

PUTTING THE POLITICS OF “JUDICIAL
ACTIVISM” IN HISTORICAL PERSPECTIVE

Every student of constitutional law knows the question: If *Lochner*¹ was wrong, can *Roe*² (or *Griswold*³ or *Lawrence*⁴ or . . .) be right? Countless discussions in law school classrooms have been launched by a question like this as part of a specific discussion of substantive due process under the Fourteenth Amendment or a more general consideration of judicial discretion in constitutional interpretation. Constitutional law classes aside, anyone who reads Chief Justice Roberts’s recent opinion in *Obergefell v Hodges*⁵ would be cued to think about the question. In dissenting from the majority’s conclusion that same-sex couples have a fundamental right to marry, the Chief Justice cited *Lochner* no fewer than sixteen times.⁶ His claim, expressed to the point

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¹ *Lochner v New York*, 198 US 45 (1905).

² *Roe v Wade*, 410 US 113 (1973).

³ *Griswold v Connecticut*, 381 US 479 (1965).

⁴ *Lawrence v Texas*, 539 US 558 (2003).

⁵ 576 US ___, 135 S Ct 2584 (2015).

⁶ Id at 2612, 2616, 2617, 2618, 2619, 2621, 2622 (Roberts, CJ, dissenting). *Lochner*, of course, struck down a New York law setting maximum hours for bakery employees based on

of exhaustion, was that *Obergefell* was simply a new version of the misguided judicial excesses of the earlier period. His argument repeatedly associated itself with the *Lochner* dissents, quoting Justice Holmes for the proposition that the Constitution “is made for people of fundamentally differing views,”⁷ and Justice Harlan for the idea that “courts are not concerned with the wisdom or policy of legislation.”⁸ Among his many other references to *Lochner* were these:

the majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York* *** Respecting [the democratic process] requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes’s dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill’s On Liberty any more than it enacts Herbert Spencer’s Social Statics.⁹

The Chief Justice’s framing did not escape notice in Justice Kennedy’s majority opinion. Kennedy met canon with canon as he countered the invocation of the *Lochner* dissents with well-known language about rights from the flag salute case:

Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943). This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”¹⁰

The basics of this exchange are numbingly familiar in jurisprudential debates in constitutional law. That debate, though, is hardly a rarefied one limited to the pages of opinions or scholarly articles. There is and has long been a parallel debate in the democratic process

the principle that the Due Process Clause protects the liberty of contract. Chief Justice Roberts also cited *Dred Scott* for the same point more than once. *Id.* at 2616, 2617.

⁷ *Id.* at 2612 (quoting *Lochner*, 198 US at 76 (Holmes, J, dissenting)).

⁸ *Id.* (quoting *Lochner*, 198 US at 69 (Harlan, J, dissenting)).

⁹ *Obergefell*, 135 S Ct at 2616, 2622 (Roberts, CJ, dissenting).

¹⁰ *Id.* at 2605–06.

itself about the role of courts. In the contemporary period and parlance, that well-worn debate travels under the name of attacks on "judicial activism." Indeed, attacks on judicial activism were a consistent part of the twenty-two-year run-up to *Obergefell*. The decision of the Hawaii Supreme Court that first ignited the same-sex marriage debate in 1993¹¹ was the prelude to years of backlash measures in the states, the federal Defense of Marriage Act, and proposed federal constitutional amendments to bar same-sex marriage.¹² Throughout these years, the idea that courts had outrageously overstepped their bounds was one of the cornerstones of political attacks. DOMA was justified in 1996 by its proponents as a "preemptive measure to make sure that a handful of judges, in a single state, cannot impose a radical social agenda upon the entire nation."¹³ George W. Bush framed his support of a federal constitutional amendment to limit marriage in 2004 as a needed response to "'activist judges' who sought to redefine marriage,"¹⁴ and the congressional hearings on the proposed Federal Marriage Amendment he supported were given the moniker "Judicial Activism v. Democracy."¹⁵ More recently, congressional measures to limit or overturn the ruling in both *United States v Windsor*¹⁶ and *Obergefell* were likewise framed as responses to "activist court judges overstepping their constitutional authority by legislating from the bench"¹⁷ and as a needed corrective because "the Constitution finds itself under sustained attack from an arrogant judicial elite."¹⁸

¹¹ *Baehr v Lewin*, 852 P2d 44 (Hawaii 1993).

¹² See Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S Cal L Rev 1153, 1185–87 (2009); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford, 2012).

¹³ Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, NY Times A1 (Sept 11, 1996) (quoting Senator Trent Lott); see Schacter, 82 S Cal L Rev at 1185, n 199 (cited in note 12).

¹⁴ *Bush Calls for Ban on Same-Sex Marriages*, CNN (Feb 25, 2004) (available at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/>).

¹⁵ *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 108th Cong, 2d Sess 22–23 (2004).

¹⁶ 570 US 744 (2013).

¹⁷ Daniel Wilson, *Lawmakers Want Same-Sex Marriage Laws in State Hands*, Law360 (Feb 11, 2015) (available at <https://www.law360.com/tax/articles/620597/lawmakers-want-same-sex-marriage-laws-in-state-hands>) (quoting Rep Randy Smith (R-Tex), cosponsor of the post-*Windsor* "State Marriage Defense Act").

¹⁸ Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, National Review Online (June 26, 2015) (available at <http://www.nationalreview.com/article/420409/constitutional>).

The Chief Justice did not use the phrase “judicial activism” in his *Obergefell* dissent, but he invoked precisely these ideas. And, he did not offer them up strictly as abstract normative propositions. He also used the *Lochner* analogy to lament particular consequences that he argued would flow from courts going astray. Exhorting his colleagues in the majority to be “attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds,”¹⁹ he argued, for example, that the Court’s legitimacy depends upon respect for its judgments and that such “respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law.”²⁰ Roberts also emphasized at various points the public resentment caused by aggressive rulings, suggesting that “[t]he Court’s accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it.”²¹ Elaborating on this theme, he warned that:

There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.²²

As an empirical matter, the Chief Justice’s prediction has thus far been wrong. There has been no sign of minds closing after *Obergefell*. To the contrary, public opinion has grown more supportive of same-sex marriage since the decision, not less.²³ But the deeper flaw in the reasoning goes beyond empirics. The picture of cause and effect drawn by Roberts is strikingly simplistic. It seems to contemplate a straight line of communication from the Court’s decisions to the

-remedies-lawless-supreme-court-ted-cruz) (online op-ed published the day *Obergefell* was decided).

¹⁹ *Obergefell*, 135 S Ct at 2626 (Roberts, CJ, dissenting).

²⁰ *Id.* at 2624 (Roberts, CJ, dissenting).

²¹ *Id.*

²² *Id.* at 2625 (Roberts, CJ, dissenting).

²³ See David Masci, Anna Brown, and Jocelyn Kiley, *Five Facts About Same-Sex Marriage*, Pew Research Center (June 26, 2017) (available at <http://www.pewresearch.org/fact-tank/2017/06/26/same-sex-marriage/>) (noting new high of 62 percent support for same-sex marriage, compared to 57 percent at time of *Obergefell*); Justin McCarthy, *U.S. Support for Gay Marriage Edges to New High*, Gallup News (May 15, 2017) (available at <http://news.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx>) (noting support rising to 64 percent).

citizenry, unmediated and unbroken. Yet, most citizens do not consume Supreme Court decisions directly, or even at all. Even with the advent of the Internet and instant access to opinions,²⁴ citizens mostly take their cues about the Court from elites, including elected officials.²⁵ For this reason, it makes little sense to address the “consequences” of purported judicial activism without accounting for the political forces and factors that surround decisions at particular times in history. Beginning to understand how the public makes sense of judicial actions requires grappling with the political dynamics that surround and will—inevitably—help to give meaning to the Court’s decisions.

In this article, I take the Chief Justice’s *Lochner* analogy as a point of departure, but pursue the dimension of political context that Roberts ignores. My aim is to explore the *political* history of judicial activism as a rallying cry—both at the time of *Lochner* and today. I take a historical perspective in order to understand similarities and differences in the two contexts, and also to better understand the evolution of the contemporary politics of opposing what is characterized by combatants as judicial activism.

Let me say three things at the outset to frame the inquiry. First, it is, of course, obvious that the political context for attacks on courts *has* changed between the turn into the twentieth century and today. Very little about politics and government has not changed meaningfully in the last century. The interesting question is not whether but *how* the political dynamics shaping attacks on courts have changed. The task of this article is to identify and explore the most relevant differences in the two periods of opposition to courts as activist, and to consider how those dynamics might matter for constitutional law and politics today. It is worth noting, as well, that not everything has changed, and there are similarities in the periods that merit exploration.

²⁴ See generally Jane S. Schacter, *Colloquium on Obergefell: Obergefell’s Audiences*, 77 Ohio St L J 1011 (2016) (exploring role of social media and websites in rapidly disseminating information about *Obergefell*).

²⁵ See Nathaniel Persily, *Introduction*, in Nathaniel Persily, Jack Citrin, and Patrick Egan, eds, *Public Opinion and Constitutional Controversy* 3, 9 (Oxford, 2008) (“The nature of court decisions’ effects on public opinion is usually a product of the way elites react to the decision and the messages they send to the mass public concerning the issue adjudicated.”); Stephen P. Nicholson and Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 Am J Pol Sci 620, 620–23 (2014) (summarizing the literature on cues and public acceptance of the Court’s decisions).

Second, I distinguish between political attacks on judicial activism (my focus) and such attacks on judicial supremacy. The latter has been the subject of rich exploration by scholarly proponents of popular constitutionalism and has sometimes been the object of contestation by political antagonists of courts, as well.²⁶ There are plainly overlaps between the two concepts; both pivot on the claim that judges misunderstand their role and arrogate excessive power to themselves. But the critique of judicial supremacy focuses principally on finality (i.e., that judges wrongly claim final authority to bind other actors, especially other branches of government), while the critique of judicial activism focuses on how courts interpret the law (i.e., that judges inject their substantive preferences and decide questions that ought to be left to political determination).

Third and finally, in labeling political movements as aimed at “judicial activism,” I do not mean to imply that the phrase reflects a coherent or readily identifiable concept. I have no disagreement with the common wisdom that the charge of judicial activism can be flung so promiscuously and without principle by critics of different stripes that it often functions as no more than a vacuous statement of disagreement with a ruling.²⁷ Does the phrase, for example, refer to *any* overturning of legislative or executive action? Only overturning laws in the absence of a Thayerian “clear” doubt about constitutionality? Any embrace of living constitutionalism over originalism? Reversal of precedent? Judicial management of institutions in the context of institutional reform litigation? Something else? Scholars have tried to define and measure it,²⁸ but the underlying skepticism has persisted—rightly, in my view, if the aim is to convincingly eliminate disagreement about what constitutes activism or to turn it into a precise or conceptually coherent idea.

²⁶ Larry Kramer both reviews historical examples of political opposition to judicial supremacy and presents a scholarly case against it. See Larry Kramer, *The People Themselves* (Oxford, 2004); Larry Kramer, *We the People*, Boston Review (Feb/Mar 2004) (available at <http://bostonreview.net/us/larry-kramer-we-people>).

²⁷ See, for example, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U Colo L Rev 1401, 1401 (2002) (“[A]ctivism’ just means Judges Behaving Badly—and each person fills in a different definition of ‘badly.’”).

²⁸ See, for example, Stefanie Lindquist and Frank B. Cross, *Measuring Judicial Activism* (Oxford, 2009); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 Const Comm 43, 66 (2007); cf. Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago, 2004) (detailed review and nuanced argument about particular brand of activism pursued by Rehnquist Court).

But the *political* history of judicial activism as a rallying cry to fight the courts can tell a different tale. There is, in fact, an identifiable claim, frequently deployed by opponents of the federal courts in the *Lochner* era and still deployed today, and it is my point of focus. This understanding is one among multiple meanings, but it is one that bridges the two eras and infuses the Roberts dissent in *Obergefell*. It can be stated, roughly, as the claim that unelected judges have usurped the functions of the political branches when they have used legal principles to effectuate their own preferred policy aims. That there is room for debate about whether this claim is fair, apt, or persuasive as applied to particular cases does not diminish its resonance or resilience as a strategy for political organizing and mobilization.

The precise language used to mount this objection has changed somewhat over the years, but there is a common conceptual core. In the *Lochner* era, the term "judicial activism" had not yet been coined, but there were similarly-motivated references to "judicial oligarchy," a term itself traceable to Thomas Jefferson.²⁹ Progressive lawyer Gilbert Roe's 1912 book challenging the courts used the phrase in its title.³⁰ In the introduction to the book, Senator Robert LaFollette charged that:

[B]y usurping the power to declare laws unconstitutional and by presuming to read their own views into statutes without regard to the plain intention of the legislators, they have become in reality the supreme law-making and law-giving institution of government. They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation.³¹

Other court critics of the time used the same phrase, including, for example, a Republican senator from Oklahoma who supported instituting a judicial recall,³² the former governor of Oregon, Sylvester

²⁹ *Letter from Thomas Jefferson to William Charles Jarvis*, in Paul Leicester Ford, ed, 10 *The Writings of Thomas Jefferson* 160, 160 (G. P. Putnam's Sons, 1904–05) ("[T]o consider the judges as the ultimate arbiters of all constitutional questions" would be "a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy"); see also Alpheus T. Mason, *Politics and the Supreme Court: President Roosevelt's Proposal*, 85 *U Penn L Rev* 659, 662 (1937).

³⁰ Gilbert E. Roe, *Our Judicial Oligarchy* (B. W. Huebsch, 1912).

³¹ *Id.* at vi–vii.

³² See speech by Senator Robert Owen Jr. (D-Okla), *Election and Recall of Federal Judges*, 62nd Cong., 1st Sess, in 3339 *Cong Rec* (July 31, 1911).

Pennoyer;³³ the chief justice of the North Carolina Supreme Court;³⁴ LaFollette and other Progressives;³⁵ Norman Thomas (the head of the Socialist Party);³⁶ and scholar Alpheus Mason.³⁷ In the hands of these critics, the term embodied a particular hostility to the hide-bound ways of the law and to the court's perceived protection of rich, propertied classes at the expense of workers.³⁸ At its heart, though, the term challenged the institutional bona fides of courts to take the actions they did.³⁹

Today, the idea that courts are exceeding their legitimate prerogatives travels under the moniker of judicial activism, a term usually attributed to Arthur Schlesinger's 1947 article in *Fortune Magazine*.⁴⁰ The term has become a familiar part of the political vernacular. It appears some 162 times in a search of the *New York Times* from 1896 to the present,⁴¹ with its first use in an October 1962 op-ed by Professor Alan Westin.⁴² Westin's usage seems strikingly anachronistic today. He invoked the term in deploring the criticism then being lobbed by elected officials at the Warren Court and *defended* the Court's action as "in lockstep with the active consensus of this era," which supports "judicial activism on behalf of Negro civil rights and judicial self-restraint in matters of industrial relations and welfare

³³ William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* at 32 (Princeton, 1994). Pennoyer became better known as the litigant in *Pennoyer v Neff*, 95 US 714 (1878).

³⁴ *Id.* at 1.

³⁵ *Id.* at 15.

³⁶ Laura Weinrib, *The Taming of Free Speech: America's Civil Liberties Compromise* 211 (Harvard, 2016).

³⁷ Mason, 85 U Penn L Rev at 666 (cited in note 29) (referring to a "rapid conquest by a small but determined judicial oligarchy").

³⁸ See LaFollette, *Introduction*, in Roe, *Our Judicial Oligarchy* at vi, vii (cited in note 30) (decrying judicial reverence for "fossilized precedent" and arguing that "because this tremendous power has been so generally exercised on the side of the wealthy and powerful, the courts have become at last the strongest bulwark of special privilege").

³⁹ Indeed, in the recent confirmation hearing of Justice Neil Gorsuch, Senator Mike Crapo referred to the "oligarchy of judges" as a threat to democracy. *Nomination of Neil Gorsuch before the Committee on the Judiciary*, 115th Cong, 1st Sess 24 (2017) (Crapo (R-Idaho)).

⁴⁰ See Arthur M. Schlesinger Jr., *The Supreme Court: 1947*, *Fortune* 73 (Jan 1947).

⁴¹ These were gathered from an August 2017 search of the *New York Times* archives (<http://www.nytimes.com/ref/membercenter/nytarchive.html>) between January 1986 and July 2017 for articles containing the terms "judicial activist" or "judicial activism." Articles using both terms were counted only once.

⁴² Alan Westin, *Also on the Bench: "Dominant Opinion,"* *NY Times Magazine* 20 (Oct 21, 1962).

programs."⁴³ Over time, particularly beginning in the late 1960s, the term came to have a negative connotation.⁴⁴ More of these articles criticize activism on the left than on the right, but, especially in recent decades, there are numerous examples in the latter category.⁴⁵

The contemporary political attack on judicial activism is probably best captured by the sibling phrase "legislating from the bench."⁴⁶ That term showed up in some form fifty-four times in the *New York Times* search,⁴⁷ and is almost exclusively used by Republican critics of courts. It was particularly popular among both Presidents Bush and Senator Orrin Hatch.⁴⁸ At least as reflected in the *New York Times*, the term is somewhat newer than "judicial activism." It shows up for the first time in 1980.⁴⁹

⁴³ Id at 80.

