside the Court, *Sorrell* has become Exhibit A for liberal commentators who believe that “the recent and aggressive expansion of commercial speech doctrine” is the “driving force” that has turned the First Amendment into “a powerful engine of constitutional deregulation.”¹⁹⁹ Putting all of this together, I conclude that commercial speech has become a reverse-polarity issue.

¹⁹⁴ 564 U.S. 552 (2011).

¹⁹⁵ *Id.* at 571.

¹⁹⁶ *Id.* at 585 (Breyer, J., dissenting) (quoting *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting)); *see id.* at 602–03 (expressing concern about “reawaken[ing] *Lochner*’s pre-New Deal threat of substituting judicial for democratic decision-making where ordinary economic regulation is at issue”).

¹⁹⁷ *See supra* note 196 and accompanying text.

¹⁹⁸ The fourth liberal, Justice Sotomayor, joined the Court’s opinion in *Sorrell*, but she later agreed with the other liberals in criticizing the decision. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2487 (Sotomayor, J., dissenting).

¹⁹⁹ Post & Shanor, *supra* note 185, at 167; *see also* Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 3, 2013), <https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation>.

F. *Compelled Speech or Subsidy*

Commercial speech is not the only area of First Amendment law in which decisions finding a constitutional violation have generated accusations of a “return to *Lochner*.” The label has also been attached to cases involving claims of compelled speech or subsidy.²⁰⁰ Not surprisingly, these decisions are also candidates for the reverse-polarity designation.

Two landmark precedents define this area of First Amendment law. The first, of course, is the flag salute case of 1943, *West Virginia State Board of Education v. Barnette*.²⁰¹ The Court there held that the Constitution protects the right *not* to speak as well as the right to express oneself, and that governments can compel “involuntary affirmation” of belief “only on even more immediate and urgent grounds” than what is required for suppression of speech.²⁰² A quarter-century later came *Abood v. Detroit Board of Education*.²⁰³ Relying in part on *Barnette*, the Court held that the First Amendment prohibits governments from compelling individuals to contribute money to a private organization—there, a public-employee union—for the advancement of ideological causes they oppose.²⁰⁴

Over the last twenty-five years, two kinds of government regulations have generated disagreement among the Justices about the scope and import of these principles. In the Rehnquist Court, the issue arose in the unlikely context of challenges to marketing orders that compelled assessments for generic advertising for agricultural products. First, in *Glickman v. Wileman Bros. & Elliott, Inc.*, producers of California tree fruits argued that the enforced contributions for product advertising violated their First Amendment rights.²⁰⁵ The Court rejected the claim by

²⁰⁰ See *infra* note 208; *infra* note 218 and accompanying text.

²⁰¹ 319 U.S. 624 (1943).

²⁰² *Id.* at 633.

²⁰³ 431 U.S. 209 (1977).

²⁰⁴ *Id.* at 232–37; see *id.* at 235–36 (stating that the “principles” expressed in *Barnette* prohibit the school board from requiring its employees “to contribute to the support of an ideological cause [they] may oppose”). The Court also held that the First Amendment does allow states to compel public employees to pay “agency fees” to the union that represents the bargaining unit; these fees correspond to the portion of union dues attributable to activities germane to collective bargaining. That aspect of *Abood* was overruled in 2018. See *infra* text accompanying note 217.

²⁰⁵ 521 U.S. 457, 457 (1997).

a vote of five to four; the majority included the Court's three most liberal Justices, while the three most conservative joined the dissent by Justice Souter.²⁰⁶

Four years later, in *United States v. United Foods, Inc.*, the Court distinguished *Glickman* and struck down a federal law requiring handlers of fresh mushrooms to fund advertising for the product.²⁰⁷ The vote was six to three; the dissent was by Justice Breyer, joined by Justices Ginsburg and O'Connor. In a portion of his opinion joined only by Justice Ginsburg, Justice Breyer cited *Lochner* and argued that "the First Amendment [does not seek] to limit the Government's economic regulatory choices in this way."²⁰⁸

Based only on these two cases, I would hesitate to classify compelled speech or subsidy as a reverse-polarity issue.²⁰⁹ But in the Roberts Court the issue generated three additional decisions, all in a context much closer to the core of the First Amendment, and these cases reveal a clear-cut ideological divide that supports the reverse-polarity characterization. The cases centered on *Abood* itself and involved challenges by objecting non-members to "agency fees" charged by public employee unions.²¹⁰

First, in *Knox v. SEIU*, the Court held that "when a public-sector union imposes a special assessment or dues increase, the union . . . may not exact any funds from nonmembers without their affirmative consent."²¹¹ The Court relied on *United Foods* for the proposition that "compulsory subsidies for private speech are subject to exacting First Amendment scrutiny."²¹² The five conservative Justices joined the

²⁰⁶ *Id.* at 477 (Souter, J., dissenting). Justice Thomas, joined in part by Justice Scalia, also dissented separately. *Id.* at 504.

²⁰⁷ 533 U.S. 405 (2001).

²⁰⁸ *Id.* at 429 (Breyer, J., dissenting).

²⁰⁹ In 2005, the Court decided a third case involving compulsory assessments for generic advertising for agricultural products. That was *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). By a vote of six to three the Court held that "the generic advertising at issue [was] the Government's own speech and therefore [was] exempt from First Amendment scrutiny." *Id.* at 553. Four of the five conservative Justices joined the Court's opinion.

²¹⁰ See *supra* text accompanying note 204.

²¹¹ 567 U.S. 298, 322 (2012).

²¹² *Id.* at 310.

Court's opinion. Two of the liberal Justices concurred in the judgment on narrow grounds; the other two dissented.²¹³

That was in 2012. Two years later, in *Harris v. Quinn*, the same five-Justice majority refused to “extend *Abood*” to personal care providers who were “quite different from full-fledged public employees.”²¹⁴ The Court applied “exacting First Amendment scrutiny” and found that the agency fee arrangement could not satisfy that test.²¹⁵ All four liberal Justices dissented, arguing that the state program fell “squarely within *Abood*'s holding” and did not violate the First Amendment.²¹⁶

Finally, in its 2018 decision in *Janus v. AFSCME*, the Court overruled *Abood* to the extent it upheld the state's authority to compel non-consenting public employees to pay agency fees to a union, even for collective bargaining purposes.²¹⁷ The four liberal Justices dissented strongly, accusing the majority of “weaponizing the First Amendment” and “using it [as a sword] against workaday economic and regulatory policy.”²¹⁸

As another example of the *Janus* majority's “aggressive” use of the First Amendment, the dissenters cited a decision handed down the day before, *NIFLA v. Becerra*.²¹⁹ That case involved a California law requiring facilities that provide pregnancy-related services to disseminate notices with content supplied by the government. The law was challenged by “pro-life pregnancy centers.”²²⁰ By the same five to four vote as in *Janus*, the Court held that the statute violated the First

²¹³ *Id.* at 323 (Sotomayor, J., joined by Ginsburg, J., concurring in judgment); *id.* at 328 (Breyer, J., joined by Kagan, J., dissenting).

²¹⁴ 573 U.S. 616, 645–46 (2014).

²¹⁵ *Id.* at 647–48.

²¹⁶ *Id.* at 657 (Kagan, J., dissenting).

²¹⁷ 138 S. Ct. 2448, 2456 (2018). The Court was poised to overrule *Abood* two years earlier, but Justice Scalia's death left the Court equally divided. *See Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam).

²¹⁸ *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting). Although Justice Kagan did not explicitly invoke *Lochner*, commentators have read her dissent as implicitly doing so. *See, e.g.*, Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy: Response to the Columbia Law Review's 2018 Symposium*, 118 COLUM. L. REV. ONLINE 179, 179 (2018).

²¹⁹ 138 S. Ct. 2361 (2018).

²²⁰ *Id.* at 2379 (Kennedy, J., concurring).

Amendment.²²¹ Although the Court opinion barely mentioned the compelled-speech argument,²²² a concurring opinion joined by four of the Justices in the majority placed heavy emphasis on the post-*Barnette* decision in *Wooley v. Maynard*,²²³ saying, “Governments must not be allowed to force persons to express a message contrary to their deepest convictions.”²²⁴ The dissent by the four liberals briefly distinguished *Barnette*.²²⁵

Because the *Barnette* line of cases is not the basis for the Court’s opinion, I do not classify *NIFLA* as a compelled-speech case. Nevertheless, the positions of the Justices in *NIFLA* shed light on the issue’s ideological valence. Over a period of twenty-five years, in three disparate settings, support for claims of compelled speech or subsidy has come primarily from the conservative Justices on the Court.²²⁶ Opposition to the claims has come primarily from the liberals. There were no cases in which a claim of compelled speech or subsidy received more support from liberal Justices than from conservatives. Taking all of this into account, I classify this as a reverse-polarity issue.²²⁷

G. Judicial Campaign Speech

Minnesota and Florida, like many other states, select their judges through popular elections. In 2002, the Supreme Court considered the constitutionality of a

²²¹ *Id.* at 2378 (majority opinion).

²²² *See id.* at 2371. This lack of attention was somewhat surprising, because the plaintiffs’ briefs invoked both *Barnette* and the post-*Barnette* decision in *Wooley v. Maynard*, 430 U.S. 705 (1977). *See, e.g.*, Brief for Petitioners at 1–3, 17–18, 22–28, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 347510.

²²³ 430 U.S. 705 (1977).

²²⁴ *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

²²⁵ *Id.* at 2387 (Breyer, J., dissenting).

²²⁶ Arguably this description also fits *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997). *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 505 & n.2 (1997) (Thomas, J., dissenting) (citing *Turner* as a compelled speech case). But the dissent in *Turner* from the –C holding, joined by three of the conservative Justices, does not cite that line of precedents. 520 U.S. at 229 (O’Connor, J., dissenting).

²²⁷ In reaching this conclusion, I do not ignore the decision in *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) (AOSI I), a case that reflects traditional polarity. Although the Court’s opinion quoted from *Barnette* and other compelled-speech cases, the decision rested on another line of precedent, the cases holding that the First Amendment supplies “a limit on Congress’ ability to place conditions on the receipt of funds.” *Id.* at 214 (quotation omitted). That line of precedent was also the basis of the disagreement between the majority and the dissent by two conservative Justices. *Compare id.* at 208–20 (Court opinion), *with id.* at 221–26 (Scalia, J., dissenting).

Minnesota canon of judicial conduct that prohibited candidates for judicial office—incumbents and non-incumbents alike—from announcing their views on “disputed legal or political issues.”²²⁸ By a vote of five to four, the Court held that this “announce clause” violated the First Amendment by restricting “core” political speech.²²⁹ The four dissenters were the four liberal Justices.

Thirteen years later, the Court considered a challenge to a Florida canon that prohibited candidates for judicial office from “personally solicit[ing] campaign funds.”²³⁰ The Florida Bar had imposed discipline on a lawyer-candidate who violated the canon by mailing a letter to local voters describing her qualifications and requesting financial support.²³¹ By this time, the liberal bloc had been reconstituted; Justices Stevens and Souter had been replaced by Justices Sotomayor and Kagan. But once again all of the liberals voted to uphold the speech restriction. And this time they secured a fifth vote—Chief Justice Roberts, who wrote the Court’s opinion. The other four conservative Justices dissented strongly, arguing that the Court had sustained a “plain . . . abridgment of the freedom of speech.”²³²

These cases make up a small corner of First Amendment law, and I do not want to overstate their importance. But it is striking that although the cases involved very different regulations, all six liberal Justices uniformly voted to deny protection to speech in the course of a campaign for public office. The senior Justice in the group, Justice Ginsburg, went so far as to reject the application of “exacting scrutiny” to the speech restriction.²³³ This is another reverse-polarity issue.