⁴⁴ See, for example, Fred P. Graham, *7-to-2 Ruling Establishes Marriage Privileges Stirs Debate*, *NY Times* 1, 35 (June 7, 1965) (describing the dissenting Justices in *Griswold* as viewing the decision as an example of judicial activism); Arthur Brock, *History Rewritten on the Bench*, *NY Times* 265 (Nov 27, 1965) (describing the Court as engaging in judicial activism to advance its notions of equality).

⁴⁵ For examples of recent critiques of conservative judicial activism, see Michael D. Shear, *GOP Turns to the Courts to Aid Agenda*, *NY Times* (Jan 3, 2015) (available at <https://www.nytimes.com/2015/01/04/us/politics/gop-turns-to-the-courts-to-aid-agenda.html>); Linda Greenhouse, *Actively Engaged*, *NY Times* (Oct 19, 2011, 9:30 p.m.) (available at <https://opinionator.blogs.nytimes.com/2011/10/19/engagement-as-the-new-activism/>); Ramesh Ponnuru, *When Judicial Activism Suits the Right*, *NY Times* (June 23, 2009) (available at <http://www.nytimes.com/2009/06/24/opinion/24ponnuru.html>).

⁴⁶ See, for example, *Comments by President on His Choice of Justice*, *NY Times* (July 24, 1990) (available at <http://www.nytimes.com/1990/07/24/us/comments-by-president-on-his-choice-of-justice.html?pagewanted=1>) (President Bush explaining that he selected Justice Souter because he "share[s] a broad view that what he ought to do on the bench is interpret the Constitution and not legislate"); Michael Luo, *G.O.P. Candidates at "Values Voters" Conference*, *NY Times* (Oct 19, 2007, 8:04 a.m.) (available at https://thecaucus.blogs.nytimes.com/2007/10/19/gop-candidates-at-values-voters-conference/?_r=0) (Mitt Romney promising to appoint judges "who won't legislate from the bench").

⁴⁷ The same search described in note 41 was done, but using the term "legislation from the bench" and its cognate verb forms.

⁴⁸ See, e.g., Linda Greenhouse, *Brennan, Key Liberal, Quits Supreme Court; Battle for Seat Likely*, *NY Times* (July 20, 1990) (George H. W. Bush explaining that he hoped to nominate someone "who will be on there not to legislate from the bench but to faithfully interpret the Constitution"); Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, *NY Times* (Mar 29, 2002) (available at <http://www.nytimes.com/2002/03/29/us/bush-vows-to-seek-conservative-judges.html>) (George W. Bush stating that he wanted "people on the bench who don't try to use their position to legislate from the bench"); Gwen Ifill, *President Is Said to Pick Babbitt for Court Despite Senate Concern*, *NY Times* (May 11, 1994) (Hatch describing Bruce Babbitt as the kind of judge "who would legislate from the bench laws that the liberal community doesn't have a tinker's chance of getting through the people's elected representatives").

⁴⁹ *Carter's Appointees Examined for Clues on Supreme Court Possibilities*, *NY Times* 20 A20 (Oct 3, 1980).

Thus, while the terminology has changed somewhat over time, there is continuity in the basic claim being made. Whether or not this is a useful, meaningful, or accurate way to look at judicial action is not what this article explores, and I do not offer a normative analysis. I try, instead, to trace the political history of the idea since the *Lochner* era, and to consider the ways it has been used by opponents of judicial actions to shape perceptions and attitudes about the Court. The political dynamics on which I focus involve party politics in elections and in the congressional domain. My aim is to understand how claims of judicial activism in these spheres shape the context in which courts—and especially the Supreme Court—make constitutional law. Although the forces of opposition addressed here can also extend to statutory interpretation and regulatory decisions by courts, my focus is on constitutional law, which is generally the most salient venue for political debates about judicial activism.

The article proceeds as follows. Part I provides a brief narrative to identify and explain the relevant time periods under study—1896–1937 (the period that includes both the embrace of *Lochner* and its undoing) and 1954–present (the period beginning with *Brown* and leading to the present). Part II then looks in more depth at these periods by probing significant dimensions of the respective political attacks on the courts, especially on the Supreme Court. Part III concludes by suggesting some implications of this political history for thinking about constitutional law and politics today.

I. DEMARCATING THE ERAS

I briefly set out in this section the periods for comparative analysis,⁵⁰ and turn in the next section to the history relevant to my analysis.

A. 1896–1937

I date the first era from 1896–1937. These markers, of course, are not inevitable. The end point is clear enough; it is the New Deal shift

⁵⁰ The history of this earlier era is probed in detail in Ross, *A Muted Fury* (cited in note 33). The history of the contemporary era is probed in detail in Barry Friedman, *The Will of the People* (Farrar, Straus and Giroux, 2009); Lucas A. Powe Jr., *The Warren Court and American Politics* (Harvard, 2000). On elections and the Supreme Court, see Donald Grier Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (Columbia, 1999).

in the Supreme Court's approach to regulation and the ensuing decline in attacks on courts as obstructionist activists. The critical turn was made in *West Coast Hotel v Parrish*⁵¹ (administering the decisive blow to *Lochner v New York*) and, soon after, *NLRB v Jones & Laughlin Steel* (doing the same for the narrow interpretations of the commerce power that had prevailed during the same period).⁵²

As to the start date, the history of objecting to courts as arrogating too much power to themselves has, of course, a much longer pedigree. To cite a few examples, such claims stretch back to Thomas Jefferson,⁵³ appeared with special prominence in attacks on *Dred Scott*,⁵⁴ and cropped up in the decade leading up to the 1896 election.⁵⁵ Nevertheless, 1896 makes sense as a starting point because it kicked off a new era of political challenges to the Court. A trio of especially controversial Supreme Court decisions in 1895 became politically salient and supplied grist for the presidential contest the next year. All three were decided in favor of protecting private property and business interests. *United States v E. C. Knight Co.*,⁵⁶ decided in January of that year, famously distinguished "manufacturing" from "commerce" in adopting a narrow understanding of the commerce power that allowed the so-called sugar trust to operate free of federal regulation. Three months later, the Court struck down the income tax in *Pollock v Farmers Loan and Trust Co.*⁵⁷ And a month after that, the

⁵¹ 300 US 379 (1937).

⁵² 301 US 1 (1937).

⁵³ See *Letters from Thomas Jefferson to William Charles Jarvis*, in Paul Leicester Ford, ed, 10 *Writings of Thomas Jefferson* at 160 (cited in note 29).

⁵⁴ Contemporaneous reactions to *Dred Scott v Sandford*, 60 US 393 (1857), are chronicled in Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 417–48 (Oxford, 1978). Fehrenbacher characterized the decision as "the most striking instance of the Supreme Court's attempting to play the role of *deus ex machina* in a setting of national crisis." *Id.* at 5. Mark Graber notes that "[p]roponents of judicial restraint consistently invoke that ruling to illustrate the dubious results they believe occur whenever Justices attempt to settle those major policy disputes that in our system should be resolved by the elected branches of government." Mark Graber, *Dred Scott as a Centrist Decision*, 83 *NC L Rev* 1229, 1231 (2005).

⁵⁵ See, for example, *Chicago, Milwaukee & St Paul Railway Co. v Minnesota*, 134 US 418 (1890) (decision limiting railroad regulation produced complaints of judicial overreaching). See generally William E. Forbath, *The Shaping of the American Labor Movement*, 102 *Harv L Rev* 1146 (1989) (on the rise of labor's hostility to courts in the Gilded Age).

⁵⁶ 156 US 1 (1895).

⁵⁷ 158 US 601, 605–04 (1895).

Court decided *In re Debs*,⁵⁸ which upheld the use of injunctions to quash strikes and thus aroused the ire of the growing labor movement. Once decided, this combustible trio of cases promptly became political fodder.⁵⁹ William Jennings Bryan, running on both the Democratic and Populist Party tickets in 1896, took aim at the Court.

The years in between 1896 and 1937 included, of course, the *Lochner* era. The Supreme Court decided the case in 1905, striking down a New York law that limited the hours bakers could work. *Lochner* itself, however, did not immediately become a political flashpoint. Indeed, it was not obvious at the time it was decided that it would have the pride of place in the judicial “anticanon” that the *Obergefell* dissent, and so much else, assigns it today.⁶⁰ While political objections to judicial invalidation of wage and hour laws were common at the time the Court ruled, the decision’s notoriety stemmed more from exaltation of the Holmes dissent—especially by Justice Felix Frankfurter—than from condemnation of the majority holding.⁶¹ After *Lochner*, however, there were a number of cases consistent with the majority’s skeptical stance toward regulation that proved to be particular sparks for political controversy—including *Hammer v Dagenhart* in 1918,⁶² striking down the first federal statute to restrict child labor; *Truax v Corrigan*,⁶³ striking down a state statute that would have prohibited injunctions against peaceful picketing; and the 1935–36 cases in which the Supreme Court struck down federal regulatory statutes that were parts of the early New Deal. Cases like *Schechter Poultry Corp. v United States*,⁶⁴ *Carter v Carter Coal*,⁶⁵ and *United States v Butler*⁶⁶ drew tremendous attention to the Court

⁵⁸ 158 US 564 (1895).

⁵⁹ Ross, *A Muted Fury* at 28–29 (cited in note 33).

⁶⁰ On *Lochner* as part of the anticanon, see Jamal Greene, *The Anticanon*, 125 Harv L Rev 379, 417–22 (2011).

⁶¹ See id at 446–53; Howard Gillman, *De-Lochnerizing Lochner*, 85 BU L Rev 859, 860 (2005).

⁶² 247 US 251 (1918).

⁶³ 257 US 312 (1921).

⁶⁴ 295 US 495 (1935).

⁶⁵ 298 US 238 (1936).

⁶⁶ 297 US 1 (1936).

and were characterized by FDR as impediments to economic recovery.⁶⁷

The feature that bears emphasis is that this period was not a time of isolated or periodic political disagreement with discrete decisions, but rather one in which there was organized, ongoing opposition to the institutional role of the courts. As I will explore in the next section, the strongest party-based assaults on courts during this period came from Progressives and from Republican candidates running on a Progressive ticket in 1912 (Theodore Roosevelt) and 1924 (Robert LaFollette). Roosevelt and LaFollette both ran on controversial court-curbing proposals that would permit judicial decisions to be overridden and, in LaFollette's case, a move to electing judges to serve with term limits.⁶⁸ The repeated charge, in some form or fashion, was that courts had usurped the prerogative of legislatures and had done so in ways that advanced the interests of business and property owners over those of working people. The claims ebbed and flowed in intensity and salience, but once on the political radar in this form, the issue stayed there to some extent until 1937.

Near the end of this era was the most famous court-curbing proposal in American history. After a string of defeats for New Deal programs at the Supreme Court, Franklin Roosevelt announced his court-packing plan in 1937. He first introduced it, misleadingly, as necessitated by the advanced age and associated loss of productivity of several Justices.⁶⁹ He was later more candid and, in a Fireside Chat, asserted that his plan was needed because the Supreme Court was "acting not as a judicial body, but as a policymaking body," and indeed as a "super legislature."⁷⁰ His language was more muted than those who had provocatively condemned "judicial oligarchy," and some faulted his timidity, but the point was basically the same.

B. 1954–PRESENT

I date the dawn of the new era of political attacks on judicial activism to roughly 1954, early in the Warren Court. The idea (though not the precise phrase) animated the fiery Southern Manifesto in

⁶⁷ Franklin D. Roosevelt, *Press Conference* (May 31, 1935) (available at <http://www.presidency.ucsb.edu/ws/?pid=15065>).

⁶⁸ Ross, *A Muted Fury* at 255 (cited in note 33).

⁶⁹ See Powe Jr., *The Warren Court and American Politics* at 3 (cited in note 50).

⁷⁰ Stephenson Jr., *Campaigns and the Court* at 157 (cited in note 50).

protest of *Brown v Board of Education*. The southern members of Congress who issued that statement in 1956 said that *Brown* “is now bearing the fruit always produced when men substitute naked power for established law,” and argued that the decision “climaxes a trend in the federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.”⁷¹ In 1957, there was also resistance to Warren Court decisions on limiting the government’s power to punish communists, including the so-called Red Monday decisions.⁷²

The contemporary political campaign against judicial activism started to take shape in a form closer to the one we see today in 1968, when Richard Nixon ran against (among others) the Supreme Court by highlighting the Warren Court’s rulings safeguarding the rights of criminal defendants. During the campaign, Nixon often promised that he would “reverse the rule of ‘activist judges’ and roll back ‘crime in the streets.’”⁷³ His campaign inaugurated a sustained period of Republican attacks on judicial activism. This is one way in which it differed from the Southern Manifesto, which was launched mostly (but not exclusively) by Democrats, but was, in the end, more regional than partisan in its focus. Nixon’s 1968 attacks created a prototype for what has been a staple issue for Republicans ever since. As we will see in the next section, Republican challenges to the courts since Nixon have evolved in some ways over the years and could be disaggregated into successive sub-eras of attacks, but the core case against what is frequently branded “liberal judicial activism” has remained largely consistent. That does not mean Democrats have been wholly silent on the issue, but for roughly the last half century, the issue has been a mainstay of the right in a way unmatched on the left.

In some ways, the more continuous and systematic Republican battle cry of “judicial activism” has affinities with the concept of “issue ownership” in political science. That framework posits that the major parties each “own” policy areas as to which the electorate believes

⁷¹ *Text of 96 Congressmen’s Declaration on Integration*, NY Times 19 (Mar 12, 1956). For more on the Manifesto, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 Tex L Rev 1053 (2014).

⁷² The most important of the Red Monday group was *Yates v United States*, 354 US 298 (1957). Other controversial decisions on communism before Red Monday include *Pennsylvania v Nelson*, 350 US 497 (1956) and *Peters v Hobby*, 349 US 331 (1955).

⁷³ Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* 175 (Princeton, 2008).

that party is most capable of solving problems.⁷⁴ The framework, however, is oriented to policy areas in which a broad national consensus exists as to a goal, and the question is which party is viewed as better able to handle the issue.⁷⁵ Health care and public safety, for example, are better fits for this framework than judicial behavior, especially because public attitudes about courts are more likely to turn on views of the underlying issues—such as abortion, LGBT rights, or race—than on more abstract institutional questions.⁷⁶ Nevertheless, Republicans’ pronounced emphasis on activism might be seen as an attempt to frame and own the courts as an issue.

II. PROBING THE POLITICAL DYNAMICS

In this section, I look at several political dimensions of the early period as they relate to battles against judicial activism. In turn, I consider party polarization; presidential campaigns and platforms involving major and third-party candidates; and activity in Congress, especially the confirmation process. After exploring each one in the context of the earlier period, I consider how the contemporary period compares.

A. PARTY POLARIZATION

A useful place to start is at 30,000 feet. How do the eras compare in terms of political party dynamics? One macro dynamic marks a significant line of distinction between the earlier and the present period. During most of the years between 1896 and 1935, the Republicans had a secure hold on both Houses of Congress. Between 1897 and 1933, Republicans controlled the House for all but six years (1911–17), and the Senate for all but a different six years (1913–19).⁷⁷ In addition to having a firm grip on Congress during this period, the

⁷⁴ For a review of the framework, see John R. Petrocik, William L. Benoit, and Glenn J. Hansen, *Issue Ownership and Presidential Campaigning, 1952–2000*, 118 *Pol Sci Quarterly* 599, 600 (2003).

⁷⁵ See Patrick Egan in *Partisan Priorities: How Issue Ownership Drives and Distorts American Politics* 5 (Cambridge, 2013) (arguing that issue ownership reflects “the long-term positive associations that exist between *individual consensus issues* and America’s two political parties”) (emphasis added).

⁷⁶ See, for example, David Fontana and Donald Braman, *Judicial Backlash? Or Just Backlash? Evidence from a National Experiment*, 112 *Colum L Rev* 731 (2012).

⁷⁷ *Party Divisions of the House of Representatives*, history.house.gov/Institution/Party-Divisions/Party-Divisions/; *Party Division*, <https://www.senate.gov/history/partydiv.htm>.

Republicans also controlled the White House for most of the time. Woodrow Wilson was the only Democratic president between 1897, when Grover Cleveland left office, and 1933, when Franklin Roosevelt entered office. By contrast, since 1980 (for the Senate) and 1994 (for the House), turnovers of one or both Houses of Congress have occurred more frequently. When the Republicans won control of the Senate in 1980, and the House in 1994, it had been decades since they had held those chambers.⁷⁸ The White House has also changed hands more than it had in the earlier era.⁷⁹

Most pertinent for our purposes is the issue of party polarization.⁸⁰ In the face of our current political conditions, this has become an area of extensive scholarship for those interested in political parties and their functions (and, increasingly, dysfunctions). The use of roll call voting data to create metrics for assessing polarization permits comparisons across time.⁸¹

In the earlier period, there were familiar ideological differences between Democrats and Republicans shaped by ideas about the role of government and economic policy. Given that debates about economic regulation were implicated by *Lochner*, judicial approval of labor injunctions, and other high-profile judicial issues of the day, these ideological differences ought to be an important part of the story. And we will see evidence that, as between the major parties, Democrats were, in fact, more likely to be court critics in these areas.