H. *Free Exercise of Religion*

For several decades, litigants claiming violations of the right to the free exercise of religion found their strongest champions in the liberal Justices. For example, in 1963, Justice Brennan wrote the landmark opinion in *Sherbert v. Verner*, holding that governmental actions that substantially burden a religious practice will be upheld only if justified by a “compelling state interest.”²³⁴ In the 1980s, when a

²²⁸ *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

²²⁹ *Id.* at 774, 788.

²³⁰ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1663 (2015).

²³¹ *Id.* at 440–41.

²³² *Id.* at 1682 (Scalia, J., dissenting).

²³³ *See id.* at 1673 (Ginsburg, J., concurring).

²³⁴ 374 U.S. 398, 406 (1963).

conservative Court rejected Free Exercise claims, Justice Brennan and Justice Marshall generally dissented, usually joined by Justice Blackmun.²³⁵ The same three Justices protested strongly in 1990 when the Court, in *Employment Division v. Smith*, rejected much of its prior jurisprudence and held that the Free Exercise Clause provides no exemption from valid and neutral laws of general applicability.²³⁶

In the Roberts Court, the alignment is quite different. To be sure, the number of free exercise cases is small, even if we include, as we should, decisions applying the two statutes that Congress enacted in response to *Smith*—the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).²³⁷ And some of the rulings have unanimously upheld the religious-liberty claim.²³⁸ But when the Court has been divided, opposition to the claims has come exclusively from members of the liberal bloc.²³⁹ And in the most contentious of the cases, *Burwell v. Hobby Lobby Stores, Inc.*, all four liberal Justices dissented strongly from the Court’s holding that the government’s regulation violated RFRA.²⁴⁰

This pattern continued in rulings handed down after the conclusion of the study period. One was a plenary decision. In *Espinoza v. Montana Department of Revenue*, the Montana Supreme Court construed the “no-aid” provision of the state constitution to require exclusion of religious schools from a state program that provided tuition assistance to parents who send their children to private schools.²⁴¹ The United States Supreme Court held that this “discrimination” was “odious to our

²³⁵ See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 458 (1988) (Brennan, J., dissenting); *Goldman v. Weinberger*, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting); *id.* at 524 (Blackmun, J., dissenting).

²³⁶ 494 U.S. 872, 890 (1990); *see id.* at 907 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting).

²³⁷ See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1467–68 (2015) (noting that courts understand RFRA “as analogous to a constitutional right”). As initially enacted, RFRA applied to state as well as federal action. However, the Supreme Court held that Congress had exceeded its powers under Section 5 of the Fourteenth Amendment in attempting to regulate states and their political subdivisions. *City of Boerne v. Flores*, 521 U.S. 507, 511, 535 (1997). Congress then passed RLUIPA to apply similar restrictions to a limited category of state-government actors. *See Cutter v. Wilkinson*, 544 U.S. 709, 715–17 (2005).

²³⁸ E.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182, 196 (2012).

²³⁹ See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2027 (2017) (Sotomayor, J., joined by Ginsburg, J., dissenting).

²⁴⁰ 573 U.S. 682 (2014); *see id.* at 739 (Ginsburg, J., dissenting).

²⁴¹ 140 S. Ct. 2246 (2020).

Constitution” and a violation of the Free Exercise Clause.²⁴² All five conservative Justices joined the Court’s opinion; all four liberal Justices dissented.²⁴³

Two cases on the “shadow docket”²⁴⁴ also fit the pattern. Both cases arose out of the COVID-19 pandemic. In each instance, the Court rejected applications for injunctive relief against state government directives that limited attendance at religious worship services.²⁴⁵ All four liberal Justices joined the Court’s rulings.²⁴⁶ But in both cases, four conservative Justices voted to grant the applications.²⁴⁷ The dissenting Justices argued that the directives discriminated against houses of worship in violation of the Free Exercise Clause.²⁴⁸

A similar alignment can be seen outside the Court. Among political elites, as Professor Baum observes, “[r]eligious freedom increasingly has become a conservative cause.”²⁴⁹ Meanwhile, liberal commentators view cases like *Hobby Lobby* as exemplifying “Free Exercise Lochnerism.”²⁵⁰ In the academic world, that is not meant as a compliment. Free exercise of religion is a reverse-polarity issue.²⁵¹

²⁴² *Id.* at 2262–63.

²⁴³ *Id.* at 2278 (Ginsburg, J., joined by Kagan, J., dissenting); *id.* at 2281 (Breyer, J., joined in part by Kagan, J., dissenting); *id.* at 2292 (Sotomayor, J., dissenting).

²⁴⁴ See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 5 (2015).

²⁴⁵ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020).

²⁴⁶ None of the liberal Justices wrote or joined an opinion in either case, but their votes were necessary to the outcomes.

²⁴⁷ *S. Bay*, 140 S. Ct. at 1613; *Calvary Chapel*, 140 S. Ct. at 2603 (Alito, J., joined by Thomas & Kavanaugh, JJ., dissenting); *id.* at 2609 (Gorsuch, J., dissenting). Chief Justice Roberts joined both rulings; in one, he wrote a concurring opinion. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

²⁴⁸ See *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting); *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting). Subsequent cases involving Free Exercise challenges to restrictions on indoor worship services also reflected reverse polarity. See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (granting partial injunctive relief over dissent by three liberal Justices).

²⁴⁹ BAUM, *supra* note 24, at 171. The context makes clear that Professor Baum is referring to free-exercise claims, not claims invoking the Establishment Clause. On Establishment Clause cases, see *infra* note 251.

²⁵⁰ See, e.g., Sepper, *supra* note 237.

²⁵¹ In contrast, on Establishment Clause issues, the traditional alignment holds: when there is disagreement within the Court, conservative Justices generally oppose the constitutional claim; liberal Justices support it. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

I. *The Second Amendment*

From 1953 through 2005, under three Chief Justices, the Supreme Court did not consider a single case challenging government regulation of firearms as a violation of the Second Amendment. But when *District of Columbia v. Heller* reached the Court in 2008, the Court divided along ideological lines, with a conservative majority holding that the Second Amendment protects an individual right to keep and bear arms; all four liberal Justices rejected that conclusion.²⁵² Two years later, in *McDonald v. City of Chicago*, the Court considered whether the right recognized in *Heller* was made applicable to the states by the Fourteenth Amendment.²⁵³ One of the four liberals, Justice David Souter, had been replaced by Justice Sonia Sotomayor, but the lineup in the Court was the same; the four liberals voted to reject the constitutional claim.

The division within the Court, Professor Baum has written, reflects “the liberal-conservative division on gun policy questions in the elite world as a whole.”²⁵⁴ It is hardly necessary to elaborate the point further; the Second Amendment is another reverse-polarity issue.

IV. OTHER REVERSE-POLARITY CASES

In the preceding Part, I identified nine issues—three defined by provisions of the Bill of Rights, the others by lines of precedent—that exemplify the phenomenon of reverse polarity. But reverse polarity can also be found in other Supreme Court decisions of the last quarter-century, and some of these decisions may point to additional *issues* that warrant the characterization. The cases fall into five groups. Two groups involve First Amendment claims, and two deal with equal protection. The final group takes us to the realm of criminal procedure.

Before turning to those cases, I will note two reverse-polarity decisions that stand by themselves in their respective areas of the law. First, in *Gasperini v. Center for Humanities, Inc.*, three conservative Justices argued that the Reexamination Clause of the Seventh Amendment “prohibit[s] federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence.”²⁵⁵ The majority, including all of the liberal Justices, rejected

²⁵² 554 U.S. 570 (2008).

²⁵³ 561 U.S. 742 (2010).

²⁵⁴ BAUM, *supra* note 24, at 113.

²⁵⁵ 518 U.S. 415, 448–49 (1996) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

this position and held that “appellate review for abuse of discretion is reconcilable with the Seventh Amendment.”²⁵⁶ *Gasperini* was the only case in all twenty-five Terms in which the Court divided over any aspect of the Seventh Amendment, so the decision does not bespeak a reverse-polarity issue.²⁵⁷

Later, in *Philip Morris USA v. Williams*, the Court held by a vote of five to four that the Due Process Clause does not permit a jury to base an award of punitive damages “in part upon its desire to *punish* the defendant for harming persons who are not before the court.”²⁵⁸ The majority was composed of three conservative Justices and two liberals.²⁵⁹ But in the Court’s other punitive damages cases, the due process claim received more support from the liberal Justices than from the conservatives.²⁶⁰ Indeed, Justice Scalia and Justice Thomas consistently rejected any use of “substantive due process” to limit state punitive damages awards.²⁶¹ The issue of punitive damages does not fall into the domain of reverse polarity.

A. Expressive Activity and Public Property

In a variety of contexts, First Amendment litigation often involves claims of access to public property for expressive activity. The Supreme Court has developed a “forum-based approach” to such questions, recognizing three types of government-controlled spaces or facilities.²⁶² But sometimes that typology does not even serve as a framework for argument, because the dispute centers on whether there is any sort of forum at all. Several cases in the past twenty-five years, including some of the most contentious, reflect a reverse-polarity alignment on issues relating to the jurisprudence of forums.

Two cases grew out of expressive activity on “public sidewalks, a prototypical example of a traditional public forum,” where “speech in public areas is at its most

²⁵⁶ *Id.* at 435 (Court opinion). Justice Stevens, although dissenting from the Court’s disposition, agreed with the Court on this point. *See id.* at 447 (Stevens, J., dissenting).

²⁵⁷ There were only two other Seventh Amendment decisions, and both were unanimous. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (upholding claim); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (rejecting claim).

²⁵⁸ 549 U.S. 346, 349 (2007).

²⁵⁹ *See id.* at 348. The conservative Justices were Chief Justice Roberts and Justices Kennedy and Alito.

²⁶⁰ *See, e.g., State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408 (2003).

²⁶¹ *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).

²⁶² *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (listing “traditional public forums, designated public forums, and nonpublic forums”).

protected.”²⁶³ The first was *Schenck v. Pro-Choice Network*, decided in 1997.²⁶⁴ A six-to-three majority, including all of the liberal Justices, rejected a First Amendment challenge to provisions of a district-court injunction establishing “fixed buffer zones” in the immediate vicinity of an abortion clinic.²⁶⁵ Three conservative Justices dissented, arguing that the trial court relied on an impermissible purpose of protecting listeners from unwanted speech.²⁶⁶

Three years later, with the same alignment of Justices, the Court decided *Hill v. Colorado*.²⁶⁷ The majority upheld a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, to approach another person without consent for the purpose of counseling or other specified speech-related conduct. The same three conservative Justices dissented, strongly disputing the majority’s conclusion that the statute was content-neutral.²⁶⁸ Justice Kennedy accused the majority of “deliver[ing] a grave wound to the First Amendment. . . .”²⁶⁹

Two cases involved the third category of forum, the “limited public forum,” where restrictions may be imposed on speech as long as they are reasonable and viewpoint-neutral.²⁷⁰ First, in *Christian Legal Society v. Martinez*, a state law school refused to register the Christian Legal Society (CLS) as a recognized student group.²⁷¹ The five-Justice majority, including the four liberal Justices, held that the law school validly conditioned access to a limited public forum on compliance with an “all-comers” requirement that implemented the school’s non-discrimination

²⁶³ *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997).

²⁶⁴ *Id.* at 357.

²⁶⁵ *Id.* at 361. Justice Breyer would also have upheld the provisions creating “floating buffer zones,” but he was alone in that view. *Id.* at 395.

²⁶⁶ *Id.* at 386 (Scalia, J., dissenting).

²⁶⁷ 530 U.S. 703 (2000).

²⁶⁸ Compare *id.* at 742–49 (Scalia, J., dissenting), and *id.* at 766–70 (Kennedy, J., dissenting), with *id.* at 719–25 (majority opinion).