At the macro level, however, much of this period unfolded during a time when the major parties were not as polarized as they are today. Indeed, using a standard measure of polarization that scales legislator voting and facilitates comparisons between different congresses, various scholars have tracked and noted that, beginning roughly with

⁷⁸ See *Party Division* (cited in note 77); *Party Divisions of the House* (cited in note 77). For reflections on this change, see Frances E. Lee, *Insecure Majorities and the Perpetual Campaign* 18–40 (Chicago, 2016).

⁷⁹ See Raymond A. Smith, *Is It That Hard for a Party to Hold Onto the White House for Three Terms?*, The Hill (Apr 15, 2015, 6:00 a.m. EDT) (available at <http://thehill.com/blogs/pundits-blog/presidential-campaign/238812-is-it-that-hard-for-a-party-to-hold-the-white-house>) (noting that since 1950, neither party has held the White House for three terms with the exception of when George H. W. Bush succeeded Reagan).

⁸⁰ I use the term here to mean “ideological convergence within parties and divergence between parties.” Nathaniel Persily, *Introduction*, in Nathaniel Persily, ed., *Solutions to Political Polarization in America* 3, 4 (Cambridge, 2015).

⁸¹ See Michael Barber and Nolan McCarty, *Causes and Consequences of Polarization*, in Persily, ed., *Solutions to Political Polarization in America* 15, 17 (cited in note 80).

the turn into the twentieth century, polarization began to decline slowly in both the House and Senate, and it continued to decline until World War II.⁸² So the direction of polarization—which was high when the period began—was on the decline for most of these years. It then stayed stable until the mid-1970s, when it began to climb, and has been moving upward ever since.⁸³

Moreover, even the high polarization in evidence in the late nineteenth century, which began to drop in the early twentieth, likely did not cleanly reflect *ideological* polarization as we understand it today. In recent work, Frances Lee has argued that the party polarization commonly assumed to have characterized the Gilded Age (1876–96) is not what it might appear to be.⁸⁴ Her analysis of roll call voting suggests that, most of the time, Republicans and Democrats in Congress were not clashing about big-picture ideological questions like the role of government or economic redistribution, but instead wrangling over “the distribution of particularized benefits, patronage and control over political office.”⁸⁵ Indeed, Hans Noel’s work suggests, more broadly, that consistent *ideological* polarization as we know it today did not rise until the middle of the twentieth century.⁸⁶

In addition, there was an important factional difference *within* the Republican Party in this era and it pertained directly to attacking the courts as activist. Between the very end of the nineteenth century and about 1915 or so, the Republicans were riven by a conflict between the more conservative, laissez-faire “old guard” and the Progressive faction, epitomized by Theodore Roosevelt and Robert LaFollette.⁸⁷

⁸² See *id* for the trend lines. Various graphs can also be seen with updating at *House and Senate Means 1879–2016 (as of October 2016)*, Voteview Blog (Oct 20, 2016) (available at <https://voteviewblog.com/2016/10/20/house-and-senate-means-1879-2016-as-of-october-2016/>).

⁸³ *Id.*

⁸⁴ Frances E. Lee, *Patronage, Logrolls, and “Polarization”: Congressional Parties of the Gilded Age, 1876–1896*, 30 *Studies in Am Pol Dev* 116, 118 (Oct 2016).

⁸⁵ *Id.* at 126; see also *id.* at 120 (“Questions of regulation and redistribution were hardly on the congressional agendas between 1876 and 1896. Regulatory issues would become more prominent in the national policy agenda during the Progressive Era, but during this period, regulation was a priority for neither major party.”).

⁸⁶ Hans Noel, *Political Ideologies and Political Parties in America* (Cambridge, 2003) (distinguishing between ideologies and political parties, and arguing that parties have not always been organized around coherent ideologies).

⁸⁷ Heather Cox Richardson, *To Make Men Free: A History of the Republican Party* 160 (Basic Books, 2014) (describing the splintering of the Republican Party during the early twentieth century).

LaFollette was part of a bumper crop of other Progressive Republican Senators.⁸⁸ He and others were allies of organized labor, a movement deeply aggrieved by judicial rulings of this period.⁸⁹ Both Roosevelt and LaFollette were reform-minded and supportive of social and economic regulation in ways that would put them at odds with *Lochner*-friendly courts. That became clearest when each man ran for president as a third-party candidate (discussed below), but even before that, each was skeptical of judicial decisions that constrained reform legislation. Even after the Progressive Party collapsed, LaFollette and some fellow Republican travelers continued to resist Republican orthodoxy and could sometimes marshal significant numbers. Most of the Senate members of the reform-oriented, agrarian Nonpartisan League that became active in 1915, for example, were Republicans.⁹⁰

At roughly the same time Progressivism was beginning to divide Republicans, Democrats were managing internal strains of their own. The more conservative, laissez-faire oriented “Bourbon Democrats” who had supported Grover Cleveland were at odds with the populist forces led by William Jennings Bryan.⁹¹ In his iconic “Cross of Gold” speech at the 1896 Democratic Convention, Bryan criticized the Supreme Court for its *Pollock* decision striking down the income tax. He caustically observed that the tax was not unconstitutional when it was passed or challenged in a prior case, but only when “one of the judges changed his mind.”⁹² The populist faction was far more likely than the Bourbons to challenge the courts, but this proved a less consequential divide for the Democrats than the Progressive-driven schism was for the Republicans.

This picture of Republicans and Democrats in a phase of declining polarization, and with especially pronounced internal ideological division about courts within the Republican Party, stands in stark

⁸⁸ Nancy C. Unger, *Fighting Bob La Follette: The Righteous Reformer 186–88* (UNC, 2000).

⁸⁹ *Id.* at 289–90.

⁹⁰ On the Nonpartisan League, see Michael J. Lansing, *Insurgent Democracy: The Nonpartisan League in North American Politics* (Chicago, 2015).

⁹¹ On these factions, see Mark Brewer and Jeffrey Stonecash, *Dynamics of American Political Parties* 48–54 (Cambridge, 2009).

⁹² William Jennings Bryan, in *The Chicago Convention*, in William Jennings Bryan and Mary Baird Bryan, eds, *Speeches of William Jennings Bryan* 238, 242 (Funk & Wagnalls, 1909).

contrast to the contemporary configuration. Studies of polarization reflect just the opposite dynamic for the Democratic and Republican parties in the relevant period.⁹³ Since the 1970s, polarization has been steadily increasing. And, as we will see in the Republican platforms, that party's position on courts has grown steadily more conservative and unified over this time period. There are complex (and contested) explanations for rising party polarization.⁹⁴ For our purposes, it is worth noting that the increase in polarization began soon after the modern era of anti-judicial activism politics began, and the two rose together. Indeed, the 1968 Nixon campaign, and the partisan-defined "southern strategy" it pursued,⁹⁵ used opposition to the Warren Court as means of attracting support from southern whites. Needless to say, the southern strategy paid off handsomely for Republicans and is at least one explanatory piece of the contemporary story of polarization.⁹⁶

Many of the subjects implicated in contemporary debates about judicial activism are issues that reflect strongly polarized partisan attitudes.⁹⁷ The racial issues that drove the southern strategy are one central example. The 1968 Nixon campaign's emphasis on "law and order" in relation to the Warren Court was shot through with racial themes.⁹⁸ Abortion is another example, and a striking one. As a political issue, opposition to abortion rights was not initially polarized by party. There was, in fact, significant opposition to *Roe* in both parties in the wake of the decision.⁹⁹ Over time, however, this changed. Work by Nicole Mellow shows that, by the early 1980s, "between 80 and 100 percent of all abortion-related votes in the House were being cast along party lines."¹⁰⁰ The trend picked up in intensity so that, by the early 1990s, "the average difference between the parties'

⁹³ See Barber and McCarty, *Causes and Consequences of Polarization*, in Persily, ed, *Solutions to Political Polarization in America* at 19 (cited in note 80).

⁹⁴ For a good review of these, see *id.*

⁹⁵ *Id.* at 19.

⁹⁶ *Id.* at 27 (discussing role of southern realignment in polarization).

⁹⁷ See Thomas M. Keck, *Judicial Politics in Polarized Times* 8 (Chicago, 2014).

⁹⁸ Kevin J. McMahon, *Nixon's Court* 27 (Chicago, 2011) (discussing rise of Nixon and Wallace campaigns as response to Warren Court).

⁹⁹ Nicole Mellow, *The State of Disunion: Regional Sources of Modern American Partisanship* 132–33 (JHU, 2008).

¹⁰⁰ *Id.* at 131.

positions was regularly more than 50 percentage points.”¹⁰¹ Opinion on same-sex marriage has also been subject to stark polarization.¹⁰²

It makes sense that attitudes about polarizing culture war and race issues are likely to be bound up with attitudes and beliefs about courts because constitutional litigation is such a mainstay in these areas. In the face of legislatures that are polarized and sometimes gridlocked on matters of great importance to their political bases, the courts offer a different institutional venue for contesting questions, and both parties have pursued judicial agendas on such issues.¹⁰³ The special salience of culture-war litigation may be why, for some, the very phrase “judicial activism” as a political epithet embeds within it the idea of liberal attitudes about disputed issues like these.¹⁰⁴

B. DYNAMICS IN PRESIDENTIAL CAMPAIGNS

Presidential elections have provided a visible forum for political parties to engage with the issue of judicial activism. In this section, I look principally at party platforms and speeches accepting a presidential nomination. Although not as salient as convention speeches in contemporary times, platforms enable a more detailed explication of party policies and often prefigure policies pursued by elected officials once in office.¹⁰⁵ In different ways, speeches and platforms both offer parties prime opportunities to state positions about the courts.¹⁰⁶

1. *The earlier period*

a) Major parties. In the earlier period, Republicans were more likely to defend, and Democrats to attack, the courts. But the Dem-

¹⁰¹ *Id.*

¹⁰² Persily, Citrin, and Egan, *Public Opinion and Constitutional Controversy* at 245–53 (cited in note 25).

¹⁰³ See Keck, *Judicial Politics in Polarized Times* at 6–8 (cited in note 97) (identifying abortion, affirmative action, gay rights, and gun rights as “four key culture war issues” that fit this paradigm).

¹⁰⁴ See, for example, David Luban, *The Warren Court and the Concept of a Right*, 34 *Harv CR-CL L Rev* 7, 9 (1999) (“[J]udicial activism’ has become, in the hands of the politicians, little more than a euphemism for judicial protection and promotion of reverse discrimination, crime on the streets, atheism, and sexual permissiveness while ‘judicial restraint’ has become a rallying cry for conservative opposition to these so-called policies.”).

¹⁰⁵ L. Sandy Meisel, *The Platform-Writing Process: Candidate-Centered Platforms in 1992*, 108 *Pol Sci Quarterly* 671, 671–72 (1993–94).

¹⁰⁶ See generally John Gerring, *Party Ideologies in America, 1828–1996* 292 (Cambridge, 1998) (despite changes over time in electioneering practices “there is no reason to suppose that the campaign speeches and party platforms of today are any less representative of the view of national party elites that they were in the 1830s”).

ocrats were relatively subdued, so the differences between the major parties were less stark than they are today.

The court-related issue that was addressed most frequently in these platforms was the issue of labor injunctions.¹⁰⁷ As industrialization proceeded and unions rose in the Gilded Age, strikes became more frequent and, correspondingly, attempts to enjoin strikes and to punish violators with contempt triggered litigation.¹⁰⁸ The Supreme Court's 1895 decision in *In re Debs* upheld a labor injunction and produced a political response from the AFL and others.¹⁰⁹ Labor sought legislative redress and appealed to allies in both parties. Ultimately, after sustained political efforts, the period was punctuated by passage of two federal bills limiting these injunctions—first, the Clayton Act, passed in 1914, restricting the use of injunctions against labor under antitrust laws, and later the Norris-LaGuardia Act in 1932, closing some of the latitude the Clayton Act had left for such injunctions to continue.¹¹⁰

Issues relating to labor injunctions, and contempt remedies for violating such injunctions, may seem like rarefied procedural issues that are distinct from the sort of institutional claims about usurpation that animate the contemporary idea of activism. During this era, however, attacks on injunctions were often paired with larger political critiques and framed as accusations of "government by injunction."¹¹¹ For example, in 1896, a year after the *Debs* decision, when William Jennings Bryan ran on a fusion ticket of the Democratic and Populist parties, he strongly opposed labor injunctions. The language in the Democratic platform he ran on was some of the sharpest of the period:

we especially object to *government by injunction* as a new and highly dangerous form of oppression by which *Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners*; and we approve the bill passed at the last session of the United States Senate, and now pending in the House of Representatives, relative to con-

¹⁰⁷ On the centrality of the courts and the injunction question to the labor movement in this era, see Forbath, 102 Harv L Rev at 1186–95 (cited in note 55).

¹⁰⁸ *Id.*

¹⁰⁹ Ross, *A Muted Fury* at 29 (cited in note 33).

¹¹⁰ *Id.* at 69, 290.

¹¹¹ Forbath, 102 Harv L Rev at 1148 (cited in note 55).

tempts in Federal courts and providing for trials by jury in certain cases of contempt.¹¹² (Emphasis added.)

Democratic platforms in 1900, 1904, 1908, 1912, 1916, and 1928 all explicitly addressed labor injunctions and called for reform, though none took aim at the courts issuing them quite as sharply as Bryan had.¹¹³ Indeed, the Democrats during this time period were often defensive about their objections to judicial practices.¹¹⁴ The 1908 platform is instructive. That year, Bryan ran against William Howard Taft (along with Eugene Debs on the Socialist ticket), but the Democratic Party was far more circumspect in its language. The platform made the case for legislating to limit labor injunctions,¹¹⁵ but even as it did so, it conspicuously disclaimed any disrespect for the courts:

The courts of justice are the bulwark of our liberties, and we yield to none in our purpose to maintain their dignity. . . . *We resent the attempt of the Republican party to raise a false issue respecting the judiciary. It is an unjust reflection upon a great body of our citizens to assume that they lack respect for the courts.*¹¹⁶

In their 1908 platform, Republicans countered with support for mild reform of labor injunctions, but wrapped their position in the kind of language about the sanctity of courts that seemed calculated to put the Democrats on the defensive. The platform asserted that “the rules of procedure in the Federal Courts with respect to the issuance of the writ of injunction should be more accurately defined by statute,” and that “no injunction or temporary restraining order should be issued without notice, except where irreparable injury would

¹¹² 1896 Democratic Party Platform (July 7, 1896) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29586>).

¹¹³ See Ross, *A Muted Fury* at 34–38, 88–89, 119 (cited in note 33).

¹¹⁴ For example, between Bryan’s 1896 run and the New Deal, only two Democratic candidates—Wilson in 1916 (running for re-election) and Al Smith in 1928—made reference to the issue in their acceptance speeches.

¹¹⁵ See 1908 Democratic Party Platform (July 7, 1908) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29589>) (“Experience has proved the necessity of a modification of the present law relating to injunctions, and we reiterate the pledge of our national platforms of 1896 and 1904 in favor of the measure . . . which a Republican Congress has . . . refused to enact, relating to contempts in Federal courts and providing for trial by jury in cases of indirect contempt”).

¹¹⁶ *Id.* (emphasis added).

result from delay, in which ease a speedy hearing thereafter should be granted."¹¹⁷ But that position was hedged by the insistence that:

The Republican party will uphold at all times the authority and integrity of the courts, State and Federal, and will ever insist that their powers to enforce their process and to protect life, liberty and property shall be preserved inviolate.¹¹⁸

In his acceptance speech, moreover, Taft also attacked the Democrats for disrespecting the judiciary. After addressing the injunction issue in a level of detail unimaginable in today's speeches, Taft said of the Democratic proposal that there be a jury trial before imposition of contempt remedies for violating a labor injunction: "Never before in this history of this country has there been such an insidious attack upon the judicial system."¹¹⁹

The injunction issue resurfaced in 1912 in the election between Woodrow Wilson, Taft, and Theodore Roosevelt. I address Roosevelt's third-party campaign in more detail below, but the fact that he was in the race and running on a court-curbing platform probably helps to explain what the Republicans did in 1912. The Democrats explicitly incorporated their 1908 language on injunctions in their 1912 document.¹²⁰ The Progressive platform addressed favored reform of injunctions, as well.¹²¹ Republicans made no mention of the limited injunction reform they had favored in 1908 and instead hammered even harder the importance of protecting judicial independence and the integrity of the courts. In part, Taft had grown resistant to the AFL's request for stronger injunction reform.¹²² But in part, Republicans sought, as they would in later platforms, to gain political advantage by stigmatizing criticism of courts:

¹¹⁷ Republican Party Platform of 1908 (June 16, 1908) (available at <http://www.presidency.ucsb.edu/ws/?pid=29632>).

¹¹⁸ Id.

¹¹⁹ William Howard Taft, *Address Accepting the Republican Presidential Nomination* (July 28, 1908) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=76222>).

¹²⁰ 1912 Democratic Party Platform (June 25, 1912) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29590>).

¹²¹ Progressive Party Platform of 1912 (Nov 5, 1912) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29617>) (favoring policy of no injunction if none would be granted in a nonlabor case, as well as new restrictions on contempt).

¹²² When, in 1910, the AFL supported more forceful pro-labor legislation, Taft criticized the proposal, saying it would "sap the foundations of judicial power." Ross, *A Muted Fury* at 74-75 (cited in note 33).

The Republican party reaffirms its intention to uphold at all times the authority and integrity of the Courts, both State and Federal, and it will ever insist that their powers to enforce their process and to protect life, liberty and property shall be preserved inviolate. An orderly method is provided under our system of government by which the people may, when they choose, alter or amend the constitutional provisions which underlie that government. Until these constitutional provisions are so altered or amended, in orderly fashion, it is the duty of the courts to see to it that when challenged they are enforced.¹²³

Taft followed suit in his acceptance speech, sharply attacking both the Democrats and Roosevelt for “promoting the hostility of the people to the courts,” and calling Roosevelt’s proposals to limit judicial power “grotesque.”¹²⁴

After the passage of the Clayton Act in 1914, the subject did not explicitly resurface in platforms again until 1928,¹²⁵ when the Democrats supported what would become the Norris LaGuardia Act in 1932 to strengthen protections for labor.¹²⁶ In 1928, the Republicans also offered mild support for reform.¹²⁷

Other than supporting injunction reform—for which the Republicans also offered some support twice—the Democrats had surprisingly little to say about the courts. They had criticized the *Pollock* decision on the income tax in the 1896 platform, and in 1912 lamented that “the Sherman anti-trust law [had] received a judicial construction depriving it of much of its efficiency,” indicating that they favored “the enactment of legislation which will restore to the statute

¹²³ Republican Party Platform of 1912 (June 18, 1912) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29633>).

¹²⁴ William Howard Taft, *The Judiciary and Progress*, repr S Doc 408, 62nd Cong, 2d Sess 9 (March 13, 1912).

¹²⁵ The 1920 and 1924 Democratic platforms both asserted that “labor is not a commodity,” which was a slogan used in supporting greater protection for labor against injunctions issued under antitrust laws. But these platforms did not explicitly address injunctions. See 1920 Democratic Party Platform (June 28, 1920) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29592>); 1924 Democratic Party Platform (June 24, 1920) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29593>).

¹²⁶ The 1928 Democratic platform asserted that “[n]o injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing and the injunction should be confined to those acts which do directly threaten irreparable injury.” 1928 Democratic Party Platform (June 26, 1928) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29594>).

¹²⁷ Republican Party Platform of 1928 (June 12, 1928) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29637>) (asserting that “injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.”).

the strength of which it has been deprived by such interpretation."¹²⁸ Notably, none of their platforms directly addressed *Lochner* or its progeny. They offered support for regulatory legislation of the sort *Lochner* made constitutionally questionable, but did not connect the issue to the courts.

One might have thought that the 1936 election would have finally pushed Democrats to criticize judicial activism more aggressively in their platform. After all, the Supreme Court in 1935 and early 1936 had decided several cases rejecting Roosevelt's New Deal programs, including *Schechter Poultry Corp. v United States*.¹²⁹ A few days after *Schechter Poultry* struck down portions of the National Industrial Recovery Act as beyond Congress's commerce power (among its other flaws), Roosevelt held forth on the opinion in a packed and lengthy press conference in which he closely reviewed and analyzed the decision.¹³⁰ According to the *New York Times*, he emphasized that the commerce power "constituted the only weapon in the government's hands to fight conditions not even dreamed about 150 years ago," and said the Court was interpreting the clause "in light of the horse-and-buggy days of 1789."¹³¹ Yet, betraying a defensiveness, he was also said in this story to be at pains to "insist[] that he was not criticizing the Supreme Court."¹³² When the Court later invalidated the Agricultural Adjustment Act in early 1936,¹³³ Roosevelt, in response, was notably restrained. He pressed the need for agricultural policy change, but did not criticize the Court or parse the decision, as he had done with *Schechter Poultry*.¹³⁴

In the 1936 campaign, the Democratic platform made no mention of the Supreme Court or its decisions striking down New Deal pro-

¹²⁸ *Id.*

¹²⁹ 295 US 495 (1935).

¹³⁰ Charles W. Hurd, *President Says End of NRA Puts Control up to People; Will Act to Halt Deflation*, *NY Times* 1, 6 (June 1, 1935).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *United States v Butler*, 297 US 1 (1936).

¹³⁴ Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* 147, 197 (W. W. Norton, 2010). Six months later, when the Court struck down New York's minimum-wage law in *Morehead v New York, ex rel Tipaldo*, 298 US 587 (1936), he suggested that the Court had created a "no man's land" in which neither the federal nor state government could legislate. See Franklin D. Roosevelt, *The Three Hundredth Press Conference*, in *5 Public Papers and Addresses of Franklin D. Roosevelt, The People Approve, 1936* at 191–92 (NY Random House, 1938).

grams. It said only that the party would support any necessary constitutional amendment if it were to be determined that the country's problems "cannot be effectively solved by legislation within the Constitution."¹³⁵ At times in the campaign, Roosevelt touted the virtues of a broader interpretation of the federal government's legislative powers, and he was, in general, not reticent about putting forward his own substantive vision of a good constitutional order.¹³⁶ But he treaded gingerly around the Court. Some Democrats in Congress were far more willing to condemn the Court directly for its activism,¹³⁷ but Roosevelt exercised notable caution. This was also true of his 1936 acceptance speech.¹³⁸

Sensing vulnerability, the Republicans criticized Roosevelt as a radical who did not respect and revere the Constitution. The 1936 Republican platform charged that "[t]he integrity and authority of the Supreme Court have been flouted," and pledged:

to resist all attempts to impair the authority of the Supreme Court of the United States, the final protector of the rights of our citizens against the arbitrary encroachments of the legislative and executive branches of government. There can be no individual liberty without an independent judiciary.¹³⁹

Republican candidate Alf Landon gave multiple speeches attacking Roosevelt along these lines, claiming that Roosevelt saw Supreme

¹³⁵ 1936 Democratic Party Platform (June 23, 1936) (available at <http://www.presidency.ucsb.edu/ws/?pid=29596>) (stating that, if necessary, "we shall seek such clarifying amendment as will assure to the legislatures of the several States and to the Congress of the United States, each within its proper jurisdiction, the power to enact those laws which the State and Federal legislatures, within their respective spheres, shall find necessary, in order adequately to regulate commerce, protect public health and safety and safeguard economic security").

¹³⁶ For an account of Roosevelt's concept of "an 'economic constitutional order' . . . essential to protect majorities against the 'enthronement of minorities' and secure a democracy of opportunity," see Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution*, 94 *BU L Rev* 669, 689 (2014).

¹³⁷ See, for example, Arthur Krock, *A Keynote by Robinson: Republicans Chided on Landon Reservation to Party Platform*, *NY Times* 13 (June 25, 1936) (quoting Senator Joseph Robinson at Democratic Convention in speech saying "members of the Court are not above the influences of their personal philosophies. . . . The court has undermined itself"); *Senator Barkley's Keynote Speech as Temporary Chairman of the Convention*, *NY Times* 16 (June 24, 1936) (quoting Senator Alben Barkley at Democratic Convention refuting notion of Court's "infallibility" and its immunity from "criticism").

¹³⁸ See Franklin D. Roosevelt, *Acceptance Speech for the Renomination of the Presidency* (June 27, 1936) (available at <http://www.presidency.ucsb.edu/ws/?pid=15314>).

¹³⁹ Republican Party Platform of 1936 (June 9, 1936) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29639>).

Court decisions as mere "barrier[s] to be circumvented,"¹⁴⁰ and accusing his administration of "ridicul[ing] the justices" and him of joining "a shameful attack on these men who were only doing their duty."¹⁴¹ In this way, the 1936 presidential campaign featured partisan attacks, but for excessive criticism of the Court, *not* for claimed judicial activism by it.

The Democratic caution would lift after the election, as FDR unveiled his court-packing proposal. It hit strong political headwinds and ultimately lost on preliminary votes, but the shift in the Supreme Court's approaches that marked the end of this period mooted the controversial plan.

b) Third parties. Looking at the role of the major parties in the early period gives us only a partial picture of the political dynamics of challenging the courts. Notably, while the Democrats exhibited restraint in criticizing courts during this period, third-party candidates Theodore Roosevelt and Robert LaFollette exhibited no such reticence. The 1912 and 1924 campaigns waged by these insurgent Republicans went hard after courts.

Roosevelt, who had served as president from 1901–1908, had chosen not to seek re-election in 1908 and had yielded that year to Taft, his preferred successor. Unhappy with Taft's conservatism, he came back into the electoral arena with a Progressive fervor a few years later. In the years leading up to the 1912 election, he launched many critiques of the courts as part of an attack on special interests. He began criticizing *Lochner*, *E. C. Knight*, and other cases in speeches and in print.¹⁴² His sharp rhetoric characterized judges as having "become far more truly the lawgivers than either the executive or legislative bodies."¹⁴³ He wrote and spoke in favor of allowing state voters to recall judges, drawing criticism from the *New York Times*, Republican lawmakers, many legal scholars, bar associations, and Taft.¹⁴⁴ He tried to wrest the GOP nomination from Taft, but ulti-

¹⁴⁰ Landon's *Speech Warning on New Deal Laws*, Associated Press 21 (Oct 22, 1936).

¹⁴¹ James A. Hagerty, *Warns Nation on Liberty*, NY Times 1 (Oct 21, 1936).

¹⁴² Ross, *A Muted Fury* at 134–35, 145 (cited in note 33).

¹⁴³ Theodore Roosevelt, *Judges and Progress*, The Outlook (Jan 6, 1912); Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 Am J Legal Hist 257, 257–58 (1980).

¹⁴⁴ Ross, *A Muted Fury* at 134–35 (cited in note 33).

mately lost and chose to run on the Progressive or “Bull Moose” ticket.

In 1912, the controversy about courts was becoming more salient. There was a movement underway around the country to try to institute a judicial recall in states to allow voters to remove a state judge.¹⁴⁵ Lawyer Gilbert Roe, an ally of Senator Robert LaFollette, published *Our Judicial Oligarchy*, a book that pointedly attacked judicial activism. Recall that LaFollette wrote an introduction that excoriated courts.¹⁴⁶ Among other things, he declared that “the judiciary ha[d] grown to be the most powerful institution in our government.”¹⁴⁷ In the body of the book, Roe provided several chapters with different answers to the question “Why the People Distrust the Courts,” and closed with an endorsement of a judicial recall.

As the candidate of the Progressives, Roosevelt was the driving force in pressing the case against judicial activism in 1912. He was forceful and direct in all the ways the Democrats were not. For the Progressives, skepticism of judicial activism was linked to their sharp, substantive attack on the major parties, which they said had become, “[i]nstead of instruments to promote the general welfare . . . the tools of corrupt interests which use them impartially to serve their selfish purposes.”¹⁴⁸ As part of a robust embrace of social welfare legislation and reforms including direct election of senators, nominating primaries, and suffrage for women, their platform pledged to pursue “such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy.”¹⁴⁹ It then advocated specifically:

. . . That when an Act, passed under the police power of the State is held unconstitutional under the State Constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the Act to become law, notwithstanding such decision.¹⁵⁰

¹⁴⁵ Id at 110–29.

¹⁴⁶ See LaFollette, *Introduction*, in Roe, *Our Judicial Oligarchy* (cited in note 30).

¹⁴⁷ Id at vi.

¹⁴⁸ Progressive Party Platform of 1912 (Nov 5, 1912) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29617>).

¹⁴⁹ Id.

¹⁵⁰ Id.

Roosevelt's advocacy for this recall of judicial decisions met with fierce criticism and claims that his proposals would crush judicial independence. Ultimately, he lost to Woodrow Wilson, but finished ahead of Taft by coming in second and securing 27.4 percent of the popular votes and eighty-eight electoral votes.¹⁵¹

The other presidential campaign in the era that squarely engaged questions of judicial activism was 1924, and it was in some ways the most strident of all. Once again, the energy and emphasis came from a Progressive. LaFollette ran against incumbent Calvin Coolidge, the Republican, and lawyer John W. Davis, the Democrat. The Progressive Party of Roosevelt's Bull Moose run had dissolved, so a new Progressive Independent Party was formed to take up the cause. The groundwork for LaFollette's run was set with the creation of the Conference for Progressive Political Action (CPPA), a new coalition of Progressives, unions, and farm leaders formed after the recession of 1921–22. CPPA, the AFL, and LaFollette banded together to focus their efforts on the courts.¹⁵² For the first time in its history, the AFL endorsed a presidential candidate.¹⁵³ In a climate of growing political opposition to unions, the AFL found the major parties weak on labor rights and on confronting the judiciary. Indeed, neither major party platform addressed labor issues in 1924.¹⁵⁴

By contrast, the Progressive Independent Party platform declared that "[t]he great issue before the American people today is the control of government and industry by private monopoly," and condemned the "tyranny" of the judiciary.¹⁵⁵ It denounced the "usurpation in recent years by the federal courts of the power to nullify laws duly enacted by the legislative branch of the government [as] a plain vi-

¹⁵¹ The fourth candidate was Eugene Debs, who ran as a Socialist and garnered 6 percent of the popular vote and no electoral votes. The Election of 1912 (available at <http://www.presidency.ucsb.edu/showelection.php?year=1912>).

¹⁵² Ross, *A Muted Fury* at 193–94, 201, 215 (cited in note 33); see also Ray P. Orman, *An Introduction to Political Parties and Practical Politics* 55 (Charles Schribner's Sons, 1924).

¹⁵³ James Appel, *Labor for LaFollette: The AFL in the 1924 Campaign*, 8 *Indust & Labor Rel Forum* 101, 101 (1972).

¹⁵⁴ Republican Party Platform of 1924 (June 10, 1924) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29636>); 1924 Democratic Party Platform (June 24, 1924) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29593>).

¹⁵⁵ Progressive Party Platform of 1924 (Nov 4, 1924) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29618>).

olation of the Constitution,”¹⁵⁶ and specifically proposed two dramatic changes:

We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.

We favor such amendment to the constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.¹⁵⁷

Both Coolidge and Davis criticized LaFollette’s position on the courts, with Coolidge and his running mate doing so sharply. Coolidge, for example, characterized the hostility to the Court, and Progressives in general, as being “the heirs of George III and Lenin.”¹⁵⁸ Increasingly under attack and finding the public unresponsive, LaFollette then tried to minimize the judicial issue.¹⁵⁹ Coolidge ultimately won in a landslide.

2. *The contemporary period.* The roots of contemporary political attacks on judicial activism can be traced to attacks by southern Democrats on *Brown*,¹⁶⁰ but as this section will demonstrate, the major party platforms began most clearly to engage with the issue of judicial activism in 1968. In the period from 1968 to the present, the major party opposing judicial activism—the Republicans—have been far more consistently critical of courts than the Democrats were in the early period. As alluded to in Part I, there has been a distinctly partisan cast to the charge of judicial activism since the 1968 campaign, with broad-based institutional critiques of the courts as activist asserted principally by the Republican Party. In their own platforms, Democrats, by contrast, have been aggrieved by or supportive of

¹⁵⁶ Id. The platform noted that, in his first inaugural address, Lincoln said: “The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.” Id.

¹⁵⁷ Id.

¹⁵⁸ Ross, *A Muted Fury* at 271–72 (cited in note 33).

¹⁵⁹ Id at 276.

¹⁶⁰ See Part I.B. Six years before *Brown*, the platform of the Dixiecrats mentioned opposition to “the usurpation of legislative functions by the executive and judicial departments.” Platform of the States Rights Democratic Party (August 14, 1948) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25851>). But race-related battles on judicial activism had not yet been clearly engaged in 1948, and the Dixiecrats did not emphasize that judicial issue at the time. Schacter, 82 S Cal L Rev at 1206–12 (cited in note 12).

particular decisions, but their claims have not been expressed in the register of activism.

The hesitation to harshly criticize courts that we saw in the *Lochner* period was still somewhat operative in Nixon's 1968 challenges to the Supreme Court, but it faded away with subsequent candidates. Indeed, Republican campaign rhetoric about judicial activism can be grouped into three waves: the Nixon campaigns, which were rhetorically restrained but strategically precise; the Reagan campaigns, which newly emphasized abortion and family values, and worked closely with the then-emerging religious right; and the campaigns from Dole's 1996 effort through to the present, which added same-sex marriage to the agenda and escalated the rhetoric.