²⁶⁹ *Id.* at 791 (Kennedy, J., dissenting). In 2014, the Court struck down a Massachusetts statute that limited expressive activity in the vicinity of facilities where abortions were performed. See *infra* text accompanying note 291.

²⁷⁰ Later cases, like the *Minnesota Voters Alliance* decision quoted *supra* note 262, have sometimes used the term “nonpublic forum,” but the description and the governing standards are the same. See *infra* note 275.

²⁷¹ 561 U.S. 661, 672–73 (2010).

policy.²⁷² Four conservative Justices dissented, arguing that “the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination.”²⁷³

More recently, in *Minnesota Voters Alliance v. Mansky*, the Court held that the state violated the First Amendment by prohibiting voters from wearing political badges or other political insignia inside a polling place on Election Day.²⁷⁴ The Court classified the interior of a polling place as a “nonpublic forum” and found that although the regulation was viewpoint-neutral, it was not reasonable.²⁷⁵ The only dissent came from two liberal Justices who argued that the state court should have been given a chance to construe the statute narrowly.²⁷⁶

Finally, in *Walker v. Sons of Confederate Veterans*, a Texas state agency rejected a proposal for a specialty license plate design featuring a Confederate battle flag.²⁷⁷ Four conservative Justices argued that “by selling space on its license plates [the state had created] a limited public forum,” and that in rejecting the Confederate flag design, the state had engaged in unconstitutional viewpoint discrimination.²⁷⁸ But those Justices were in dissent. The majority, composed of the four liberal Justices and Justice Thomas, held that the specialty plate designs constituted government speech and were not subject to First Amendment limitations at all.²⁷⁹

On the other side of the ledger, there have been only two instances in the last twenty-five years in which public-forum claims have received more support from liberal Justices than from their conservative counterparts. In a 1998 case, a state-owned public television station sponsored a candidate debate and excluded an independent candidate who had little popular support.²⁸⁰ A six-Justice majority found

²⁷² *Id.* at 669, 687–90.

²⁷³ *Id.* at 707 (Alito, J., dissenting).

²⁷⁴ 138 S. Ct. 1876 (2018).

²⁷⁵ *Id.* at 1886–91. The Court’s description of the “nonpublic forum” accords with the delineation of the “limited public forum” in earlier cases. Compare *id.* at 1885, with, e.g., *Christian Legal Soc’y*, 561 U.S. at 679 n.11.

²⁷⁶ *Minn. Voters All.*, 138 S. Ct. at 1893 (Sotomayor, joined by Ginsburg, J., dissenting).

²⁷⁷ 576 U.S. 200, 203 (2015).

²⁷⁸ *Id.* at 234 (Alito, J., dissenting).

²⁷⁹ *Id.* at 211–19 (Court opinion).

²⁸⁰ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 666 (1998).

that the decision to exclude satisfied the standards for regulation of speech in a nonpublic forum.²⁸¹ Three liberal Justices argued that irrespective of the nature of the forum, the station failed to define the forum's contours with sufficient specificity.²⁸² More recently, all four liberal Justices took the position that a public-access cable channel constituted a public forum in which "viewpoint discrimination is impermissible."²⁸³ But the five-Justice conservative majority held that the entity operating the public access channel was not a state actor and thus was not subject to First Amendment constraints at all.²⁸⁴

Some readers may wonder why this compilation of public forum cases does not include two decisions from the Rehnquist Court, *Good News Club v. Milford Central School*²⁸⁵ and *Rosenberger v. University of Virginia*.²⁸⁶ After all, in both cases, the conservative Justices found that state educational institutions violated the First Amendment by excluding speech from a limited public forum based on viewpoint, while the liberal Justices found no denial of free speech rights.²⁸⁷ That alignment seems to fit the reverse-polarity model. However, in each instance, the conservative Justices also rejected the argument that *allowing* the speech would violate the *Establishment Clause*.²⁸⁸ The cases thus reflect both traditional and reverse polarity—what one might call dual polarity. That is an anomalous outcome; it can occur only when both sides are claiming that the Constitution compels a ruling in

²⁸¹ *Id.* at 682–83.

²⁸² *Id.* at 690–95 (Stevens, J., dissenting).

²⁸³ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting).

²⁸⁴ *Id.* at 1926 (Court opinion). Although the Court rejected the First Amendment claim, the opinion asserted that the state-action doctrine itself "protects a robust sphere of individual liberty." *Id.* at 1934; *see* *Campbell v. Reisch*, 986 F.3d 822, 824 (8th Cir. 2021) ("By not interfering with private restrictions on speech, the [First Amendment] 'protects a robust sphere of individual liberty.'"). However, the Court's opinion did not say that the First Amendment or any other constitutional provision *compelled* rejection of the access claim. *Manhattan Community* is thus not what I have called a dual polarity case. *See infra* text accompanying notes 288–90.

²⁸⁵ 533 U.S. 98 (2001).

²⁸⁶ 515 U.S. 819 (1995).

²⁸⁷ In *Good News Club*, Justice Breyer concurred in the judgment. 533 U.S. at 127.

²⁸⁸ *Good News Club*, 533 U.S. at 112–19; *Rosenberger*, 515 U.S. at 837–45.

their favor.²⁸⁹ Fortunately (from the perspective of classification), such situations are extremely rare.²⁹⁰

Even when we put aside the cases implicating the Establishment Clause, the predominance of reverse polarity on issues relating to public forum jurisprudence is striking. Moreover, the analysis has looked only at outcomes. In 2014, the Court considered a challenge to a Massachusetts statute that made it a crime to knowingly stand on a public sidewalk within thirty-five feet of an entrance to a facility where abortions are performed.²⁹¹ The Court was unanimous in holding that the statute violated the First Amendment, but four conservative Justices denounced the majority (Chief Justice Roberts and the four liberals) for holding that the statute was content-neutral and thus not subject to strict scrutiny.²⁹²

There is no doubt that for more than two decades, litigants in the Supreme Court seeking access to public property for expressive purposes have been substantially more likely to get support from conservative Justices than from the liberals. However, the cases have arisen in a wide variety of contexts, invoking different aspects of the doctrine. And, of course, two important cases do not fit the pattern. For those reasons, and notwithstanding the strong skew in the voting alignments, I have not identified a reverse-polarity issue here. If, over the next few years, this segment of the docket continues to be dominated by reverse-polarity cases, the characterization may well be warranted.

²⁸⁹ A court of appeals decision applying the rationale of *Manhattan Community*, the public-access channel case discussed *supra* text at note 283, appears to fit that description. In *Campbell v. Reisch*, the district court held that a state representative violated a constituent's First Amendment rights by blocking him from her Twitter account. 986 F.3d at 823. The court of appeals reversed, rejecting the constituent's First Amendment claim and stating that the representative's "own First Amendment right to craft her campaign materials necessarily trumps [her constituent's] desire to convey a message on [the representative's] Twitter page that she does not wish to convey." *Id.* at 827.

²⁹⁰ For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 70, 803–04 (2007) (Breyer, J., dissenting), the dissenters invoked the spirit of *Brown v. Board of Education*, 347 U.S. 483 (1954), but they did not argue that the Equal Protection Clause *required* the challenged state action. See also *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), discussed *supra* Section II.A.

²⁹¹ *McCullen v. Coakley*, 573 U.S. 464 (2014).

²⁹² *Id.* at 499–510 (Scalia, J., dissenting). The four Justices also chastised the majority for not considering whether to limit or overrule *Hill v. Colorado*, 530 U.S. 703 (2000); see *supra* text accompanying notes 267–69.

B. *Freedom of Expressive Association*

In *NAACP v. Alabama*, a landmark decision of the Civil Rights Era, the Supreme Court held that the Constitution protects “freedom to engage in association for the advancement of beliefs and ideas.”²⁹³ Thirty years later, the Court considered a series of cases in which freedom of association was asserted as a defense to compliance with state antidiscrimination laws that limited the freedom of private organizations like the Jaycees to choose their members. The Court unanimously rejected the constitutional claims.²⁹⁴

That unanimity disappeared when the Court decided *Boy Scouts of America v. Dale* in 2000.²⁹⁵ The case arose when the Boy Scouts, upon learning that James Dale was “an avowed homosexual and gay rights activist,” revoked Dale’s adult membership in the organization.²⁹⁶ The state court held that the Boy Scouts had violated the state’s public accommodations law, and the court required the organization to reinstate Dale as an adult leader.²⁹⁷ The United States Supreme Court reversed. The five conservative Justices found that the state-court order constituted “a severe intrusion on the Boy Scouts’ rights to freedom of expressive association,” and that the interests embodied in the public accommodations law did not justify the intrusion.²⁹⁸ The four liberal Justices dissented, arguing that the state law “did not ‘impose any serious burdens’ on [the Boy Scouts’] ‘collective effort on behalf of its shared goals.’”²⁹⁹

Freedom of expressive association was also invoked in the *Christian Legal Society* case discussed earlier.³⁰⁰ The majority—four liberal Justices and Justice Kennedy—found that the limited public forum precedents provided the better “guide” for resolving the dispute, but it also rejected the organization’s expressive

²⁹³ 357 U.S. 449, 460 (1958).

²⁹⁴ The sequence began with *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984).

²⁹⁵ 530 U.S. 640 (2000).

²⁹⁶ *Id.* at 644.

²⁹⁷ *Id.* at 646–47.

²⁹⁸ *Id.* at 659.

²⁹⁹ *Id.* at 665 (Stevens, J., dissenting) (cleaned up) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

³⁰⁰ See *supra* Section IV.A.

as sociation claims.³⁰¹ Four conservative Justices, in dissent, argued that the case was “largely control[ed]” by a 1972 decision in which the Court, relying on expressive association precedents, reversed a judgment approving a college’s denial of recognition to a student group.³⁰²

Almost simultaneously with *Christian Legal Society*, the Court decided *Doe v. Reed*.³⁰³ By an eight to one vote, the Court rejected a claim that public disclosure of the names and addresses of voters who signed referendum petitions would violate First Amendment rights.³⁰⁴ Justice Thomas, the only dissenter, argued that the *NAACP v. Alabama* line of cases required strict scrutiny, which the disclosure required by the state did not satisfy.³⁰⁵ Justice Alito, although joining the Court in rejecting the facial challenge, found that “plaintiffs have a strong case that they are entitled to as-applied relief.”³⁰⁶ In contrast, three liberal Justices expressed deep skepticism about a potential as-applied challenge.³⁰⁷

In all three cases, the only support for the First Amendment claim came from conservative Justices. But there is one major case in which support for a claim of expressive association came solely from the liberal side.³⁰⁸ So I would not classify freedom of expressive association, considered as a whole, as a reverse-polarity issue. However, the Court recently granted review in a case that may shed light on whether the characterization applies to the narrower issue addressed by *NAACP v. Alabama* itself—state action requiring disclosure of an organization’s supporters.³⁰⁹

³⁰¹ *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 683, 697 (2010).

³⁰² *Id.* at 718–22 (Alito, J., dissenting). The dissent relied heavily on *Healy v. James*, 408 U.S. 169 (1972), which in turn relied on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). *See Healy*, 408 U.S. at 181–83.

³⁰³ 561 U.S. 186 (2010).

³⁰⁴ *Id.* at 202.

³⁰⁵ *Id.* at 232–40 (Thomas, J., dissenting).

³⁰⁶ *Id.* at 212 (Alito, J., concurring).

³⁰⁷ *Id.* at 215 (Sotomayor, J., dissenting). Note, though, that the strongest opposition to the plaintiffs’ constitutional claims came from Justice Scalia. *See id.* at 219 (Scalia, J., concurring in judgment).

³⁰⁸ *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 43 (2010) (Breyer, J., joined by Ginsburg & Sotomayor, JJ., dissenting). This case was decided contemporaneously with *Christian Legal Society* and *Doe v. Reed*.