In 1968, Nixon emphasized law and order. The platform declared that "lawlessness is crumbling the foundations of American society."¹⁶¹ On the campaign trail, Nixon frequently repeated a favorite line: "some of our courts have gone too far in weakening the peace forces as against the criminal forces."¹⁶² He used the same phrase in his acceptance speech, while also assuring that courts should always be respected.¹⁶³ In the platform, the language about appropriate regard for courts was more subtle. It said that the party pledged "a determined effort to rebuild and enhance public respect" for the Supreme Court and other courts.¹⁶⁴

In one way, 1968 does provide a parallel to the earlier period. This is the only election in the contemporary period where there was a third-party candidate running aggressively against the Supreme Court. George Wallace, who collected forty-six electoral votes and received almost 10 million votes, was far harsher than Nixon about the Court and activism. His American Independent Party Platform said:

In the period of the past three decades, we have seen the Federal judiciary, primarily the Supreme Court, transgress repeatedly upon the prerogatives

¹⁶¹ Republican Party Platform of 1968 (Aug 5, 1968) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25841>); see McMahon, *Nixon's Court* (cited in note 98).

¹⁶² Stephenson Jr., *Campaigns and the Court* at 181 (cited in note 50).

¹⁶³ Richard Nixon, *Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida* (Aug 8, 1968) (available at <http://www.presidency.ucsb.edu/ws/?pid=25968>).

¹⁶⁴ Republican Party Platform of 1968 (cited in note 161). In support of Humphrey, the Democrats' platform said only that crime fighting should not "foster injustice" or come at the expense of the "hard won liberties of all Americans." 1968 Democratic Party Platform (Aug 26, 1968) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29604>).

of the Congress and exceed its authority by enacting judicial legislation, in the form of decisions based upon political and sociological considerations, which would never have been enacted by the Congress. We have seen them, in their solicitude for the criminal and lawless element of our society, shackle the police and other law enforcement agencies; and, as a result, they have made it increasingly difficult to protect the law-abiding citizen from crime and criminals. . . .¹⁶⁵

The platform went on to propose that federal district judges be made to face the voters at periodic intervals, and that circuit judges and Supreme Court Justices be subject to periodic reconfirmation by the Senate.¹⁶⁶ Wallace did not give a nomination acceptance speech, but he gave a speech nine days after he launched his campaign that singled out the Supreme Court. Speaking to a crowd of business executives, he said that the Court can “strike down all the acts of your legislature. I don’t want them to have the power over all governors, all legislatures, and all the people.”¹⁶⁷

In 1972, the Republicans continued their emphasis on crime, with their platform and Nixon’s acceptance speech touting the administration’s success in fighting crime and appointing judges with “fidelity to the Constitution,” who “balance the rights of defendants with the needs of law enforcement.”¹⁶⁸ The platform endorsed “legislation to halt immediately all further court-ordered busing,” but did not challenge judicial activism in any general way.¹⁶⁹

In 1980, as issues associated with the religious right rose, Republican rhetoric began to emphasize the idea that Democrats had shunted the family aside and “given its jurisdiction to the courts,” along with a call for judges who “respect the traditional family and the sanctity of innocent human life.”¹⁷⁰ By 1984, when Ronald Reagan ran for reelection, Republicans offered a more fully elaborated set of institutional ideas about courts, arguing that:

¹⁶⁵ American Independent Party Platform of 1968 (Oct 13, 1968) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29570>).

¹⁶⁶ *Id.*

¹⁶⁷ James Strong, *Executives Cheer Talk by Wallace—Hits Actions of High Court*, Chicago Tribune S1 (Feb 17, 1968).

¹⁶⁸ Republican Party Platform of 1972 (Aug 21, 1972) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25842>).

¹⁶⁹ *Id.*

¹⁷⁰ Republican Party Platform of 1980 (July 15, 1980) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>).

judicial power must be exercised with deference towards State and local officials; it must not expand at the expense of our representative institutions. It is not a judicial function to reorder the economic, political, and social priorities of our nation. The intrusion of the courts into such areas undermines the stature of the judiciary and erodes respect for the rule of law. Where appropriate, we support congressional efforts to restrict the jurisdiction of federal courts.¹⁷¹

The platform went on to "commend the President for appointing federal judges committed to the rights of law-abiding citizens and traditional family values," "shar[ing] the public's dissatisfaction with an elitist and unresponsive federal judiciary," and calling for judges committed to "judicial restraint."¹⁷²

The language in George H. W. Bush's 1992 acceptance speech marked the appearance of particular language about judicial activism that became common in GOP platforms and speeches thereafter. He said that Bill Clinton would "stock the judiciary with liberal judges who will write laws they can't get approved by the voters."¹⁷³ By 1996 and the Dole campaign, the anti-activism rhetoric in Republican platforms was ramping up. At the same time, although no court had yet legalized same-sex marriage, the possibility of that result had been introduced by the Hawaii Supreme Court in a preliminary decision in 1993,¹⁷⁴ and the Republican Party began to fold same-sex marriage into its portfolio of complaints about judicial activism. In 1996, for example, the platform applauded congressional passage of the Defense of Marriage Act, noting that it would prevent "federal judges and bureaucrats from forcing states to recognize other living arrangements as 'marriages.'"¹⁷⁵ Since 1996, references to same-sex marriage in relation to judicial activism have been a mainstay for Republican

¹⁷¹ Republican Party Platform of 1984 (Aug 20, 1984) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25845>). In 1980, Reagan's acceptance speech had not mentioned the abortion issue. In 1984, he referred to the "sacredness of human life" in his speech but did not connect the issue to courts. Ronald Reagan, *Remarks Accepting Presidential Nomination at the Republican National Convention in Dallas, Texas* (Aug 23, 1984) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=40290>).

¹⁷² *Id.*

¹⁷³ George Bush, *Remarks Accepting the Presidential Nomination at the Republican National Convention in Houston* (Aug 20, 1992) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=21352>).

¹⁷⁴ *Baehr v Lewin*, 852 P2d 44 (Hawaii 1993).

¹⁷⁵ Republican Party Platform of 1996 (Aug 12, 1996) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25848>).

platforms. The 1996 platform also quoted the Tenth Amendment and said “[f]or more than half a century, that solemn compact has been scorned by liberal Democrats and the judicial activism of the judges they have appointed.”¹⁷⁶ It admonished that:

The federal judiciary, including the U.S. Supreme Court, has overstepped its authority under the Constitution. It has usurped the right of citizen legislators and popularly elected executives to make law by declaring duly enacted laws to be “unconstitutional” through the misapplication of the principle of judicial review. [These actions are] fundamentally at odds with our system of government in which the people and their representatives decide issues great and small.¹⁷⁷

The sharper tone of 1996 has been maintained ever since. Succeeding platforms have argued, for example, that “scores of judges with activist backgrounds in the hard-left now have lifetime tenure” (2000 and 2004);¹⁷⁸ the President should “name only judges who have demonstrated respect for the Constitution and the processes of our republic” (2000);¹⁷⁹ “the sound principle of judicial review has turned into an intolerable presumption of judicial supremacy” (2004);¹⁸⁰ “[j]udicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing personal opinions upon the public . . .” (2008);¹⁸¹ “judicial activism” is a “threat to the constitution” and “Republican Senators [must] do all in their power to prevent the elevation of additional leftist ideologues to the courts”

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* This platform went on to link the problem of activism to the American Bar Association:

A Republican president will ensure that a process is established to select for the federal judiciary nominees who understand that their task is first and foremost to be faithful to the Constitution and to the intent of those who framed it. In that process, the American Bar Association will no longer have the right to meddle in a way that distorts a nominee’s credentials and advances the liberal agenda of litigious lawyers and their allies.

¹⁷⁸ 2004 Republican Party Platform (Aug 30, 2004) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25850>); 2000 Republican Party Platform (July 31, 2000) (available at <http://www.presidency.ucsb.edu/ws/?pid=25849>).

¹⁷⁹ 2000 Republican Party Platform (July 31, 2000) (cited in note 178).

¹⁸⁰ 2004 Republican Party Platform (Aug 30, 2004) (cited in note 178).

¹⁸¹ 2008 Republican Party Platform (Sept 1, 2008) (available at <http://www.presidency.ucsb.edu/ws/?pid=78545>).

(2012);¹⁸² and, most recently, the activist judiciary is a "critical threat to our country's constitutional order," and "only Republican appointments will enable the courts to begin to reverse the long line of activist decisions, including *Roe*, *Obergefell* and the Obamacare cases," which have "expanded the power of the judiciary at the expense of the people and their elected representatives" (2016).¹⁸³

The Democratic platforms in the contemporary period have typically included one or more of the following: a call for equal rights in various realms;¹⁸⁴ a call for a diverse bench;¹⁸⁵ opposition to jurisdiction-stripping measures;¹⁸⁶ support for abortion rights;¹⁸⁷ and commentary on specific issues or decisions.¹⁸⁸ There is no mention of judicial activism in any of them. The phrase or idea appears neither on defense (as a reply to the GOP's claims) nor on offense (as a way to attack the Supreme Court's rising conservatism over these years). One might

¹⁸² 2012 Republican Party Platform (Aug 27, 2012) (available at <http://www.presidency.ucsb.edu/ws/?pid=101961>).

¹⁸³ 2016 Republican Party Platform (July 18, 2016) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=117718>). In this time period, several Republican candidates also addressed the activism question in their speeches, some more explicitly than others. See Robert Dole, *Address Accepting the Presidential Nomination at the Republican National Convention in San Diego* (Aug 15, 1996) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25960>); George W. Bush, *Remarks Accepting the Presidential Nomination at the Republican National Convention in New York City* (Sept 2, 2004) (available at <http://www.presidency.ucsb.edu/ws/?pid=25955>); John McCain, *Address Accepting the Presidential Nomination at the Republican National Convention in Saint Paul* (Sept 4, 2008) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=78576>); Donald J. Trump, *Address Accepting the Presidential Nomination at the Republican National Convention in Cleveland, Ohio* (July 21, 2016) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=117935>).

¹⁸⁴ See, e.g., 1972 Democratic Party Platform (July 10, 1972) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29605>); 1984 Democratic Party Platform (July 16, 1984) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29608>); 2016 Democratic Party Platform (July 21, 2016) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=117717>).

¹⁸⁵ See, e.g., 1996 Democratic Party Platform (August 26, 1996) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29611>); 2008 Democratic Party Platform (August 25, 2008) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=78283>).

¹⁸⁶ See, e.g., 1984 Democratic Party Platform (July 16, 1984) (cited in note 184); 2000 Democratic Party Platform (August 14, 2000) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29612>).

¹⁸⁷ See, e.g., 1980 Democratic Party Platform (August 11, 1980) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29607>); 2000 Democratic Party Platform (cited in note 186); 2016 Democratic Party Platform (cited in note 184).

¹⁸⁸ See, e.g., 1972 Democratic Party Platform (cited in note 184); 1976 Democratic Party Platform (July 12, 1976) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29606>); 2016 Democratic Party Platform (cited in note 184).

have expected attacks on judicial activism in recent years, given that decisions like *Citizens United v FEC*¹⁸⁹ and *Shelby County v Holder*¹⁹⁰ striking down congressional legislation have provoked outrage from the left. As we will see in the next section, there is some evidence of such claims from Democratic senators in confirmation hearings, but the approach in Democratic platforms has been to criticize these decisions sharply while eschewing more abstract criticism of the institution as activist. For example, the 2012 platform said, “Our opponents have applauded the Supreme Court’s decision in *Citizens United* and welcomed the new flow of special interest money with open arms. In stark contrast, we believe we must take immediate action to curb the influence of lobbyists and special interests on our political institutions.”¹⁹¹ In 2016, the platform again attacked *Citizens United* and implicitly criticized *Shelby County* without name checking it. That platform said: “We will fight to end the broken campaign finance system, overturn the disastrous *Citizens United* decision, restore the full power of the Voting Rights Act, and return control of our elections to the American people.”¹⁹²

C. DYNAMICS IN CONGRESS

1. *Confirmation in the Senate.* The confirmation process provides another political venue for making claims about judicial activism. But it has changed significantly since the *Lochner* era. Three aspects of that process merit exploration. I will review, in turn, changes to the confirmation process itself, the changing dynamics of voting on nominees, and the changing role of interest groups in the process.

a) *Changes in the confirmation process.* The confirmation process of the earlier period looked, for much of that period, very different from the one we see today. First, until the Seventeenth Amendment was ratified in 1913, the Constitution provided for state legislatures to appoint senators. In the absence of popular election, senators were not held directly accountable to voters for confirmation votes, nor typically subject to pressure from voters or interest groups in the

¹⁸⁹ 558 US 310 (2010).

¹⁹⁰ 570 US 529 (2013).

¹⁹¹ 2012 Democratic National Platform (Sept 3, 2012) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=101962>).

¹⁹² 2016 Democratic Party Platform (July 21, 2016) (cited in note 184).

same way as they are today. A second difference was that, until 1929, the Senate considered nominations in closed executive session. Thus, both the committee hearing and the vote were typically held out of public view.¹⁹³ Third, the nominee did not routinely appear personally before the committee until 1925. All of this means that, for a good deal of the earlier period, confirmation hearings did not afford a robust opportunity to publicly debate judicial activism or the philosophy of nominees poised to take the bench.

Contrast the contemporary process, where hearings are televised and now available for viewing online. Senators on the committee regularly engage in colloquies with nominees and witnesses. Whether or not they get any meaningful answers, they have a chance to raise questions about cases and approaches and thus to communicate with the public about what the Supreme Court is or should (by their lights) be doing. Often, these "questions" take the form of, or are intermingled with, mini-speeches.

Review of the transcript of every confirmation hearing since 1896 shows that, over time, it has become increasingly commonplace for senators to raise the issue of judicial activism, whether phrased in exactly those terms, in related terminology like "legislating from the bench," through a rhetorical antonym like "judicial restraint" or "strict construction," or through questions about approach that are underwritten by concerns about judicial usurpation, such as questions about static versus evolving constitutional meaning and enumerated versus unenumerated rights. As early as William Brennan's hearing in 1957—in the shadow of *Brown*—the nominee was asked about evolving constitutional meaning in skeptical ways. For example, Senator James Eastland of Mississippi asked Brennan: "Do you think the Constitution of the United States could have one meaning this week and another meaning next week?"¹⁹⁴ Other senators responded with a functional defense of evolving meaning.¹⁹⁵

¹⁹³ Two relevant exceptions during the earlier period were the nominations of Louis Brandeis (1916) and Harlan Fiske Stone (1925). Michael J. Gerhardt, *The Federal Appointment Process: A Constitutional and Historical Analysis* 67 (Duke, 2003).

¹⁹⁴ *Nomination of William Joseph Brennan Jr. before the Committee on the Judiciary*, 58th Cong, 1st Sess 38 (1957) (Eastland (D-Miss)).

¹⁹⁵ See, for example, *id* at 43 (Wiley (R-Wis)) ("[W]hen the Constitution was born it was a horse and buggy age. Now we are in the atomic age."); *id* at 39 (Watkins (R-Utah)) ("[H]uman beings are likely to err. . . . we can't let the first judge who passed on it fix it for all times.").

As far as I can determine, the phrase “judicial activism” itself made its first appearance in the confirmation setting at the 1967 hearing on the nomination of Thurgood Marshall to be Associate Justice. Senator Sam Ervin (D-NC) invoked it, saying:

My personal opinion is, and I say it with reluctance, but I say, because I believe it to be true, that the road to destruction of constitutional government in the United States is being paved by the good intentions of the judicial activists, who, all too often, constitute a majority of the Supreme Court. *A judicial activist*, in my book, is a man who has good intentions but who is unable to exercise the restraint inherent in the judicial process when it is properly understood and applied, and who is willing to add to the Constitution things that are not in it and subtract from the Constitution things that are in it.¹⁹⁶

Ervin went on to make comments about activism part of his standard repertoire.¹⁹⁷

Since 1967, the activism issue, or questions about methodology implicating the issue, have been raised in the confirmation of every Supreme Court nominee, typically by multiple senators. Table 1 reflects the number of senators who have asked questions or made comments about activism at any confirmation hearing for a Supreme Court nominee from 1896 to the present. The compilation in the table distinguishes between questions explicitly employing the term “judicial activism” or a related phrase¹⁹⁸ and those more generally asking about the boundaries of the judicial function, but not using these precise terms.¹⁹⁹ The first general questions appear in 1949. This kind of questioning and commentary has an upward trajectory over time, such that by the late 1960s, multiple senators regularly pursue it.

¹⁹⁶ *Nomination of Thurgood Marshall before the Committee on the Judiciary*, 19th Cong, 1st Sess 155–56 (1967) (Ervin (D-NC)).

¹⁹⁷ See, for example, *Nominations of Abe Fortas and Homer Thornberry before the Committee on the Judiciary*, 90th Cong, 2nd 149 (1968) (“The Harper case is a plain example of judicial activism at work”); *Nominations of William H. Rehnquist and Lewis F. Powell, Jr. before the Committee on the Judiciary*, 92nd Cong, 1st Sess 22 (1971) (“I think a man who would substitute his personal notions for constitutional principles is not fit to be a member of the Supreme Court.”).

¹⁹⁸ Specific terms tracked here are any variant of “judicial activism,” “judicial restraint,” “legislation from the bench,” “strict construction,” or references to “usurpation” by the Court.

¹⁹⁹ General terms mean questions or comments about the candidate’s judicial or interpretive methodology that do not invoke the specific terms identified above. These questions frequently include references to changing versus static constitutional meanings and, in recent years, living constitutionalism versus originalism.

Notably, in this context, the partisan patterns are different than what we saw in the realm of presidential platforms and acceptance speeches. Recall that, in the contemporary era, the critique of courts-as-activist has been the sole domain of Republicans in that setting, with Democrats defending or criticizing particular decisions, but not launching institutional attacks on the Supreme Court. The picture in confirmation hearings is more bipartisan, but there are nevertheless partisan dimensions of note.

The first movers were southern Democrats (or former southern Democrats, in the case of Strom Thurmond). Even before the explicit references to judicial activism in the 1960s, these senators began to press on issues of method. This pattern is reflected in Senator Eastland's question to nominee Brennan (discussed above), as well as questions from this faction to Potter Stewart in 1959. They asked him about whether "the Constitution has the same meaning today that it had when it was adopted,"²⁰⁰ whether "you consider yourself what is termed a 'creative judge' or do you consider yourself a judge that follows precedent,"²⁰¹ and, as a preface to critiquing *Brown*, "[d]o you agree with me that a judge or court ought not to overrule a prior decision simply because he thinks that it ought to be decided some other way?"²⁰² As the southern realignment unfolded, though, it gradually became more common for Republicans to press aggressively on the activism issue. Over time, Republicans came to be the most consistent interlocutors on the issue. Standard questions and comments include, for example:

You have stated that you feel it is personally abhorrent and repugnant, and that it is a legislative matter to deal with it. Do you mean by that we should legally protect the unborn? If so, how, considering the *Roe v. Wade activism* from the judicial branch?²⁰³

The role of the judiciary is to interpret the law. However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will as judicial activists.

²⁰⁰ *Nomination of Potter Stewart before the Committee on the Judiciary*, 86th Cong, 1st Sess 16 (1959) (Eastland (D-Miss)).

²⁰¹ *Id.* at 26 (Johnston (D-SC)).

²⁰² *Id.* at 120 (Ervin (D-NC)).

²⁰³ *Nomination of Sandra Day O'Connor before the Committee on the Judiciary*, 97th Cong, 1st Sess 240 (1981) (Denton (R-Ala)).

Table 1
 Number of Senators Asking Supreme Court Nominees Questions About or Related to
 Judicial Activism at Confirmation Hearings, 1896–Present

Nominee	Year	Republicans	Democrats	Republicans	Democrats
		Asking Questions with Specific Terms	Asking Questions with Specific Terms	Asking Questions with General Terms	Asking Questions with General Terms
Brandeis	1916	0	0	0	0
Stone	1925	0	0	0	0
Parker	1930	0	0	0	0
Reed	1938	0	0	0	0
Frankfurter	1939	0	0	0	0
Douglas	1939	0	0	0	0
Jackson	1941	0	0	0	0
Stone	1941	0	0	0	0
Vinson	1946	0	0	0	0
Clark	1949	0	0	0	0
Minton	1949	0	0	2	1
Harlan	1954	0	0	0	0
Warren	1955	0	0	0	0
Brennan	1957	0	0	2	1
Whittaker	1957	0	0	0	0
Stewart	1959	0	0	1	5
Goldberg	1962	0	1	0	0
White	1962	0	0	0	1
Fortas (Assoc. J)	1965	0	0	0	1
Marshall	1967	0	2	0	2
Thornberry	1968	1	0	0	0

Table 1 *Continued*

Nominee	Year	Republicans Asking Questions with Specific Terms	Democrats Asking Questions with Specific Terms	Republicans Asking Questions with General Terms	Democrats Asking Questions with General Terms
Fortas (Chief J)	1968	1	2	0	0
Haynsworth	1969	2	2	1	1
Burger	1969	2	2	0	1
Carswell	1970	1	2	0	0
Blackmun	1970	2	4	0	1
Rehnquist (assoc. J)/Powell	1971	0	3	0	3
Stevens	1975	1	1	0	3
O'Connor	1981	4	5	0	0
Scalia	1986	3	0	0	0
Rehnquist (Chief)	1986	3	1	1	0
Bork	1987	5	5	0	0
Kennedy	1987	3	2	0	0
Souter	1990	3	4	0	0
Thomas	1991	4	3	0	0
Ginsburg	1993	4	4	0	0
Breyer	1994	3	1	0	0
Roberts	2005	5	4	0	0
Alito	2006	7	2	0	0
Sotomayor	2009	6	6	0	0
Kagan	2010	6	8	0	0
Gorsuch	2017	4	4	4	3

Would you please briefly describe your views on the topic of judicial activism?²⁰⁴

But activism by a growing number of judges threatens our judiciary. And frankly, that is what I am hearing as I talk to my constituents and hear from the American people. Activism is when a judge allows his personal views on a policy issue to infect his judgments. Activist rulings are not based on statutes or the Constitution, but reflect whatever a judge may think is decent or public policy²⁰⁵

If [Democrats] had filled [Scalia's] seat, we would have seen a Supreme Court where the will of the people would have been repeatedly cast aside by a new activist Supreme Court majority.²⁰⁶

Even while it has been Republicans who have pressed most consistently on this issue, Democratic senators have also engaged with the activism idea in the hearings. This has become especially pronounced since 2010, in the wake of the Supreme Court's decision in *Citizens United*.²⁰⁷ But Democratic comments and questions are often framed in certain stylized ways. Whereas many Republican questions and comments launch broadsides against judicial activism, Democratic senators often pursue a more narrow and nuanced version of the claim. One common approach is to question the conceptual coherence of judicial activism. Consider these examples:

Judge, as you have just learned, one man's innovative ways is strict construction and another man's application of innovative ways is judiciary running rampant. I think you have found that out by talking to us all up here. Judicial activism is in the eye of the beholder. That seems to me—as the Senator from Utah just pointed out, he knows you will be innovative and if you are innovatively conservative you will be a strict constructionist.²⁰⁸

That is why I suggest to everyone watching today that they be a little wary of a phrase that they are hearing at this hearing: “judicial activism.” That term really seems to have lost all usefulness, particularly since so many

²⁰⁴ *Nomination of Judge Clarence Thomas before the Committee on the Judiciary*, 102nd Cong, 1st Sess 135 (1991) (Thurmond (R-SC)).

²⁰⁵ *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States before the Committee on the Judiciary*, 109th Cong, 1st Sess 30 (Sessions (R-Ala)).

²⁰⁶ *Nomination of Neil Gorsuch before the Committee on the Judiciary*, 115th Cong, 1st Sess (2017) (Cruz (R-Tex)).

²⁰⁷ 558 US 310 (2010).

²⁰⁸ *Nomination of David H. Souter before the Committee on the Judiciary*, 101st Cong, 2nd Sess 314 (1990) (Biden (D-Del)).

rulings of the conservative majority on the Supreme Court can fairly be described as "activist" in their disregard for precedent and their willingness to ignore or override the intent of Congress.²⁰⁹

Another common form is to attack Republicans as hypocrites by pointing out examples of what they consider to be conservative activism. Examples include:

Do you think they are activist judges? [referring to Scalia and Thomas] . . . Can you tell me in 30 seconds, so I can just ask one more question, how is it different not to want to characterize Justices Thomas and Scalia but it was okay to characterize Justices Marshall and Brennan as activist?²¹⁰

Many commentators see the *Bush v. Gore* decision as an example of judicial activism, an example of the judiciary improperly injecting itself into a political dispute. Indeed, it appears to many of us who have looked at your record that *Bush v. Gore* seems contrary to so many of the principles that you stand for, that the President has said you stand for when making your nomination in talking about judicial restraint, not legislating from the bench and, of course, respecting the rights of the States.²¹¹

I think we have heard repeatedly from the other side of the aisle their loyalty to the concept of traditionalism, their opposition to judicial activism. . . . I have two words for them: *Citizens United*. . . . If that is not judicial activism, what is? And it was espoused and sponsored by men who had stood before us under oath and swore they would never engage in judicial activism. That is the reality.²¹²

Why is discussion of judicial activism, albeit in different ways, more bipartisan in the context of Senate confirmation hearings than in presidential platforms and speeches? One possible explanation is that the institutional settings are different. Senators on the Judiciary Committee are repeat players, and gain expertise in matters relevant to the Supreme Court. Many serve for long stretches on the committee. Indeed, many senators repeat the same comments or questions in dif-

²⁰⁹ *Confirmation Hearing on the Nomination of the Hon. Sonia Sotomayor before the Committee on the Judiciary*, 111th Cong, 1st Sess 20 (2009) (Feingold (D-Cal)).

²¹⁰ *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States before the Committee on the Judiciary*, 109th Cong, 1st Sess 378 (2005) (Schumer (D-NY)).

²¹¹ *Confirmation Hearing on the Nomination of Samuel A. Alito Jr. before the Committee on the Judiciary*, 109th Cong, 2nd Sess 386 (2006) (Kohl (D-Wis)).

²¹² *The Nomination of Elena Kagan before the Committee on the Judiciary*, 111th Cong, 2nd Sess 32 (2010) (Durbin (D-Ill)).

ferent hearings.²¹³ Relatedly, the senators on the committee are working closely with specialized, knowledgeable interest groups in preparing for the hearings. And, unlike platforms, which cut across multiple topics, Supreme Court confirmation hearings focus in depth on exploring law at the Supreme Court level.

At the macro level, moreover, there may be a larger dynamic at play. Recall that one point of contrast between the more recent and the earlier eras is that control of the Senate has flipped between the two parties more frequently in the contemporary era, at least since 1980 when the Republicans took the Senate for the first time in many years. In her recent book, *Insecure Majorities*, Frances Lee argues that the plausibility of more frequent party shifts has made pursuit of such a shift a more prominent part of congressional operations than it once was.²¹⁴ Among other things, these conditions make party leaders eager to capitalize on any issues of electoral benefit,²¹⁵ and there are good reasons to place judicial issues in that category. Issues relating to judicial appointments mobilize well organized interests and constituencies on both sides of the aisle, and the intense interest of these groups creates incentives for both Republican and Democratic legislators to use confirmation hearings to engage closely and fiercely with the issue of judicial activism.²¹⁶

b) Changing voting patterns in the Senate. A second difference between the earlier and contemporary periods relates to the dynamics of Senate voting. Between 1896 and 1937, presidents made 23 nom-

²¹³ See, e.g., *Nomination of Ruth Bader Ginsburg before the Committee on the Judiciary*, 103rd Cong, 2nd Sess 5 (1993) (Hatch (R-Utah)); *Nomination of Stephen G. Breyer before the Committee on the Judiciary*, 103rd Cong, 2nd Sess 8 (1994) (Hatch (R-Utah)) (decrying activism and asserting in both hearings that “a Supreme Court Justice should interpret the law and not legislate his or her own policy preferences from the bench” or “impose their own personal views on the American people in the guise of construing the Constitution and Federal statutes”); *Nomination of Judge Clarence Thomas before the Committee on the Judiciary*, 102nd Cong, 1st Sess 212 (1991) (Grassley (R-Iowa)) (*Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States before the Committee on the Judiciary*, 109th Cong, 1st Sess 179 (Grassley (R-Iowa)) (raising the subject of activism and asking nominees in both hearings if they think the “filling of vacuums” by Justices is appropriate).

²¹⁴ Lee, *Insecure Majorities* 198 (cited in note 78).

²¹⁵ *Id.*

²¹⁶ For an argument that, in the domain of judicial nominations, Republicans are more aggressive in their tactics and dismissive of institutional norms, see David Fontana, *Cooperative Judicial Nominations During the Obama Administration*, 2017 Wis L Rev 285, 288. A broader argument about asymmetric tactics in constitutional politics appears in Joseph Fishkin and David E. Pozen, *Asymmetric Constitutional Hardball*, 118 Colum L Rev (forthcoming 2018) (draft on file with author).

inations to the Supreme Court.²¹⁷ Only one—the 1930 nomination of John Parker—was rejected. More strikingly by contemporary standards, two-thirds of them (15 of 22) were approved by voice vote, some within hours of being nominated. Of the seven who were the subject of a roll call vote, more than half won overwhelmingly.²¹⁸ The other three won by between 24–26 votes.²¹⁹ The closest vote overall was the failed Parker nomination, which went down 39–41.

Overall, then, the vast majority of nominations were not closely contested. A few were, most notably Brandeis (see below), but the picture is very different than today. Contemporary hearings have come to be defined by partisan frames and objectives. There are no voice votes, let alone for two-thirds of the nominees. And the days of 98–0 (Scalia, 1986), 97–0 (Kennedy, 1987), and 96–3 (Ginsburg, 1993) votes would seem to be over, at least for now. The more notable change is the rise of partisanship in voting. Building on work demonstrating the increasing role of ideology in Supreme Court confirmation votes,²²⁰ Charles Shipan has demonstrated that “partisanship has played an increasingly important role over time, with members of the president’s party much more likely now than in the past to support his nominee.”²²¹ This should not be surprising because it is simply another facet of the rising polarization in Congress. But it further reinforces that, in contrast to the earlier period, political challenges to

²¹⁷ The nominees were McKenna, Holmes, Day, Moody, Lurton, Hughes (as Associate Justice), White, Van Devanter, Lamar, Pitney, McReynolds, Brandeis, Clarke, Taft, Sutherland, Butler, Sanford, Stone, Hughes (as Chief Justice), Parker, Roberts, Cardozo, and Black. Denis S. Rukus, Maureen Bearden, and Sam Garrett, *Supreme Court Nominations 1789–2005: Actions (Including Speed) by the Judiciary Committee and the President 154–57* (Nova, 2007).

²¹⁸ Id. The votes were 44–6 (McReynolds (1914)), 61–8 (Butler (1922)), 71–6 (Stone (1925)), and 63–16 (Black (1937)).

²¹⁹ Id. The votes were 50–26 (Pitney (1912)), 47–22 (Brandeis (1916)), and 52–26 (Hughes as Chief Justice (1930)).

²²⁰ See Charles Cameron et al, *Senate Voting on Supreme Court Nominees: A Neoinstitutional Model*, 84 Am Pol Sci Rev 525 (1990); Lee Epstein et al, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J Pol 296 (2006).

²²¹ Charles R. Shipan, *Partisanship, Ideology, and Senate Voting on Supreme Court Nominees*, 5 J Empir Legal Studies 55, 72 (2008); see also Scott Basinger and Maxwell Mak, *The Changing Politics of Supreme Court Confirmations*, 40 Am Pol Research 737, 757 (2012) (focusing on internal party cohesion and offering empirical evidence to show that “as partisanship in the Senate has risen, Supreme Court confirmation voting has become more divided along party lines”). For a broader and longer-term historical perspective on partisanship in the confirmation process at the time of Reconstruction, and its decline in ensuing decades, see Richard Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 Cardozo L Rev 1 (1983).

perceived judicial activism today are powerfully shaped by partisan factors.

c) *The changing role of interest groups.* The third area of contrast is the role of interest groups in the process. For the most part, interest groups were not a major player in judicial confirmations in the earlier period. The closed process gave them limited opportunity to participate, and the attenuated electoral connection between senators and constituents before the Seventeenth Amendment was enacted would have made it more difficult for them to organize and mobilize constituents. Both the hotly contested Brandeis nomination in 1916 and the failed Parker nomination in 1930 were, however, exceptions in the earlier era.

Interest groups pressed their positions as to both Brandeis and Parker, but only the process as it unfolded with Parker bears much resemblance to the process as it exists today. Hoover nominated Parker, a sitting judge on the Fourth Circuit, in 1930. By that time, the Senate had opened to the public its committee proceedings and floor deliberations on confirmations. Parker was done in by two sources of opposition: organized labor, which objected to his opinion in the *Red Jacket* case,²²² in which an employer sought and obtained an injunction enforcing yellow dog contracts; and the NAACP, which objected to racist statements Parker had made discouraging black voting while he was running for governor of North Carolina in 1920. Both William Green, president of the AFL, and Walter White, executive secretary of the NAACP, testified against Parker. Parker defended his *Red Jacket* opinion as compelled by the 1913 Supreme Court ruling in *Hitchman Coal & Coke v Mitchell*,²²³ but Green argued—and a majority of the Judiciary Committee seemed ultimately to accept—that his opinion lavished too much approval on labor injunctions and yellow dog contracts. Likewise, Parker tried to explain the 1920 campaign speech in which he had said that “the negro has not yet reached that stage in his development where he can share the burdens and responsibilities of government,” and that “the participation of the negro in politics is a source of evil and danger to both races.”²²⁴ His

²²² *International Union, United Mine Workers of America v Red Jacket Consolidated Coal and Coke Co.*, 18 F2d 839 (4th Cir 1927).