³⁰⁹ *See Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1187 (9th Cir. 2019) (Ikuta, J., dissenting from denial of en banc rehearing) (arguing that the panel decision failed to follow *NAACP v. Alabama*

The law on freedom of expressive association has also generated a distinct line of precedent on the associational rights of political parties.³¹⁰ There were five cases during the study period in which claims of this kind were raised. The ideological alignments varied considerably. Two of the decisions reflected reverse polarity, albeit in a weak form. In the first case, two liberal Justices dissented from a decision finding a First Amendment violation;³¹¹ in the second, two conservative Justices dissented from a decision rejecting a facial challenge to a state initiative measure.³¹² Two other cases reflected traditional polarity; the only support for the claim came from three liberal Justices in dissent.³¹³

The fifth case was *sui generis*. In *Morse v. Republican Party of Virginia*, the Court held that Section 5 of the Voting Rights Act of 1965 required the state Republican Party to “preclear” the party’s decision to impose a fee (\$35 or \$45) for participation in the convention that would select the party’s candidate for United States Senator.³¹⁴ Four conservative Justices argued in dissent that the Court’s interpretation of Section 5 raised serious questions “relating to [the party’s] freedom of political association.”³¹⁵ The four liberal Justices, joined by Justice O’Connor, viewed the First Amendment claim as insubstantial and indeed barely worth mentioning.³¹⁶ Thus, from a First Amendment perspective, the alignment reflects reverse polarity. But the Voting Rights Act bears such a close relationship to the Fifteenth Amendment that *Morse* can be viewed as a case in which both sides were

and that the panel’s approach “puts anyone with controversial views at risk”), *cert. granted*, 141 S. Ct. 973 (2021).

³¹⁰ See, e.g., *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (citing cases).

³¹¹ See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., joined in part by Ginsburg, J., dissenting).

³¹² See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 262 (2008) (Scalia, J., joined by Kennedy, J., dissenting).

³¹³ In both cases Justice Stevens wrote the dissent, joined by Justice Ginsburg and in part by Justice Souter. See *Clingman v. Beaver*, 544 U.S. 581, 608 (2005) (Stevens, J., dissenting); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997) (Stevens, J., dissenting).

³¹⁴ 517 U.S. 186 (1996).

³¹⁵ *Id.* at 283 (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., dissenting); see also *id.* at 250 (Kennedy, J., joined by Rehnquist, C.J., dissenting) (emphasizing political party’s freedom of association). The dissenting Justices asserted that Section 5 should be construed to avoid conflict with First Amendment rights. *Id.* at 282–83.

³¹⁶ See *id.* at 229 n.38 (lead opinion) (characterizing the “burden on the right of association implicated in this case” as “minimal”); *id.* at 239 (Breyer, J., joined by O’Connor & Souter, JJ., concurring in judgment) (stating that “the practice challenged here . . . lies outside the area of greatest ‘associational’ concern”).

asserting constitutional rights. Considered in that light, *Morse* is another dual polarity case.³¹⁷

Even putting aside the ambivalence of *Morse*, the absence of any dominant pattern in the positions of the Justices in the other cases negates the possibility of identifying a reverse-polarity issue in this narrow but important corner of First Amendment law.

C. *Race and Redistricting*

The role of race in redistricting has generated a complex body of law—complex in no small part because the two primary sources of that law can point in opposite directions. The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits “racial gerrymandering,” which is defined as “intentionally assigning citizens to a district on the basis of race without sufficient justification.”³¹⁸ But the Court has also acknowledged that the Voting Rights Act “often insists that districts be created precisely because of race.”³¹⁹ To make matters more difficult, “a voter’s race sometimes correlates closely with political party preference.”³²⁰

In this setting, it is perhaps not surprising that some of the decisions reflect reverse polarity. Indeed, when the Court first recognized “racial gerrymandering” as a distinct equal protection claim, the liberal Justices objected strongly to the entire concept, saying that by requiring strict scrutiny for districting plans “predominantly motivated” by race, the Court was issuing an “invitation to litigate against the State” that was “neither necessary nor proper.”³²¹ In 2001, four conservative Justices voted to affirm a judgment finding that “race not politics” explained a state’s redistricting

³¹⁷ See *supra* Section IV.A.

³¹⁸ *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993)).

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Miller v. Johnson*, 515 U.S. 900, 945 (1995) (Ginsburg, J., dissenting); see also *Bush v. Vera*, 517 U.S. 952, 1004–05 (1996) (Stevens, J., dissenting) (asserting that the Court, with its jurisprudence of racial gerrymandering, has “struck out into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts”).

plan, thus rendering the plan unconstitutional.³²² But the four liberal Justices, joined by Justice O'Connor, held otherwise.³²³

More recently, however, the Court has divided along traditional ideological lines. In one case, the liberal Justices voted to strike down a redistricting plan as an impermissible racial gerrymander, while conservative Justices, in dissent, accused the Court of ignoring the legislature's "legitimate political explanation."³²⁴ In another case, the liberal Justices, in dissent, insisted that the majority "ignore[d] the substantial amount of evidence of [the state's] discriminatory intent."³²⁵ Racial gerrymandering may have been a reverse-polarity issue in the 1990s and even in 2001, but it is not one today.

D. Other Equal Protection Claims

Two other equal protection decisions reflect reverse polarity. Both grew out of litigation in state courts. One case is quite well known; the other, quite obscure.

The well-known case is *Bush v. Gore*, the decision that determined the winner of the 2000 presidential election.³²⁶ A per curiam opinion joined by the five conservative Justices found that several aspects of the Florida recount process were "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."³²⁷ The result was "a violation of the Equal Protection Clause,"³²⁸ and the Court ordered a halt to the recount.³²⁹ The four liberal Justices dissented, with two rejecting the majority's finding of an Equal Protection violation.³³⁰

³²² *Easley v. Cromartie*, 532 U.S. 234, 244 (2001); *see id.* at 259 (Thomas, J., dissenting).

³²³ *Id.* at 237 (Court opinion) (holding district court findings clearly erroneous).

³²⁴ *Cooper v. Harris*, 137 S. Ct. 1455, 1504 (2017) (Alito, J., dissenting) (quoting *Easley*, 532 U.S. at 242). In *Cooper*, Justice Thomas joined the four liberal Justices to make up the majority. *Id.* at 1485.

³²⁵ *Abbott v. Perez*, 138 S. Ct. 2305, 2345 (2018) (Sotomayor, J., dissenting).

³²⁶ 531 U.S. 98 (2000) (per curiam).

³²⁷ *Id.* at 109.

³²⁸ *Id.* at 103.

³²⁹ *Id.* at 110.

³³⁰ *See id.* at 143 (Ginsburg, J., joined by Stevens, J.) (finding no "substantial equal protection claim"); *id.* at 133–35 (Souter, J., joined by Breyer, J., dissenting) (agreeing that the equal protection claim presents "a meritorious argument for relief" but finding "no justification" for halting the recount).

The obscure case is *Armour v. City of Indianapolis*.³³¹ In *Armour*, the city changed its method of payment for sewer improvement assessments. Petitioners were lot owners who had paid their entire assessment in a lump sum. The city refused to refund any of the money they had paid, while it forgave the outstanding project debts of owners who had elected to pay on the installment plan. A six-Justice majority, including all four liberal Justices, applied rational-basis review and found no equal protection violation.³³² Three conservative Justices dissented, arguing that where state law provided that abutting landowners are in the same class, the city's justifications for the disparate treatment could not satisfy even the rational basis standard.³³³

Two decisions drawing on totally different lines of precedent do not allow for any generalization. And in other equal protection cases not involving suspect categories or fundamental rights, the constitutional claim received more support from the liberal Justices than from the conservatives.³³⁴ No reverse-polarity issue can be identified here.

E. *Criminal Procedure*

Justice Scalia was a leading member of the Court's conservative bloc, but he was also an originalist. As commentators have pointed out, his originalism sometimes led him to support constitutional claims challenging police practices or asserting the rights of criminal defendants.³³⁵ The same can be said about Justice Thomas, albeit to a lesser degree.³³⁶ This pattern can be seen principally in three areas of criminal procedure: searches and seizures, the Confrontation Clause, and the right to a jury trial in sentencing.

That does not mean, however, that the cases were reverse-polarity cases. Consider, for example, the important opinions by Justice Scalia that broadly defined

³³¹ 566 U.S. 673 (2012).

³³² *Id.* at 676.

³³³ *Id.* at 690 (Roberts, C.J., dissenting).

³³⁴ *E.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008).

³³⁵ See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184, 184 n.3 (2005).

³³⁶ See *infra* note 342.

the “searches” subject to the Fourth Amendment³³⁷ and expanded the rights of confrontation and jury trial protected by the Sixth Amendment.³³⁸ Justice Thomas joined each of those opinions. But all of these decisions were five to four, and Justices Scalia and Thomas were the only conservative Justices to vote in favor of the constitutional claims. Justice Scalia was able to write for the Court only because he had the support of three of the four liberal Justices.³³⁹

Commentators have given extensive attention to these cases, and for good reason: they appear to represent “an idiosyncratic coalition of conservative originalists and liberal Justices sympathetic toward criminal defendants.”³⁴⁰ That is a phenomenon worth studying, but it is a phenomenon distinct from reverse polarity.³⁴¹ None of the cases discussed above are reverse-polarity cases.³⁴²

In fact, among more than 300 criminal law and procedure cases in the twenty-five Terms of the study, I found only four in which the constitutional claim received more support from conservative Justices than from the liberals. Each involved a different area of the law—confrontation, double jeopardy, the right of self-representation, and the right to a jury trial.

³³⁷ See *Florida v. Jardines*, 569 U.S. 1 (2013) (use of drug-sniffing dog on homeowner’s porch); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of thermal imaging aimed at a private home).

³³⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (confrontation); *Blakely v. Washington*, 542 U.S. 296 (2004) (jury trial). *Blakely* followed up on the landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The lineup of the Justices was the same in both cases.

³³⁹ In *Kyllo*, Justice Stevens parted company from the other liberal Justices and wrote the dissent. 533 U.S. at 41 (Stevens, J., dissenting). In the other cases listed, Justice Breyer wrote or joined the dissent rejecting the constitutional claim. See *Jardines*, 569 U.S. at 16; *Melendez-Diaz*, 557 U.S. 305 at 330; *Blakely*, 542 U.S. at 314.

³⁴⁰ Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, 1516 (2019); see *id.* at 1515–17 (listing commentaries).

³⁴¹ Professor Fischman argues that the coalitions were not really idiosyncratic—that in each of the cases listed above (except for *Kyllo*), the majority was composed of “authority formalists,” while the dissenters were primarily the “authority functionalists.” See *id.* at 1517–18 (listing the Justices in the two camps); *id.* at 1516–17 (analyzing jury trial, confrontation, and Fourth Amendment cases).

³⁴² In two of the Fourth Amendment cases discussed by Professor Fischman, the coalition splintered: Justice Thomas joined with the other conservatives in rejecting the constitutional claim, and Justice Scalia wrote a dissent joined by three liberal Justices. See *Navarette v. California*, 572 U.S. 393, 404 (2014) (Scalia, J., dissenting); *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting). Justice Thomas also disagreed with Justice Scalia’s pro-defendant position in a confrontation case discussed by Professor Fischman. See *Williams v. Illinois*, 567 U.S. 50, 103 (2012) (Thomas, J., concurring in judgment).

The confrontation case was *Giles v. California*, decided in 2008.³⁴³ The issue was a narrow one involving forfeiture by wrongdoing. Justice Scalia wrote for a six-Justice majority rejecting the California Supreme Court's broad theory of forfeiture and holding that a defendant forfeits his confrontation right only when he "engaged in conduct *designed* to prevent the witness from testifying."³⁴⁴ The three dissenters from the ruling in favor of the defendant included two of the Court's liberals (Justice Breyer and Justice Stevens).³⁴⁵

The double jeopardy case was *Smith v. Massachusetts*.³⁴⁶ Here too, the issue that divided the Court was a narrow one: whether the Double Jeopardy Clause allows a judge to reconsider a mid-trial acquittal after the defendant has rested his case.³⁴⁷ The Court answered "no," with Justice Scalia writing for himself, two other conservatives (Justice O'Connor and Justice Thomas) and two liberals (Justice Stevens and Justice Souter).³⁴⁸

The right of self-representation, recognized by the 1975 decision in *Faretta v. California*,³⁴⁹ was at issue in *Indiana v. Edwards*.³⁵⁰ The case involved a criminal defendant who had "sufficient mental competence to stand trial"—but who, in the view of the state court, "lack[ed] the mental capacity to conduct his trial defense unless represented."³⁵¹ A seven to two majority, including all of the liberal Justices, held that the state could insist on representation by counsel contrary to the defendant's wishes.³⁵² Justice Scalia, joined by Justice Thomas, dissented, arguing that "the Constitution does not permit a State to substitute its own perception of

³⁴³ 554 U.S. 353 (2008).

³⁴⁴ *Id.* at 359.

³⁴⁵ *Id.* at 380 (Breyer, J., dissenting).

³⁴⁶ 543 U.S. 462 (2005).

³⁴⁷ *Id.* at 464.

³⁴⁸ *Id.* at 469–70.

³⁴⁹ 422 U.S. 806 (1975). The Court found the right to be implicit in the Sixth Amendment. *See id.* at 832.

³⁵⁰ 554 U.S. 164 (2008).

³⁵¹ *Id.* at 174.

³⁵² *Id.* at 178.

fairness for the defendant’s right to make his own case before the jury—a specific right long understood as essential to a fair trial.”³⁵³

Finally, in *Oregon v. Ice*, the Court held that the jury-trial guarantee of the Sixth Amendment does not bar states from assigning to judges, rather than juries, the determination of facts “necessary to the imposition of consecutive, in lieu of concurrent, sentences,” for multiple offenses.³⁵⁴ Only one of the Court’s four liberals, Justice Souter, voted in favor of the constitutional claim, but three conservative Justices did so (Chief Justice Roberts and Justices Scalia and Thomas).³⁵⁵

The paucity of cases and the narrowness of the rulings tell the story. In the realm of criminal procedure, reverse-polarity issues are not to be found. There are occasional atypical alignments in individual cases, but on the broad range of issues ranging from searches and seizures to the administration of the death penalty, support for the constitutional claim remains the liberal, not the conservative, position.

V. OBSERVATIONS ON THE REVERSE-POLARITY CASES

To fully explore the phenomenon of reverse polarity would require comparing the reverse-polarity cases with those in which liberal and conservative Justices adhered to the ideological alignment associated with the Warren Court era. That is a task for future research.³⁵⁶ For now, I offer some preliminary observations suggested by an initial review of the cases discussed in the preceding pages. Three ways of thinking about the cases come to mind. I begin by considering reverse-polarity *liberalism*—first as a throwback to the Progressive Era, then as an embrace of Justice Felix Frankfurter’s vision of judicial self-restraint. Shifting perspectives, I look at reverse-polarity *conservatism* as an application of the theory of judicial review associated with Justice Harlan Fiske Stone’s famous Footnote Four in *United States*

³⁵³ *Id.* at 180 (Scalia, J., dissenting). Justice Scalia asserted that “the dignity at issue” in the case was “the supreme human dignity of being master of one’s fate rather than a ward of the State—the dignity of individual choice.” *Id.* at 186–87. “[T]he dignity of individual choice” is a phrase that one might expect to find in the writing of a liberal, not a conservative, Justice, and indeed until *Edwards*, the only member of the Court to use it was Justice Stevens. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁵⁴ 555 U.S. 160, 163 (2009).

³⁵⁵ *See id.* at 173 (Scalia, J., dissenting). This was the first time in the sequence starting with *Appendi v. New Jersey*, 530 U.S. 466 (2000), that Justice Stevens voted against the Sixth Amendment claim.

³⁵⁶ I offer some initial thoughts in the Conclusion *infra*.

v. *Carolene Products Co.*³⁵⁷ Because these ideas are speculative and provisional, I use question marks in the section titles.

A. *A Throwback to the Progressive Era?*

In the reverse-polarity cases, liberal Justices are voting to reject individual rights claims and uphold government action, while conservative Justices are on the other side. Viewed in that light, reverse-polarity liberalism can be seen as a throwback to the version of liberalism that was dominant in the Progressive Era.³⁵⁸

The linkage is most direct in the Takings Clause cases. As Professor Feldman has written, during the first third of the twentieth century, a “conservative Supreme Court had framed its property-protecting measures in terms of individual rights.”³⁵⁹ The “constitutional liberalism [of Roosevelt Justices like Black and Frankfurter] was defined in opposition to [those] doctrines.”³⁶⁰ Today, the “constitutional liberalism” of the Justices nominated by Presidents Clinton and Obama is defined in part by opposition to the “property-protecting measures” endorsed by the conservative Justices of the Roberts Court.³⁶¹ Justice Kagan’s strongly worded dissent in *Koontz v. St. Johns River Water Management District*, a 2013 case on land use regulation, is a good example.³⁶² She argued that the Court’s decision “turns a broad array of local land-use regulations into federal constitutional questions” and “deprives state and local governments of the flexibility they need to enhance their communities.”³⁶³

The parallel to the Progressive Era emerges most strongly, however, in cases that do not involve property rights. If constitutional liberalism in the 1930s was defined by opposition to decisions of a “conservative Supreme Court,” no decision aroused greater hostility than the 1905 ruling in *Lochner v. New York*, striking down a state law limiting the hours of work for bakers.³⁶⁴ *Lochner* occupies a similar

³⁵⁷ 304 U.S. 144, 152 n.4 (1938).

³⁵⁸ See *supra* Section I.A.

³⁵⁹ FELDMAN, *supra* note 19, at 179.

³⁶⁰ *Id.* at 177.

³⁶¹ See *supra* Section III.A.

³⁶² 570 U.S. 595 (2013).

³⁶³ See *id.* at 635–36 (Kagan, J., dissenting). See also *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2180 (2019) (Kagan, J., dissenting), discussed *supra* Section III.A. In both cases Justice Kagan’s dissent was joined by the other three liberal Justices.

³⁶⁴ 198 U.S. 45 (1905).

position for the liberal Justices in the Roberts Court; in dissents from decisions upholding claims under the First Amendment, they warn of a return to the “*Lochner* era.”³⁶⁵ Justice Kagan’s dissent in *Janus v. AFSCME*, although not citing *Lochner* by name, expressed the idea in unmistakable terms; she accused the majority of “using [the First Amendment as a sword] against workaday economic and regulatory policy.”³⁶⁶ Indeed, “First Amendment *Lochnerism*” has become almost a cliché among liberal commentators.³⁶⁷

Yet there are also important differences between the reverse-polarity cases of the last quarter-century and the individual rights decisions of the *Lochner* era. In the view of Progressive Era liberals, conservative Justices were invoking “property protecting doctrines” to strike down legitimate state efforts “to reform the relationship between workers and employers.”³⁶⁸ It was the plight of employees—“those least free”—that aroused liberal anger about decisions like *Lochner*.³⁶⁹ But in *Janus*, for example, the litigant challenging the state law was himself an employee, seeking release from state-compelled payments to a union.³⁷⁰

³⁶⁵ *E.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 585 (2011) (Breyer, J., dissenting). Prominent scholars have argued that *Lochner* and its “eponymous jurisprudential era” have been misrepresented and caricatured. *See* David E. Bernstein, *Class Legislation, Fundamental Rights, and the Origins of Lochner and Liberty of Contract*, 26 GEO. MASON L. REV. 1023, 1023 (2019); *id.* at 1027–28 (“Today, no serious legal historian accepts the cartoonish version of history that still has traction in some circles.”). For present purposes, it is unnecessary to consider whether *Lochner* deserves its obloquy; the question here is not what *Lochner* actually did but how it is being used.

For completeness, it should be noted that conservatives too can invoke *Lochner*—in cases reflecting the traditional ideological alignment. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 696–97 (2015) (Roberts, C.J., dissenting); *see* Bernstein, *supra*, at 1027 (asserting that the Roberts dissent “repeat[s] virtually every hoary myth about *Lochner* and liberty of contract” and that most of what the Chief Justice writes about “*Lochner* and like-minded cases” “is simply false.”).

³⁶⁶ 138 S. Ct. 2448, 2501 (2018) (Kagan J., dissenting). *See supra* note 218.

³⁶⁷ *See* Kessler, *supra* note 22, at 1917–18 (noting that comparisons with *Lochner* “fill the law reviews”); Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1243, 1244–45, 1271–72 (2020) (citing examples).

³⁶⁸ FELDMAN, *supra* note 19, at 177–78. The text says “employees,” but surely that is a typo for “employers.”

³⁶⁹ *See* FRANKFURTER, *supra* note 18, at 165 (citing *Lochner* among other cases in which the Supreme Court used “the dogma of ‘liberty of contract’ . . . to slay most important social legislation and to deny the means of freedom to those least free.”).

³⁷⁰ *Janus*, 138 S. Ct. at 2461–62.

The contrast can also be seen in the Takings Clause cases. In the well-known *Kelo* case, for example, the challenge to state action came not from an employer seeking to impose a longer workweek on his employees but (as Professor Baum puts it) from “a woman who was far from wealthy and who was in danger of losing a home that she loved”; moreover, “a large company [was] implicitly [standing] on the other side.”³⁷¹ Other Takings Clause cases, too, have involved individual owners of small tracts of land.³⁷²

Invocation of *Lochner* may carry greater force when the government relies on its authority to regulate commercial activity or protect health and safety. That is so whether the challenge to the regulation is based on the First Amendment right of free speech,³⁷³ the Second Amendment right to “keep and bear arms,”³⁷⁴ or other constitutional protections.³⁷⁵ But whether or not the analogy is found to be persuasive, the cases discussed in this Article show that across a wide spectrum of constitutional issues, liberal Justices and commentators have gone far to revive the “doctrine” that Justice Robert H. Jackson described as one basis for “the Roosevelt fight against the old Court”—“that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs.”³⁷⁶ Like their ideological forebears of the 1920s and 1930s, modern-day liberals “insist that a majority out of nine appointed life-tenure [Justices] should not settle such issues.”³⁷⁷

³⁷¹ BAUM, *supra* note 24, at 131. The case is *Kelo v. City of New London*, 545 U.S. 469 (2005).

³⁷² *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017) (two lots totaling 2.5 acres); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (14.9-acre tract of land).

³⁷³ *See, e.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 591–92 (Breyer, J., dissenting); *United States v. United Foods, Inc.*, 533 U.S. 405, 429 (2001) (Breyer, J., dissenting).

³⁷⁴ *See McDonald v. City of Chicago*, 561 U.S. 742, 878, 905 (2010) (Stevens, J., dissenting).

³⁷⁵ *See, e.g.*, Sepper, *supra* note 237, at 1455 (“[B]usinesses, scholars, and courts increasingly incorporate the central premises of *Lochner* into religious liberty doctrine.”).

³⁷⁶ Letter from Justice Robert H. Jackson to Professor Charles Fairman (Mar. 13, 1950), *reprinted in* WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION* 713 (2006). Jackson was writing to Fairman to seek his “informed judgment as to the constitutional questions involved in racial segregation in education”—questions that were shortly to come before the Court. Jackson emphasized that he “still . . . believe[d]” in the doctrine of limited judicial authority that he summarized, but, for him, that doctrine did not solve the “problem” of whether “we nine . . . should . . . decide such questions for the Nation.” *Id.* at 714.