²²³ 245 US 229 (1917).

²²⁴ Sondra Kay Wilson, ed, *In Search of Democracy: The NAACP Writings of James Weldon Johnson, Walter White and Roy Wilkins (1920–1977)* 239 (Oxford, 1998).

unsuccessful defense was that he was trying to keep the volatile issue of race out of the campaign. He was ultimately defeated narrowly, with Progressive Republican William Borah one of the leaders against confirmation.

In addition to there being an NAACP-sponsored campaign of intense telephone calls and letter writing, there were other aspects of the process that made it more like contemporary hearings, albeit a very modest form of what happens today. There was some testimony in the record that framed Parker's problems in terms of the concept of judicial activism. Clearest on this was Norman Thomas, the leader of the Socialist Party, whose letter to the committee accused Parker of subscribing to the "reactionary theory of property rights" that the Supreme Court had "virtually legislated," and condemned Parker as embodying "the dead hand of precedent and the live hand of a judicial oligarch."²²⁵ In a similar vein, Green, testifying for the AFL, said that Parker had fatally failed to embrace "legal principles in terms of human rights and needs," was thus "not worthy to sit with a Holmes or a Brandeis," and in following the Supreme Court's decision on injunctions and yellow dog contracts in *Hitchman* had embraced what was "the *Dred Scott* decision to labor."²²⁶ On the opposing side, those favoring the appointment repeated that Parker was "fair and impartial."²²⁷ Ultimately, his supporters and the judge himself blamed "radical Senators" and "quasi-socialistic" groups like the NAACP and organized labor for the failed nomination.²²⁸

The Brandeis nomination fourteen years earlier also had interest group involvement. Labor, LaFollette, and most Progressives supported Brandeis, who had been nominated by Woodrow Wilson. He was bitterly opposed by business and financial interests, along with the conservative wing of the Republican Party. They claimed that he lacked the necessary temperament²²⁹ and, according to senior Re-

²²⁵ *Confirmation of Hon. John J. Parker before the Committee on the Judiciary*, 71st Cong, 2nd Sess 59 (1930). Notably, Thomas's focus on judicial views and method was not the subject of senatorial questioning.

²²⁶ *Id.* at 29, 59.

²²⁷ See, for example, *id.* at 76.

²²⁸ Richard L. Watson Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 *Miss Hist Rev* 213, 233 (Sept 1963).

²²⁹ John A. Maltese, *The Selling of Supreme Court Nominees* 50–51 (JHU, 1998).

publican Elihu Root, was “intellectually acute and morally blind.”²³⁰ In some ways, his nomination functioned as a referendum of sorts on progressivism, including its attacks on courts. He had given a speech to the Chicago Bar Association shortly before he was nominated. In it, he argued that the “struggle for the living law has not been fully won,” and lamented that *Lochner* had not been overruled.²³¹ One of his biographers called it “the progressive era’s clearest and most cited critique of the failure to take into account the facts of the real world.”²³² In other ways, though, the opposition was more of a character attack, one that included plenty of anti-Semitism.²³³ The contentious hearings were held in open session, and they dragged on, but did not feature testimony by Brandeis and thus could not produce quite the same kind of public spectacle as we would expect today under the circumstances.

The role of interest groups in contemporary confirmation hearings has changed dramatically since the earlier period. As the battle against judicial activism intensified as a Republican political issue, particularly in the 1980s, so rose a set of interest groups ready to pounce on nominations, both in support and in opposition. The profile of these groups grew higher with the televising of Supreme Court confirmations, which began in 1981.²³⁴ Recall that we earlier observed a rise in the number of senators incorporating the activism issue into their hearing questions and comments.²³⁵ The introduction of the subject was, presumably, related to the greater interest in judicial confirmations taken by interest groups.

Over time, both left- and right-leaning groups came to form virtual standing armies that monitor, organize, and communicate to senators and the public about nominees. On the left, Alliance for Justice, formed in 1985, has acted as an umbrella group researching, monitoring, and

²³⁰ A. L. Todd, *Justice on Trial: The Case of Louis Brandeis* 128 (McGraw-Hill, 1964).

²³¹ Louis D. Brandeis, *The Living Law*, 10 U Ill L Rev 461, 467 (1916).

²³² Melvin I. Urofsky, *Louis D. Brandeis: A Life* 431 (Pantheon, 2009).

²³³ *Id.* at 438–42.

²³⁴ Maltese, *The Selling of Supreme Court Nominees* at 89 (cited in note 229). The Bork nomination was a particular turning point, both for its visibility and the intricacy and sophistication of the media campaign and strategic efforts waged against Bork. It involved coordination among many well-known groups. See Gregory A. Caldeira and John Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 Am J Pol Sci 499 (1998). After the Bork defeat, however, conservatives became better organized and centralized.

²³⁵ See Part II.C.1.

messaging about nominees.²³⁶ It has typically worked with a host of left-leaning groups. On the right, umbrella groups like the Judicial Selection Monitoring Project of the Free Congress Foundation (formed in 1987 after the Bork defeat) and the Judicial Crisis Network have played similar roles, working along with right-leaning interest groups and the Federalist Society.²³⁷

Significantly, over time, these party-loyal interest groups came to be engaged in lower court confirmations as well as Supreme Court nominations.²³⁸ Where such appointments were traditionally matters of patronage, especially appointments to the federal district court, that began to change decisively in the Carter presidency and became institutionalized in the Reagan Administration.²³⁹ The blanket practice of "Senate courtesy," by which home-state senators made choices purely as a matter of patronage, yielded to a more ideologically sensitive practice.²⁴⁰ In the earlier period, patronage generally reigned and interest groups almost never got involved.

The regular role of interest groups on both sides raises the profile of the judicial activism issue as these groups work to communicate with, attract, and mobilize supporters.²⁴¹ Social media is a force-multiplier and makes knowledge about confirmation hearings and debates more easily accessible. The effect of all of this is to widen the sphere of political contestation over nominees and, more generally, judicial activism in ways that were unimaginable in the earlier period.

²³⁶ Amy Steigerwalt, *Battle Over the Bench: Senators, Interest Groups, and Lower Court Confirmations* 11 (U Va, 2010).

²³⁷ Id at 12–13. On the role of Leonard Leo of the Federalist Society in the confirmation hearings for Neil Gorsuch, see Eric Lipton and Jeremy W. Peters, *In Gorsuch, Conservative Activist Sees Test Case for Reshaping the Judiciary*, NY Times (Mar 18, 2017) (available at <https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-conservatives.html>).

²³⁸ Steigerwalt, *Battle Over the Bench* at 13–14 (cited in note 236); Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* 108 (Stanford, 2005).

²³⁹ Roger E. Hartley and Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominations*, 80 *Judicature* 274, 277 (1996).

²⁴⁰ The ideological dimension of lower-court selections is part of what led to the creation of judicial monitoring groups on the left and right. See Steigerwalt, *Battle Over the Bench* at 11 (cited in note 236).

²⁴¹ Another arena in which interest groups participate is through the filing of amicus briefs that provide facts to the Justices in ways that can be controversial. See Allison O. Larsen and Neal Devins, *The Amicus Machine*, 102 *Va L Rev* 902, 921, 944 (2016). This practice has taken off in recent years in a way that had no analogue in the earlier period.

2. *Court-curbing legislation.* Another congressional vehicle for political responses to perceived judicial activism is the proposal of court-curbing legislation. In both the early and the contemporary period, legislators introduced bills designed to modify judicial behavior in various ways. In the early period, bills introduced during heavy periods of court-curbing efforts most frequently addressed matters of procedure, remedy, and jurisdiction.²⁴² This would be consistent with the controversy surrounding labor injunctions and procedures for adjudicating contempt of such injunctions.²⁴³ In the more recent period, when Congress has been active in proposing curbs on courts, there has been the greatest interest in the composition of the Court, along with jurisdiction, judicial review, and targeting of specific decisions by the court. Social issues have figured prominently.²⁴⁴

In *The Limits of Judicial Independence*, Tom Clark offers the most sustained and detailed study of court-curbing.²⁴⁵ He concludes that bills of this sort, the overwhelming majority of which never see the light of day, are more a means of political communication and “position-taking” than a genuine effort to enact legislation.²⁴⁶ Most often they are, in other words, symbolic politics, not practical attempts at governance.

Clark compiled a database of bills introduced between 1878 and 2008. I have taken the decades of relevance for present purposes and then added to Clark’s data the party identification of the sponsor for each bill in the database. The totals by party are shown in table 2.

The partisan patterns over time are consistent with what we have seen in other areas. The political valence of opposition to courts switches from the liberal side in the early period to the conservative side in the contemporary period. Many bills introduced in the 1950s protested a set of Supreme Court rulings on the rights of communists.²⁴⁷ These bills tended to come from members of both parties.²⁴⁸ In the 1960s,

²⁴² Tom S. Clark, *The Limits of Judicial Independence* 45, 52 (Cambridge, 2010).

²⁴³ During the earlier period, there were also some proposals from Progressives to either elect federal judges or limit their terms to a specified number of years. Ross, *Muted Fury* at 95–102 (cited in note 33).

²⁴⁴ *Id.* at 57.

²⁴⁵ See Clark, *The Limits of Judicial Independence* (cited in note 242).

²⁴⁶ *Id.* at 256.

²⁴⁷ The “Red Monday” cases are cited in note 72; see Clark, *The Limits of Judicial Independence* at 54–55 (cited in note 242).

²⁴⁸ Clark, *The Limits of Judicial Independence* at 55 (cited in note 242).

Table 2
Jurisdiction-Stripping Bills by Party
of Sponsor, 1896–2008

Decade	Democrats	Republicans	Other
1896–1900	11	5	2 (Populist)
1901–1910	57	37	0
1911–1920	40	14	0
1921–1930	10	12	1 (Farm-Labor)
1931–1940	45	10	5 (Farm-Labor)
1941–1950	4	4	0
1951–1960	39	12	0
1961–1970	91	62	0
1971–1980	74	80	3 (Independents)
1981–1990	25	45	0
1991–2000	15	36	0
2001–2008	9	76	0

the bills took on a more conservative character and reflected hostility to the Warren Court on a number of issues.²⁴⁹ The partisan makeup of the bills' sponsors in the 1960s, however, reflects that the realignment of southern Democrats had not yet taken root. That partisan turn shows up in this context in the 1970s and 1980s. In the 1980s, bills introduced by Republicans begin to outnumber Democrats and, in recent years, the imbalance has been fairly pronounced.

To take a closer look at contemporary partisan dynamics, I examined the party support for the bills that were introduced between 1980 and 2008 and that were popular enough to draw 10 or more cosponsors. My research finds that there were 49 such bills.²⁵⁰ They

²⁴⁹ *Id.* at 55–57.

²⁵⁰ Not all bills have cosponsor information available. My tally is based on bills with records of cosponsorship.

cover an array of issues, mostly social issues, including such familiar ones as abortion, prayer, flag burning, traditional marriage, and the pledge of allegiance, among others. Fully 40 of those 49 bills had more Republican than Democratic cosponsors, and 18 of them had *only* Republican cosponsors. By contrast, bills with only Democratic (or Democratic-leaning independent) cosponsors numbered only three. Two affirmed the primacy of *Roe*, and one expressed the sense of the house that Supreme Court Justices should try to hire more qualified minority law clerks.²⁵¹ Not unexpectedly, the partisan patterns we have seen elsewhere hold in connection with bill sponsorship.

III. IMPLICATIONS

What might all of this mean? Let us return to where we began—with an argument that equated the nature and consequences of asserted judicial activism in *Obergefell* with the claimed activism of *Lochner*. As we have seen, there are some broad similarities in how opponents framed their claims of judicial activism in the two eras. And, there are more specific similarities, such as that the party most aggrieved by the courts in each era introduces more court-curbing proposals. Yet, overall, the differences in the prevailing political dynamics far exceed the similarities. Systematic efforts to label and oppose judicial activism in the era of *Obergefell* are marked by key features that were absent in the earlier era, including party polarization and cohesion, the regular use of platforms by one party to condemn the courts as activist, and a confirmation process that serves as a regular venue for airing charges of activism, with a standing army of interest groups on both sides of the aisle poised to do battle regularly over judicial appointees. We have seen the rise of these phenomena from the time of the early Warren Court to the present, and they indicate that Supreme Court decisions in the contemporary era are released into a political ecosystem that is strikingly different from the one that existed in the earlier period.

Moreover, juxtaposing the two eras reveals another difference that is sometimes considered part of contemporary polarization: declining civility on the part of the major political parties, a phenomenon that is

²⁵¹ HR 5151, 109th Cong, 2nd Sess (Apr 6, 2006) (“Freedom of Choice Act”); S 2593, 109th Cong, 2nd Sess (Apr 6, 2006) (“Freedom of Choice Act”); HR 111, 106th Cong, 1st Sess (Mar 3, 1999) (clerks).

readily apparent in the context of criticizing courts.²⁵² Contrast the mostly restrained critiques gingerly—and only occasionally—offered up by the Democrats in the earlier period with the more strident language that has been a regular part of Republican platforms of the last few decades. The sense of political caution that held back the major parties from harshly attacking courts in the earlier era has, to put it mildly, receded. Indeed, another thing on display in the *Obergefell* opinions is the extent to which the face of civility on *the Court itself* has been fading, at least in some quarters. In his *Obergefell* dissent, for example, Justice Scalia included a footnote deriding Justice Kennedy's rhetoric that was later characterized by Michael Dorf as "perhaps the most intemperate line in the U.S. Reports."²⁵³ There was, to be sure, incivility of an extreme variety on the Court in the earlier period. Consider, for example, Justice MacReynolds's outrageous racism and anti-Semitism.²⁵⁴ What is different (not worse, but different) about Scalia's outburst is that it involved the tone he came to take with other Justices in his opinions. The coarseness of the Justices' recent written discourse has sometimes echoed the coarseness in the broader political arena.

One way to summarize all of this change since the earlier period is to say that the judiciary has increasingly come to be seen as a political actor. That is not, of course, entirely new; *Dred Scott* stands as a striking example of critics casting the Court as partisan.²⁵⁵ But modern in-

²⁵² See Persily, *Introduction*, in Persily, ed, *Solutions to Political Polarization in America* at 9 (cited in note 80). It bears emphasis that I am focused on how the *major political parties* attacked the courts. The earlier era was not one of civility in any broad or categorical sense. In the domain of labor, there were both violent clashes and harshly hostile rhetoric about courts. See Forbath, 102 Harv L Rev at 1141 (cited in note 55); Richard White, *The Republic for Which It Stands* 782 (Oxford, 2017). In addition, as explored earlier, some of the Progressives' rhetoric about the courts was fairly scathing. See Part II.B.1.b.

²⁵³ Michael Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSblog (June 27, 2015, 5:08 p.m.) (available at <http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/>) (referring to Scalia's assertion that "[i]f, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began [in this way], I would hide my head in a bag."). See also *Obergefell*, 135 S Ct at 2612 (Roberts, CJ, dissenting) (suggesting that Justice Kennedy had been "pretentious" and asking "[j]ust who do we think we are?").

²⁵⁴ David M. O'Brien, *This Time, It's Personal: Justice Scalia's Increasing Incivility*, LA Times (July, 14, 1996) (available at http://articles.latimes.com/1996-07-14/opinion/op-24100_1_justice-antonin-scalia).

²⁵⁵ John B. Gates, *The Supreme Court and Partisan Realignment* (Westview, 1992) 36 ("The fact that the [*Dred Scott*] Court was composed of eight Democrats and one Whig only reinforced the partisan debate over the decision").

formation technology has combined with extreme polarization to significantly intensify his phenomenon. The court is most likely to be perceived in frankly partisan terms in high-profile and controversial cases, where public opinion is already polarized by party, such as *Obergefell*, *NFIB v Sebelius*,²⁵⁶ *Citizens United*,²⁵⁷ and *Shelby County*.²⁵⁸ In such cases, the stakes are high and the Court's decisions are covered by the media like other high-salience political events. This is not to say that the public views the Supreme Court as just another political body, for the evidence suggests that the public sees the Court as both a legal and a political body—as “half-politics-half-law.”²⁵⁹ But it is to say that broad swaths of the public do not see the Court in the simplistic institutional terms that Chief Justice Roberts's propositions about law and legitimacy would suggest.

Indeed, the very assumption that citizens expect judges to decide cases in mechanical or “value-free” ways is not consistent with significant research about how lay citizens view the work of courts. Leading work by James Gibson and Gregory Caldeira argues that citizens are more nuanced than one might think in their perceptions about how judges and courts operate. Based on surveys they fielded, Gibson and Caldeira suggest that nonlawyer citizens believe that judges are not mechanical and do exercise discretion, yet those citizens still retain significant respect for courts:

The American people know that the justices of the Supreme Court exercise discretion in making their decisions—what better evidence of this is there than the multiple and divided judgments by the group of nine? They are also aware that the justices' discretion is guided to at least some degree by ideological and even partisan considerations. None of these understandings seem to contribute to undermining the legitimacy of the Supreme Court. Instead, legitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.²⁶⁰

²⁵⁶ 567 US 519 (2012).