³⁷⁷ *See id.*; *compare* *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (asserting that a “healthy [and] democratic . . . debate ends” because “[t]he majority has adjudged who should prevail”), and *McDonald v. City of Chicago*, 561 U.S. 742, 913 (2010) (Breyer, J., dissenting) (finding

In that light, one way of looking at reverse-polarity liberalism is to see it as injecting an element of the Progressive Era's worldview into a version of liberalism that is, in other respects, more closely aligned with the outlook of the Warren Court era. Depending on how one weighs the comparative importance of the reverse-polarity and traditional-polarity issues, that may even be the dominant strain.³⁷⁸

B. Felix Frankfurter, Liberal Icon?

In 1943, when the Supreme Court vindicated the right of Jehovah's Witnesses children not to salute the American flag, Justice Felix Frankfurter wrote a passionate and personal dissent arguing that the Court had assumed "a legislative responsibility that does not belong to it."³⁷⁹ With that dissent, as historian Joseph Lash memorably observed, Frankfurter "uncoupled [himself] from the locomotive of history."³⁸⁰ Frankfurter continued to advocate "vigilant judicial self-restraint,"³⁸¹ but that approach no longer appealed to liberals, on the Court or off. For several decades, as Professor Brad Snyder has written, it became "[c]onventional historical wisdom" to assert that Frankfurter was a "jurisprudential failure."³⁸² In the "triumphalist . . . narrative" that celebrated the "Warren Court's individual rights revolution," Frankfurter "served as the villain."³⁸³

With the arrival of reverse-polarity decisions, however, liberal Justices and commentators have found inspiration and wisdom in opinions of Justice Frankfurter rejecting constitutional claims. Three opinions by Justice Stevens stand out.

The first came in 1996. As noted earlier, when the Supreme Court initially recognized a claim for "racial gerrymandering," the liberal Justices rejected the

no "justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts").

³⁷⁸ Any such assessment would have to take into account the fact that liberals remain committed to a robust judicial role on issues that reflect traditional polarity. See Balkin, *supra* note 9, at 261 (noting that liberal legal intellectuals, although deeply disillusioned with "judicial review in the hands of a conservative judiciary, . . . continue to defend a large number of liberal civil rights and civil liberties precedents—for example, *Roe* and *Lawrence*").

³⁷⁹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 663 (Frankfurter, J., dissenting).

³⁸⁰ JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 73 (1975).

³⁸¹ *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring).

³⁸² Brad Snyder, *Frankfurter and Popular Constitutionalism*, U.C. DAVIS L. REV. 343, 346, 350 (2013). Snyder provides numerous examples of scholars who derided Frankfurter's approach to constitutional questions. *Id.*

³⁸³ *Id.*

concept.³⁸⁴ Justice Stevens was the harshest critic of the new doctrine; in addition to rejecting the claims on the merits, he argued that the plaintiffs lacked standing to pursue them.³⁸⁵ In support of his argument, he quoted “Justice Frankfurter’s memorable characterization of the suit brought in [the 1946 case of] *Colegrove v. Green*.”³⁸⁶ *Colegrove* is widely regarded as having been overruled by *Baker v. Carr*,³⁸⁷ a landmark decision of the Warren Court.³⁸⁸ Nevertheless, Justice Stevens did not simply cite it; he also relied on language that was part of its rationale.

A few years later, in *McConnell v. FEC*, all four liberal Justices joined in an opinion upholding the major provisions of the Bipartisan Campaign Reform Act of 2002.³⁸⁹ The opinion was co-authored by Justice Stevens and Justice O’Connor. It begins with a lengthy account of the history of campaign finance legislation drawn almost entirely from the Court’s 1957 opinion in *United States v. Automobile Workers*.³⁹⁰ As the Court notes, the author of that opinion was Justice Frankfurter. A careful scholar has argued that “*Auto Workers* contains not history but a fable.”³⁹¹ History or fable, reliance on the Frankfurter version by liberal Justices is not what one would have expected in the decades following Frankfurter’s retirement in 1962.

Justice Stevens’s last opinion before his own retirement in July 2010 was a dissent in *McDonald v. City of Chicago*.³⁹² The Court held in *McDonald* that the Second Amendment right “to keep and bear arms for self-defense,” first recognized in *District of Columbia v. Heller*,³⁹³ “is fully applicable to the states.”³⁹⁴ Justice Stevens rejected the approach to “incorporation” taken by the Court, arguing that inclusion of a right in the Bill of Rights does not necessarily create an “interest” that

³⁸⁴ See *supra* Section IV.C.

³⁸⁵ *Shaw v. Hunt*, 517 U.S. 899, 919–29 (1996) (Stevens, J., dissenting).

³⁸⁶ *Id.* at 922 (citing *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion)).

³⁸⁷ 369 U.S. 186 (1962).

³⁸⁸ See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2355 n.193 (2006).

³⁸⁹ 540 U.S. 93 (2003).

³⁹⁰ 352 U.S. 567 (1957), quoted in *McConnell*, 540 U.S. at 115–17.

³⁹¹ Allison R. Hayward, *Revisiting the Fable of Reform*, HARV. J. LEGIS. 421, 425 (2008).

³⁹² 561 U.S. 742 (2010).

³⁹³ 554 U.S. 570 (2008).

³⁹⁴ *McDonald*, 561 U.S. at 750.

is “judicially enforceable [against state action] under the Fourteenth Amendment.”³⁹⁵ In support of his argument, Justice Stevens invoked “[c]lassic opinions [of] Justice Cardozo and Justice Frankfurter”,³⁹⁶ he also quoted with approval the “principle” set forth in Justice Frankfurter’s opinion for the Court in *Wolf v. Colorado*³⁹⁷—a decision overruled by another landmark ruling of the Warren Court.³⁹⁸

In the academic world, liberal commentators have found insights in Justice Frankfurter’s dissents, including dissents to Court opinions by Justice William J. Brennan, one of the heroes of “the Warren Court’s individual rights revolution.”³⁹⁹ Two examples centering on reverse-polarity cases deserve mention. The first involves *Bush v. Gore*.⁴⁰⁰ As Professor Michael C. Dorf has noted, “Justice Frankfurter’s critique of judicial review of politics in *Baker v. Carr* was derided by liberals for nearly forty years. Then the Supreme Court decided *Bush v. Gore*, and Frankfurter didn’t look so bad.”⁴⁰¹ The decision in *Bush v. Gore* led other scholars also “to reexamine Frankfurter’s *Baker* dissent.”⁴⁰²

A second example involves compelled union agency fees, the subject of the reverse-polarity decision in *Janus v. AFSCME*.⁴⁰³ One of the predecessor cases to *Janus* was *Machinists v. Street*, the 1961 decision in which the Court, speaking through Justice Brennan, construed the Railway Labor Act “to deny the unions, over an employee’s objection, the power to use his exacted funds to support political causes which he opposes.”⁴⁰⁴ Justice Frankfurter dissented, insisting that neither the

³⁹⁵ *Id.* at 866 (Stevens, J., dissenting).

³⁹⁶ *Id.* at 865 n.9 (citing *Adamson v. California*, 332 U.S. 46, 59–69 (1947) (Frankfurter, J., concurring)).

³⁹⁷ 338 U.S. 25, 26 (1949), quoted in *McDonald*, 561 U.S. at 866 n.10 (Stevens, J., dissenting).

³⁹⁸ Justice Stevens acknowledged that “*Wolf*’s holding on the exclusionary rule was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961),” but he said that the “principle” he quoted had “never been disturbed.” *Id.*

³⁹⁹ See *supra* text accompanying note 382.

⁴⁰⁰ 531 U.S. 98 (2000), discussed *supra* Section IV.D.

⁴⁰¹ Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN’S J. LEGAL COMM. 497, 524 (2007).

⁴⁰² Snyder, *supra* note 382, at 411–13 (citing examples).

⁴⁰³ 138 S. Ct. 2448 (2018), discussed *supra* Section III.F.

⁴⁰⁴ 367 U.S. 740, 768–69 (1961). The Court made clear that it construed the statute in this way “to avoid serious doubt [about its] constitutionality.” *Id.* at 749. In fact, when the Court first heard the case, a majority was prepared to hold Section 2, Eleventh, of the Railway Labor Act unconstitutional as applied. Justice Black prepared and circulated an opinion to that effect. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT, A JUDICIAL BIOGRAPHY* 371–72 (1983).

Act nor the First Amendment barred the unions from using compelled dues for political purposes.⁴⁰⁵ A recent article criticizing the *Janus* decision quotes extensively from the Frankfurter dissent⁴⁰⁶ and concludes by saying that “Frankfurter’s warning about the antidemocratic effects of expanding the Court’s First Amendment jurisprudence was prescient.”⁴⁰⁷

I do not want to take the point too far. Neither liberals nor conservatives today are likely to endorse the full measure of Justice Frankfurter’s brand of judicial self-restraint.⁴⁰⁸ Nevertheless, the fact that liberal Justices and commentators are quoting Frankfurter opinions with approval provides a useful perspective on the reverse-polarity cases. And it shows how far judicial liberalism has moved from the Warren Court era and its immediate aftermath, when Frankfurter “served as the villain.”⁴⁰⁹

C. *Flipping Footnote Four?*

Justice (later Chief Justice) Harlan Fiske Stone was one of the liberal Justices who often dissented when the conservative Court of the 1920s and 1930s struck down economic and social legislation as a denial of due process.⁴¹⁰ But he also believed that “the courts played a critical role in protecting noneconomic liberty and equality against overbearing majorities.”⁴¹¹ How could the Supreme Court “legitimate judicial activism in the service of the Bill of Rights without resurrecting the unwanted activism of the *Lochner* era?”⁴¹² In 1938, a year before Felix Frankfurter joined the Court, Justice Stone sought to resolve this dilemma in what

⁴⁰⁵ *Street*, 367 U.S. at 811–18 (Frankfurter, J., dissenting).

⁴⁰⁶ Kate Andrias, *Janus’s Two Faces*, 2019 SUP. CT. REV. 21, 35–37, 42–43, 55 (2019).

⁴⁰⁷ *Id.* at 55; see also Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2185 (2018) (criticizing the *Janus* decision, summarizing the Frankfurter dissent in *Street*, and suggesting that Frankfurter’s view of the relationship between unions and politics provides a “bridge to an alternative, democratic political economy in First Amendment doctrine”).

⁴⁰⁸ See Balkin, *supra* note 9, at 263–64 (“Felix Frankfurter’s star may rise again among liberal legal academics, . . . [but] liberals today are in a very different position than progressives in the 1930s.”).

⁴⁰⁹ See *supra* text accompanying note 382.

⁴¹⁰ See, e.g., *Ribnik v. McBride*, 277 U.S. 350, 359 (1928) (Stone, J., dissenting).

⁴¹¹ WIECEK, *supra* note 376, at 118.

⁴¹² *Id.* at 122.

became “the most celebrated footnote in constitutional law”⁴¹³—Footnote Four of *United States v. Carolene Products Co.*⁴¹⁴

In the text of his opinion for the Court, Stone stated and applied what has become known as the “rational basis” test for reviewing economic legislation challenged as a violation of due process.⁴¹⁵ Footnote Four, in three separate paragraphs, listed three circumstances in which courts would be less deferential to legislative judgments. These encompassed, first, challenges based on “specific prohibition[s]” of the Constitution, such as those contained in the Bill of Rights; second, challenges to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation”; and third, claims that may implicate “prejudice against discrete and insular minorities.”⁴¹⁶

Footnote Four is widely viewed as having laid the foundation for the construction of a robust jurisprudence of civil rights by the Warren Court. For example, in 1965, at the height of the Warren Court, Professor Herbert Wechsler quoted from the footnote and exclaimed, “What a change in the legal cosmos those few words portended in the quarter of a century ahead!”⁴¹⁷ To be sure, it would be a mistake to say that the Warren Court Justices self-consciously drew inspiration from Footnote Four; there is good reason to believe that they did not.⁴¹⁸ Rather, the footnote provided liberal members of the legal academy with a “theoretical rationale” that could justify the “judicial activism” practiced by the Warren Court—while escaping “the ghost of *Lochner*.”⁴¹⁹

In the reverse-polarity cases, it is the conservative Justices who are voting to uphold individual rights claims and set at naught the outcomes reached by majoritarian processes. Can the “theoretical rationale” of Footnote Four support their

⁴¹³ Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

⁴¹⁴ 304 U.S. 144, 152 n.4 (1938).

⁴¹⁵ *Id.* at 152–54.

⁴¹⁶ *Id.* at 152 n.4.

⁴¹⁷ Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1002 (1965); see also Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (“The footnote codified the hard fought victory of the Progressives and seemed to provide a framework for the judicial activism that was about to transpire.”).

⁴¹⁸ See POWE, *supra* note 21, at 215–16, 487–89; Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 238 (2004).

⁴¹⁹ Gilman, *supra* note 418, at 238–39.

“judicial activism” as well? That is a large question beyond the scope of this Article. But it is possible to identify some instances in which the conservative Justices, explicitly or implicitly, have claimed the mantle of the *Carolene Products* footnote.

1. Enumerated Rights

Of the nine reverse-polarity issues discussed in Part III, all but two (personal jurisdiction and challenges to affirmative action programs) involve rights protected by “a specific prohibition of the Constitution.”⁴²⁰ But for the most part, the cases drew upon well-established lines of precedent, so it is not surprising that the conservative Justices did not rely on Justice Stone’s distinction between claims under the Due Process Clause, such as the one in *Carolene Products* itself, and assertions of what have been called “enumerated rights.”⁴²¹ However, in two important reverse-polarity cases, the Court did allude to the distinction—once explicitly, once implicitly.

In *District of Columbia v. Heller*, the Second Amendment case, Justice Breyer asserted in dissent that the District’s ban on possession of a handgun in the home would satisfy rational basis scrutiny.⁴²² The Court agreed with that proposition but said that that standard applies only “when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws.”⁴²³ The Court added: “Obviously, [that] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right,” or the enumerated right would be redundant. The Court quoted the first paragraph of the *Carolene Products* footnote.⁴²⁴

The implicit allusion came in *Sorrell v. IMS Health, Inc.*⁴²⁵ This too was a response to a dissent by Justice Breyer. The dissent challenged the Court’s use of a “heightened” standard of review and said that the Court’s approach risked “a return to the bygone era of *Lochner*.”⁴²⁶ In *Lochner* itself, Justice Holmes’s famous dissent

⁴²⁰ *Carolene Products*, 304 U.S. at 152 n.4.

⁴²¹ See Kessler, *supra* note 22, at 1937–40 (explaining that the first paragraph of the footnote, with its reference to “specifically enumerated rights,” was added at the suggestion of Chief Justice Hughes).

⁴²² 554 U.S. 570, 687–88 (2008) (Breyer, J., dissenting).

⁴²³ *Id.* at 628 n.27 (Court opinion).

⁴²⁴ *Id.*

⁴²⁵ 564 U.S. 552 (2011).

⁴²⁶ *Id.* at 585 (Breyer, J., dissenting) (cleaned up).

insisted that the Fourteenth Amendment “does not enact Mr. Herbert Spencer’s Social Statics.”⁴²⁷ The *Sorrell* majority quoted that line and added: “[The Constitution] does enact the First Amendment.”⁴²⁸ The Court thus sought to invoke the distinction drawn in the first paragraph of Footnote Four.⁴²⁹

2. Distortion of Political Processes

The second paragraph of Footnote Four probably had its greatest influence through the writings of Professor John Hart Ely, who built upon that paragraph in developing his “representation-reinforcing theory of judicial review.”⁴³⁰ In characteristically direct language, Ely explained why his theory required courts to “strenuously” protect freedom of speech and association: “Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.”⁴³¹ Opinions by conservative Justices in two of the most controversial reverse-polarity areas recognize the concern that underlay Ely’s prescription.

In *Citizens United v. FEC*, the conservative majority struck down section 441b of the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited corporations and unions from making certain independent expenditures to support or oppose political candidates.⁴³² Much of the opinion suggests that the Court viewed the law as reflecting an effort by “ins . . . wanting to make sure the outs stay out.” For example, the Court said: “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”⁴³³ The Court also noted that government officials might use their “authority, influence, and power to threaten corporations to support the

⁴²⁷ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

⁴²⁸ *Sorrell*, 564 U.S. at 567.

⁴²⁹ Justice Thomas made the same point in a dissenting opinion in a reverse polarity case. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 505–06 n.3 (1997) (Thomas, J., dissenting).

⁴³⁰ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

⁴³¹ *Id.* at 105–06.

⁴³² 558 U.S. 310 (2010). The Court treated the law as a “ban.” See, e.g., *id.* at 337. The dissent strenuously disputed this characterization. See *id.* at 415–19 (Stevens, J., dissenting).

⁴³³ *Id.* at 354 (Court opinion).

Government's policies."⁴³⁴ These efforts "are often unknown and unseen."⁴³⁵ The Court viewed the "public" speech that was the target of the BCRA prohibition as a potential counter to this kind of behind-the-scenes pressure.

Other opinions by members of the *Citizens United* majority also echo Professor Ely's warning. *Citizens United* overruled in part the 2003 decision in *McConnell v. FEC*.⁴³⁶ Justice Scalia, dissenting in *McConnell*, said that "any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents."⁴³⁷ In a later case, Chief Justice Roberts made the same point in more general terms, asserting that "those who govern should be the *last* people to help decide who *should* govern."⁴³⁸ Justice Thomas, in a separate opinion addressing a different kind of campaign finance regulation, rejected an argument for deferring to Congress by quoting Ely's *Democracy and Distrust* and emphasizing "the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it."⁴³⁹

Concern about legislation that distorts the political process can also be seen in *Janus v. AFSCME*, the public-sector agency fees case.⁴⁴⁰ A major theme of the Court's opinion is that "union speech in collective bargaining, including speech about wages and benefits," is a matter of public concern, thus imposing a heavy burden on the state to justify what the Court viewed as a compelled subsidy.⁴⁴¹ To support that conclusion, the Court noted that a quarter of the state's budget was devoted to paying down enormous "unfunded pension and retiree healthcare

⁴³⁴ *Id.* at 356.

⁴³⁵ *Id.* at 355.

⁴³⁶ 540 U.S. 93 (2003).

⁴³⁷ *Id.* at 249 (Scalia, J., concurring in part and dissenting in part). Justice Scalia added that "the present legislation *targets* for prohibition certain categories of campaign speech that are particularly harmful to incumbents." *Id.* This latter comment was addressed to BCRA as a whole, not just the provision that was struck down in *Citizens United*. For discussion of a contrary view, see *infra* Section V.C.4.

⁴³⁸ *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion).

⁴³⁹ *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., concurring in part).

⁴⁴⁰ 138 S. Ct. 2448 (2018), discussed *supra* Section III.F.

⁴⁴¹ *Id.* at 2474; see generally *id.* at 2474–77.

liabilities.”⁴⁴² That assertion, in turn, drew on an amicus brief by the former general counsel to the Illinois governor who initiated the *Janus* litigation.⁴⁴³

One might wonder why the Court’s opinion devotes so much space to the state’s “severe budget problems.”⁴⁴⁴ Although the opinion does not connect the dots, the amicus brief does. It states that “Illinois government management and labor have had a ‘long and largely uneventful bargaining history,’” and it explains why: “That is largely because management bargains with the taxpayers’ money, and management’s incentive is to get re-elected in a State in which unions carry heavy clout and make significant contributions to the political leaders to whom the individuals negotiating these contracts report.”⁴⁴⁵

That is probably not the kind of situation that either Justice Stone or Professor Ely had in mind. But given the *Janus* Court’s focus on the “severe budget problems” experienced by the state of Illinois, there is good reason to believe that the account in the amicus brief suggested to the Justices that the agency-fee requirement constituted part of a process by which “the ins [were] choking off the channels of political change” in a way that justified judicial intervention.⁴⁴⁶

3. Discrete and Insular Minorities

In the third paragraph of Footnote Four, Justice Stone suggested that “prejudice against discrete and insular minorities” may justify a more robust exercise of judicial review. As Justice Lewis F. Powell, Jr. observed more than forty years later, “Stone’s cryptic language frames more questions than it implies answers.”⁴⁴⁷ I leave those questions to others; here, I note that conservative Justices have invoked the rationale

⁴⁴² *Id.* at 2474–75.

⁴⁴³ *Id.* at 2475 (citing Brief for Jason R. Barclay et al. as *Amici Curiae* at 9, *Janus v. AFSCME*, 138 S. Ct. 2448 (2017) (No. 16-1466), 2017 WL 6311777 [hereinafter Barclay Brief]). For a description of Governor Rauner’s role in the litigation, see *Janus*, 138 S. Ct. at 2461–62.

⁴⁴⁴ *Janus*, 138 S. Ct. at 2474.

⁴⁴⁵ Barclay Brief, *supra* note 443, at 11 (punctuation altered).

⁴⁴⁶ See ELY, *supra* note 430, at 103. Professor Purdy too, although not citing *Carolene Products*, reads the Court’s opinion as “invok[ing] the dangers of entrenchment and self-dealing.” Purdy, *supra* note 407, at 2182. See also *id.* at 2183 (“The individual-rights core of the opinion is buttressed by the structural worry that the challenged regime distributes the power of political influence in a way that entrenches certain established interests, here public-sector unions.”).

⁴⁴⁷ Powell, *supra* note 413, at 1090.

of Footnote Four's third paragraph in two reverse-polarity cases. In one case, the reference was explicit; in the other, it was implicit.

In *Kelo v. City of New London*, the Court held that the city's use of its eminent domain power to acquire property from an unwilling owner for the purpose of economic development by private entities did not violate the "public use" requirement of the Takings Clause.⁴⁴⁸ Justice Thomas, in dissent, argued that "extending the concept of public purpose to encompass any economically beneficial goal guarantees that [the] losses will fall disproportionately on poor communities" that are "the least politically powerful."⁴⁴⁹ He added: "If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects."⁴⁵⁰

Footnote Four does not mention "poor communities," but it does refer to "religious . . . minorities," and that suggests a look at the 2018 decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.⁴⁵¹ In that case, the Commission imposed sanctions against a baker under the state's anti-discrimination law because he declined to "create" a cake for a same-sex wedding.⁴⁵² The Supreme Court set aside the Commission order based on a finding of "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection."⁴⁵³ Two Justices who concurred in the Court's opinion emphasized that the First Amendment requires courts to protect "unpopular religious beliefs"⁴⁵⁴—another way of referring to "religious . . . minorities."

4. Other Perspectives

In the preceding pages, I have discussed the reverse-polarity cases from the perspective of the Justices who supported the constitutional claims. From that perspective, decisions like *Janus* and *Citizens United* can be viewed as implementing the rationale for a "legitimate judicial activism" associated with Justice Stone's

⁴⁴⁸ 545 U.S. 469, 489–90 (2005).

⁴⁴⁹ *Id.* at 521 (Thomas, J., dissenting).

⁴⁵⁰ *Id.* (Thomas, J., dissenting) (quoting *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

⁴⁵¹ 138 S. Ct. 1719 (2018).

⁴⁵² *Id.* at 1726–27.

⁴⁵³ *Id.* at 1729.

⁴⁵⁴ *Id.* at 1737 (Gorsuch, J., concurring).

Footnote Four.⁴⁵⁵ Of course, there are other ways of looking at the cases. Those who disagree with the conservative position would probably reject pretty much every one of the characterizations I have quoted.⁴⁵⁶

One example stands out. As mentioned earlier, Justice Scalia believed that campaign finance legislation like BCRA is designed to benefit incumbents at the expense of challengers.⁴⁵⁷ Chief Justice Roberts has spoken in similar terms.⁴⁵⁸ Some progressive academics are sympathetic to that view,⁴⁵⁹ but a recent article asserts that “both the Roberts Court and these academics have it wrong. In fact, most campaign finance regulations *disadvantage* incumbents and *increase* competition.”⁴⁶⁰

I take no position on who has the better of this argument. Nor do I jump into the academic fray over whether “Ely’s (and *Carolene*’s) idea of pro-democratic judicial review” is itself flawed.⁴⁶¹ My point is only that conservative Justices have, to some degree, internalized Footnote Four; they draw on its rationale when they explain why they vote in favor of individual rights claims in reverse-polarity cases.⁴⁶²

⁴⁵⁵ See *supra* text accompanying note 417.

⁴⁵⁶ More nuanced responses are also possible. For example, Professor Purdy cites *Janus, Citizens United*, and other reverse polarity decisions as illustrating what he views as the central aim of the Roberts Court’s First Amendment jurisprudence: “averting partisan and bureaucratic entrenchment— . . . preventing political elites from picking future winners from among candidates, parties, and policies.” Purdy, *supra* note 407, at 2162. That characterization aligns the decisions with the second paragraph of Footnote Four. But Professor Purdy does not applaud the Court’s work, because he believes that in trying to avoid *partisan* entrenchment, the conservative Justices have promoted *class* entrenchment. *Id.* at 2174.

⁴⁵⁷ See *supra* text accompanying note 437.

⁴⁵⁸ See *supra* text accompanying note 438.

⁴⁵⁹ See Nicolas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 S. CT. REV. 111, 165–66 (2019) (summarizing academic commentaries).

⁴⁶⁰ *Id.* at 166.

⁴⁶¹ See *id.* at 135–40 (summarizing the “cottage industry” of attacks on Ely and *Carolene Products*).

⁴⁶² Arguably, the conservative Justices have done more than internalize Footnote Four. Arguably they have adapted its theoretical framework to a new century in which (in their view) political entrenchment and prejudice against minorities take on very different forms from those that concerned Justice Stone in the 1930s or Professor Ely in the 1970s. But that leads to a question: why did those Justices not endorse judicial intervention to limit partisan gerrymandering, which looks like an extreme form of political malfunction in any century? See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (stating that excessive partisanship in districting is “incompatible with democratic principles,” but holding that the claims are “beyond the reach of the federal courts”); Stephanopoulos, *supra* note 459, at 114 (denouncing *Rucho* as “an anti-*Carolene* decision”).

VI. CONCLUSION

In an Article whose subject is reverse polarity, I have, not surprisingly, said little about cases that exemplify what I have called traditional polarity—cases in which the civil rights claim receives more support from the liberal Justices than from the conservatives. Of course, there were many such cases in the twenty-five Supreme Court Terms that I examined, and they include some of the most important decisions of the Roberts Court.⁴⁶³ But the reverse-polarity cases are neither rare nor random; rather, they reveal a set of *issues* on which support for the constitutional claim is the conservative rather than the liberal position. A different set of issues manifests traditional polarity.

What we see in the Roberts Court, then, is that there are two kinds of constitutional claims—those that receive more support from conservatives than liberals, and those that receive more support from liberals than conservatives. It is almost as though each group of Justices has found its own copy of the Constitution. In one copy, certain provisions—the Second Amendment, the Takings Clause, and the Free Exercise Clause—are printed in boldface and italics, while other provisions—the Cruel and Unusual Punishments Clause, the Self-Incrimination Clause, and the Establishment Clause, among others—are grayed out and barely discernable. In the other copy, the typographical conventions are reversed. The two copies also differ in their annotations, particularly to the Free Speech Clause.

Is that a novel phenomenon? Not entirely; we see something like it in the Court of the 1920s and 1930s. The conservative Justices of that era were the stalwarts of substantive due process when economic and social legislation came before the Court; yet when other kinds of civil liberties claims were in dispute, it was the liberal Justices who were more likely to support judicial intervention. For example, the “Four Horsemen” who strongly reaffirmed “freedom of contract” in 1923 dissented a few years later when the Court struck down a statute limiting freedom of the

⁴⁶³ *E.g.*, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (abortion); *Glossip v. Gross*, 576 U.S. 863 (2015) (death penalty); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriage); *Kerry v. Din*, 576 U.S. 86 (2015) (due process and immigration); *Miller v. Alabama*, 567 U.S. 460 (2012) (sentencing of juveniles); *Lafler v. Cooper*, 566 U.S. 156 (2012) (ineffectiveness of counsel); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (Miranda rights of juveniles); *Boumediene v. Bush*, 553 U.S. 723 (2008) (Suspension Clause); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (First Amendment rights of government employees). In each of these cases, the four liberal Justices supported the constitutional claim. If they got Justice Kennedy’s vote, the claim prevailed; if they did not, the claim was rejected.

press.⁴⁶⁴ But modern constitutional law was in its infancy at that time, and very few Bill of Rights cases appeared on the Court's docket.

In the Warren Court, the phenomenon I have described was almost entirely absent.⁴⁶⁵ Evidence can be found in the scalograms prepared by the political scientists in the 1950s and 1960s. Each scalogram lists the civil liberties cases in a particular Term and rank-orders the Justices by the number of votes they cast in favor of the constitutional claim.⁴⁶⁶ There are occasional plus votes by Justices at the low end of the scale, but no clusters, and certainly no discrete issues on which conservative Justices supply plus votes when liberal Justices do not.

My own review of the decisions points to the same conclusion. Even in the Takings Clause cases—which the political scientists did not include in their scalograms—there is no consistent pattern of reverse polarity, as there was in the last quarter-century.⁴⁶⁷ To be sure, in perhaps the most important Takings Clause case of the Warren Court, a liberal Justice wrote a unanimous opinion rejecting the claim.⁴⁶⁸ But when the Court divided, the liberal Justices could sometimes be found on the claimants' side, with rhetoric to match.⁴⁶⁹

What accounts for the emergence of reverse polarity as a significant phenomenon in the Roberts Court? It would be foolish to expect a single explanation, but it is possible to identify some patterns. At one end of the spectrum, some of the reverse-polarity issues were not being litigated in the Warren Court era. Prime examples are the Second Amendment and challenges to affirmative action programs.

⁴⁶⁴ Compare *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 554 (1923) (recognizing "the general rule forbidding legislative interference with freedom of contract"), with *Near v. Minnesota*, 283 U.S. 697, 723 (1931) (Butler, J., dissenting) (stating that Court's decision "gives to freedom of the press a meaning and a scope not heretofore recognized"). All four of the dissenters in *Near* joined the Court opinion in *Adkins*.

⁴⁶⁵ I say "almost" out of a lawyer's caution. In my research thus far, I have not found any examples.

⁴⁶⁶ See, e.g., Spaeth, *supra* note 39, at 293–97.

⁴⁶⁷ See *supra* Section III.A.

⁴⁶⁸ See *Berman v. Parker*, 348 U.S. 26 (1954) (unanimously rejecting claims under Takings and Due Process Clauses); see also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (same).

⁴⁶⁹ E.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Black, J.) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Three conservative Justices dissented. See *id.* (Harlan, J., dissenting).

At the other end of the spectrum, we can identify some issues on which liberals and conservatives have switched positions. Campaign finance regulation fits this pattern. In 1957, in *United States v. Automobile Workers*, the Court reversed the dismissal of an indictment charging a union with violating a federal statute that prohibited corporations and labor organizations from making a “contribution or expenditure in connection with” any election for federal office.⁴⁷⁰ The indictment alleged that the union had used members’ dues to sponsor advertising supporting candidates for Congress. All of the Court’s conservatives joined the opinion by Justice Frankfurter allowing the prosecution to go forward. The three most liberal Justices of that era dissented in an opinion by Justice Douglas. The dissent said that the belief “that one group or another . . . [i]s too powerful” is “not justificatio[n] for withholding First Amendment rights from any group—labor or corporate.”⁴⁷¹

That language in Justice Douglas’s dissent was quoted by the Court in *Citizens United*.⁴⁷² The dissent in *Citizens United*, joined by all four liberal Justices, reproached the Court for relying on the dissent in *Automobile Workers*, saying that in the past, the Court had found it significant that the position taken by a separate opinion “failed to command a majority.”⁴⁷³ The contrast between the two dissents by liberal Justices in two eras speaks for itself.⁴⁷⁴

Such explicit repudiation is, of course, rare. But Professor Baum has examined the “change in the ideological polarity of free expression decisions in the Supreme Court,”⁴⁷⁵ and his analysis is relevant to reverse-polarity issues generally. He notes

⁴⁷⁰ 352 U.S. 567 (1957).

⁴⁷¹ *Id.* at 597 (Douglas, J., dissenting). Justice Douglas acknowledged that dissenting members of the union might “need protection against the use of union funds for political speech-making,” but he said that “alternative measures” were available “to cure this evil.” *Id.* at 597, 598 n.1. Four years later, Justice Douglas argued that the First Amendment requires such protection. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 778 (1961) (Douglas, J., concurring).

⁴⁷² *Citizens United v. FEC*, 558 U.S. 310, 344 (2010).

⁴⁷³ *Id.* at 434–35 (Stevens, J., dissenting). Justice Stevens was also reproaching the Court for relying on a concurring opinion by Justice Rutledge. *See United States v. CIO*, 335 U.S. 106, 143 (1948) (Rutledge, J., concurring). This criticism was especially noteworthy because Justice Stevens had clerked for Justice Rutledge, and in an opinion for the Court in 2004, he quoted with approval from a dissent by Justice Rutledge in the same volume of the *United States Reports*. *See Rasul v. Bush*, 542 U.S. 466, 477 (2004) (citing *Ahrens v. Clark*, 335 U.S. 188, 209 (1948) (Rutledge, J., dissenting)).

⁴⁷⁴ Free exercise of religion is another issue on which there is substantial evidence of a switch of positions by liberals and conservatives. *See supra* Section III.H.

⁴⁷⁵ BAUM, *supra* note 24, at 48.

that scholars have pointed to two explanations. First, “liberals [have come] to perceive [some constitutional rights] as frequently conflicting with other values that are important to them, especially equality.”⁴⁷⁶ That helps to explain why liberals vote *against* some civil rights claims, but it does not explain why conservatives *support* them.

Here is where the second explanation comes into play: civil liberties claims “increasingly have been brought on behalf of interests that conservatives favor more than liberals, such as the business community.”⁴⁷⁷ Especially if we add additional “interests,” such as traditional religions, this explanation carries substantial weight. Yet it also raises a question: what accounts for the proliferation of such claims? One possibility is that governments at various levels are increasingly using the coercive power of the state to implement their preferred policies in ways that conflict with *values* that are important to *conservatives*.

This last observation suggests that to fully understand the origins and implications of reverse polarity, one must consider not only the legal environment but also the larger socio-political world out of which the decisions arise. That is an enterprise for another day. For now, what stands out is that for the first time since civil rights cases became a major component of the Supreme Court’s plenary docket, there is a wide spectrum of issues on which the constitutional claim receives more support from conservative Justices than from the liberals. At the same time, there are other issues on which traditional polarity continues to hold sway. The next step will be to compare and contrast the two sets of civil rights claims, each associated with one of the Court’s two Constitutions.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* It is not clear whether Professor Baum is distinguishing between “interests” and “values.” It may well be useful to draw the distinction. “Interests” would refer to “clientele groups” such as the labor movement or the business community. *See id.* at 187. Examples of “values” would be equality and individual autonomy.