²⁵⁷ *Citizens United v FEC*, 558 US 310 (2010).

²⁵⁸ *Shelby County, Ala v Holder*, 570 US 529 (2013).

²⁵⁹ Keith Bybee, *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* 4 (Stanford, 2010); see Nicholson and Hansford, 58 Am J Pol Sci at 621–22 (cited in note 25) (reviewing literature); see generally James Gibson and Gregory Caldeira, *Has Legal Realism Damaged the Legitimacy of the Supreme Court?*, 45 L & Soc'y Rev 195, 213 (2011).

²⁶⁰ Gibson and Caldeira, 45 L & Soc'y Rev at 213 (cited in note 259). In the article, they contrast the perceived “sincerity” of courts with what subjects typically see as self-interested, strategic behavior in Congress.

Relatedly, Gibson and various coauthors have long emphasized the difference between specific and diffuse support, suggesting that citizens may object to *specific* decisions in the short term, yet tend to have a reservoir of diffuse institutional support for the Court that is rooted in more general faith in democratic values and institutions.²⁶¹ Particularly polarizing decisions, such as *Bush v Gore*, may change the partisan dynamics of even diffuse support to some degree, but there is little evidence that substantive opposition to such decisions translates into long-term threats to the Court’s legitimacy.²⁶²

The picture that Gibson and colleagues draw is one of a public that has a more nuanced perception than the Chief Justice suggests—that is, of citizens perceiving that a mix of rules and discretion guides the Court. One provocative recent analysis went further, suggesting on the basis of experimental research that “a large segment of the public perceives of the court in political terms, and *prefers* that justices be chosen on political ideological bases.”²⁶³ There is a debate about whether that view of public perceptions is well-grounded, and it seems premature to go quite that far based on the current state of the research.²⁶⁴ But it is not controversial to say that, at a minimum, elite cues shape public beliefs about the Court’s work, and that these cues are increasingly partisan. Stephen Nicholson and Thomas Hanford, for example, report on an experiment reflecting that “when there is a political party attached to a Court decision, it appears to operate as it might for other political actors, at least in terms of public acceptance of policy outcomes,” making it more likely that the public will view

²⁶¹ See James L. Gibson, Gregory A. Caldeira, and Lester K. Spence, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 *Brit J Pol Sci* 535, 545 (2003); James L. Gibson and Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 *Annu Rev L Soc Sci* 201, 204–05 (2014); Andrea Louise Campbell and Nathaniel Persily, *The Health Care Case in the Public Mind: Opinion on the Supreme Court and Health Reform in a Polarized Era*, in Nathaniel Persily, Gillian E. Metzger, and Trevor W. Morrison, eds, *The Health Care Case: The Supreme Court’s Decision and Its Implications* 245, 247–48 (Oxford, 2013).

²⁶² See Gibson, Caldeira, and Spence, 33 *Brit J Pol Sci* at 555 (cited in note 261); Manoj Mate and Matthew Wright, *The 2000 Presidential Election Controversy*, in Persily, Citrin, and Egan, eds, *Public Opinion and Constitutional Controversy* at 348–49 (cited in note 25).

²⁶³ Brandon L. Bartels and Christopher D. Johnson, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 *Pub Op Q* 105 (2012) (analyzing data from Annenberg Supreme Court Survey). Bartels and Johnson suggest that citizens do not necessarily think it is ideal, but they acknowledge and accept it.

²⁶⁴ See Gibson and Nelson, 10 *Annu Rev L Soc Sci* (cited in note 261), responding to Bartels and Johnson, *id.*

“the Court as a partisan policy maker.”²⁶⁵ This phenomenon was on clear display in the public’s reaction to the Roberts’s Court decision *upholding* the Affordable Care Act.²⁶⁶ Notably, even though that case might fit the definition of legitimacy-enhancing judicial restraint suggested in the Chief Justice’s *Obergefell* dissent, it engendered sharp, partisan reactions and—at least in the short term—both reduced and further polarized the public’s approval of the Court.²⁶⁷

The importance of partisan cues about the Court’s work intersects with another development of note: evidence of partisan polarization on the Court itself. Neal Devins and Lawrence Baum have found identifiable Democratic and Republican voting blocs among the Justices.²⁶⁸ They attribute the emergence of this partisan divide to the larger growing polarization among political elites, the fact that presidents have increasingly made ideology central to appointment choices, party-line voting in the Senate, and the fact that legal elites in the two parties have sorted themselves on the basis of ideology.²⁶⁹ This phenomenon is, of course, at odds with the image of the apolitical Court evoked by the Chief Justice in *Obergefell*. It is also inconsistent with what Roberts has said recently about the increasingly politicized confirmation process. In 2017, for example, he noted that “[w]e don’t work as Democrats or Republicans,” and lamented that “when you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms.”²⁷⁰ He is surely right that the confirmation process has become more politicized. But it is misguided to focus on that process in isolation. As we have seen, the confirmation process is part of a much larger and more elaborate political context that surrounds and

²⁶⁵ See Nicholson and Hanford, 58 Am J Pol Sci at 634 (cited in note 25); see generally Persily, Citrin, and Egan, eds, *Public Opinion and Constitutional Controversy* (cited in note 25).

²⁶⁶ See Campbell and Persily, *The Health Care Case in the Public Mind*, in Persily, Metzger, and Morrison, eds, *The Health Care Case* at 261–65 (cited in note 261).

²⁶⁷ Id at 265–67.

²⁶⁸ Neal Devins and Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court* 3 (William & Mary Law School Research Paper No 09-276, 2014) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432111); see also Adam Liptak, *The Polarized Court*, NY Times (May 11, 2014) (available at https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?_r=0).

²⁶⁹ Devins and Baum, *Split Definitive* (cited in note 268).

²⁷⁰ Adam Liptak, *An “Ideological Food Fight” (His Words in 2002) Awaits Neil Gorsuch*, NY Times (Mar 18, 2017) (available at https://www.nytimes.com/2017/03/18/us/politics/neil-gorsuch-supreme-court-trump.html?_r=0).

shapes the Court, and that connects partisanship and law in complex ways.

The dynamics suggested by this body of research on partisanship and judicial decision making were very much on display in the public reactions to *Obergefell*. Indeed, those reactions provide good reasons to doubt the Chief Justice's argument equating public legitimacy with restraint, and suggest that the argument misconceives the contemporary environment in which the Court operates. Given the polarized politics that have surrounded the Court for the last several decades, it is likely that Democrat/Republican or Liberal/Conservative, more than any institutional ideal or legal-methodological commitment, provides the lens through which most citizens, with cues from partisan political and partisan-aligned elites, assess the judiciary and the subset of decisions that capture significant public attention.²⁷¹

Obergefell was among the most salient decisions in recent memory, capturing massive international attention and dominating social media activity the day it was decided. As I have explored elsewhere, in the first hour after *Obergefell* was decided, it spawned 3.8 million posts on Facebook.²⁷² There were 6.2 million tweets about it, at a pace of 20,000 tweets per minute, in the first four hours after the decision was released. Thousands of people posted excerpts of language from the opinions, which were readily available at scores of news and other websites. Particularly popular on Twitter were Justice Kennedy's closing lines that same-sex couples "ask for equal dignity in the eyes of the law. The Constitution grants them that right."²⁷³ That rights language was countered by many people tweeting language about activism from the dissents, such as Justice Scalia's characterizing the ruling as a "judicial Putsch," the Chief Justice's rhetorical question "Just who do we think we are?," or Roberts's invitation to supporters of marriage equality to relish their victory but not to "celebrate the Constitution. It has nothing to do with it."²⁷⁴

Consistent with the high profile of the case, most of the candidates in the 2016 presidential primaries posted rapid reactions to it, with a

²⁷¹ Nicholson and Hansford, 58 Am J Pol Sci at 634 (cited in note 25); Schacter, 77 Ohio St L J at 1029–31 (cited in note 24) (reviewing partisan reactions to *Obergefell*).

²⁷² I review this in detail in Schacter, 77 Ohio St L J at 1029–33 (cited in note 24).

²⁷³ Id at 1032.

²⁷⁴ Id.

clear—and utterly unsurprising—political divide.²⁷⁵ Hillary Clinton, for example, celebrated the historic victory “from Stonewall to the Supreme Court,” while candidate Jeb Bush made a plea for religious liberty protection for opponents of same-sex marriage.²⁷⁶ Many of the Republican candidates made some version of an activism-based attack, arguing, for example, that “five unelected justices [had] decided to redefine the foundational unit that binds together our society,”²⁷⁷ and that citizens “must resist and reject judicial tyranny, not retreat.”²⁷⁸ By contrast, President Obama tweeted that “Today is a big step in our march toward equality,”²⁷⁹ and adopted a rights-based framing in his Rose Garden speech, praising the decision for “reaffirm[ing] that all Americans are entitled to the equal protection of the law. That all people should be treated equally, regardless of who they are or who they love.”²⁸⁰ In the public eye, in other words, the decision unfolded like other high-salience government decisions, with partisan frames and ideologically distinct social media feeds shaping what people saw and learned about the case.

The public criticisms of *Obergefell* from conservative opponents pressed the activism theme as a way of attacking the legitimacy of the ruling and of the “five lawyer” Court itself. But it is not hard to imagine a different kind of legitimacy attack on the Court had the case come out the other way. Let us engage in a thought experiment. Imagine a counterfactual *Obergefell* in which Justice Kennedy cast the deciding vote to affirm the Sixth Circuit. The marriage bans in Kentucky, Tennessee, Michigan, and Ohio were upheld, and other states were thus free to maintain or reinstate bans on same-sex marriage.

²⁷⁵ Id.

²⁷⁶ Id. at 1030.

²⁷⁷ Jonathan Topaz and Nick Gass, *Republican Presidential Candidates Condemn Gay Marriage Ruling*, Politico (June 26, 2015) (quoting Rick Santorum) (available at <http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466>).

²⁷⁸ Topaz and Gass, *Republican Presidential Candidates* (cited in note 277) (quoting Mike Huckabee).

²⁷⁹ President Barack Obama (@POTUS), *Twitter* (June 26, 2015, 7:10 a.m.) (available at <https://twitter.com/POTUS/status/614435467120001024>).

²⁸⁰ *Remarks by the President on the Supreme Court Decision on Marriage Equality*, White House Briefing Room (June 26, 2015) (available at <https://obamawhitehouse.archives.gov/the-press-office/2015/06/26/remarks-president-supreme-court-decision-marriage-equality>).

What would the public reaction have been to this reverse-*Obergefell*? Most likely, with different winners and losers: Praise from social conservatives, condemnation from the left, and a decision at odds with the trajectory of public opinion. What, more specifically, would have been the critique coming from disappointed advocates and elected officials who supported marriage equality?

We can make an informed prediction about the likely critiques that would have greeted this reverse-*Obergefell* based on the reactions to the Sixth Circuit's ruling in *Obergefell* itself. By a 2–1 vote, that court upheld the marriage bans in a case then captioned *DeBoer v Snyder*.²⁸¹ Reactions to *DeBoer* are not a perfect parallel because the volume and visibility of reaction was considerably lower than what would have followed a reverse-*Obergefell* ruling.²⁸² But there are predictable themes and, in truth, neither the media coverage, nor the reaction from marriage-equality supporters to *DeBoer*, should be seen as terribly surprising. Just as the criticisms of the Supreme Court's actual holding in *Obergefell* tracked the dissenters' emphasis on activism, so the criticisms of the *DeBoer* decision tracked the *Obergefell* majority's emphasis on the importance of constitutional equality and judicial independence from politics.

With these caveats, consider the following descriptions of, and commentaries on, the Sixth Circuit's decision. First, mainstream reporters covering the decision identified the writing judges by their party of appointment. The *USA Today* story called Judge Sutton "one of the Republican Party's most esteemed legal thinkers and writers," noted that "fellow GOP nominee Deborah Cook concur[red]," and characterized Judge Martha Craig Daughtrey as "a Democratic appointee" who "delivered a blistering 22-page dissent."²⁸³ The *New York Times* similarly noted that Sutton was "an appointee of George W. Bush," and that the "stinging dissent" was written by Daughtrey,

²⁸¹ 772 F3d 388 (6th Cir 2014).

²⁸² And, some of the reaction to the 6th Circuit opinion was shaped by the fact that it was the first federal appellate decision that was decided adversely to same-sex couples after a wave of victories. As such it set up the circuit split that many supporters of marriage equality had hoped for to trigger a certiorari grant.

²⁸³ Richard Wolf, *Gay Marriage Bans in Four States Upheld, Supreme Court Review Likely*, *USA Today* (Nov 6, 2014) (available at <https://www.usatoday.com/story/news/nation/2014/11/06/gay-marriage-appeals-court-ohio-michigan-kentucky-tennessee/15712319/>).

“an appointee of Bill Clinton.”²⁸⁴ Just as coverage of *Obergefell* frequently included references to the Supreme Court’s “liberal” and “conservative” wings or to the party affiliation of the Justices,²⁸⁵ so the *DeBoer* decision was framed by national newspapers in terms of the judges’ partisan ties.

There were plenty of reactions from those unhappy with Judge Sutton’s opinion upholding the marriage bans. Some of those reacting are likely to be the kinds of elites that cue constituencies within the mass public about important decisions. We can begin with a major interest group. The Human Rights Campaign, a leading national LGBT rights group, blasted the opinion with a statement headlined “Shameful Sixth Circuit Decision Upholds Discriminatory Marriage Bans in MI, KY, TN, & OH.”²⁸⁶ The statement included this:

The legacies of Judges Deborah Cook and Jeffrey Sutton will forever be cemented on the wrong side of history. . . . Gay and lesbian couples in Kentucky, Michigan, Ohio and Tennessee are just as deserving of marriage equality as the rest of America. Now, more than ever before, the Supreme Court of the United States must take up the issue and decide once and for all whether the Constitution allows for such blatant discrimination.²⁸⁷

The essential framing here was the accusation of “blatant discrimination,” a charge that attacks the court’s legitimacy in a different way than the activism charge does. This theme was pursued by some of

²⁸⁴ Eric Eckholm, *Court Upholds Bans in Four States*, NY Times (Nov 6, 2014) (available at <https://www.nytimes.com/2014/11/07/us/appeals-court-upholds-same-sex-marriage-ban.html>); see also Joshua Berlinger, *Court Upholds 4 Same-Sex Marriage Bans; Will Supreme Court Review?*, CNN (Nov 7, 2014, 8:51 a.m. ET) (available at <http://www.cnn.com/2014/11/07/us/same-sex-marriage-ruling/index.html>).

²⁸⁵ For examples, see Robert Barnes, *The Supreme Court: Too Liberal?*, Wash Post, July 26, 2015 (available at https://www.washingtonpost.com/politics/courts_law/the-supreme-court-too-liberal/2015/07/26/5e31c988-320f-11e5-8353-1215475949f4_story.html?utm_term=.bd0f8cec128d); Lawrence Hurley, *Supreme Court’s Landmark Ruling Legalizes Gay Marriage Nationwide*, Reuters, June 27, 2015 (available at <https://www.reuters.com/article/us-usa-court-gaymarriage/landmark-u-s-supreme-court-ruling-legalizes-gay-marriage-nationwide-idUSKBN0P61SW20150628>). This phenomenon, of course, extends beyond *Obergefell*. See generally Hannah Fairfield and Adam Liptak, *A More Nuanced Breakdown of the Supreme Court*, NY Times, June 26, 2014 (available at <https://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html>) (noting that “[t]his is the time of year that the news media rolls out a familiar graphic: nine head shots of Supreme Court justices, arrayed from most liberal to most conservative”).

²⁸⁶ *Shameful Sixth Circuit Decision Upholds Discriminatory Marriage Bans in MI, KY, TN, & OH*, Human Rights Campaign (Nov 6, 2014) (available at <https://www.hrc.org/press/shameful-sixth-circuit-decision-upholds-discriminatory-marriage-bans-in-mi>).

²⁸⁷ *Id.*

the Democratic politicians who got into the act, as well. Consider, for example, this press release from Ohio Senator Sherrod Brown:

"All Americans should have the same rights," Brown said. "Like so many Ohioans, I'm disappointed in today's ruling that restricts the recognition of lawful marriages regardless of whom they love or where they live. It's time for the courts to join the growing majority of Americans who support full civil rights for our gay and lesbian family, friends, and neighbors."²⁸⁸

Representative Dan Kildee, from Michigan's 5th congressional district, alluded in his press release to Michigan Governor Rick Snyder and Attorney General Bill Schuette, saying these partisans had "continue[d] their ideological crusade against loving Michigan families at taxpayer's expense,"²⁸⁹ and then declared:

With today's ruling, the U.S. Supreme Court should immediately take up the issue of marriage equality, as I am confident that the U.S. Constitution affords every Michigander and American the right to marry whom they choose. Love is love, and equality will ultimately prevail.²⁹⁰

Some commentary from bloggers responded in greater depth and offered more fully elaborated critiques of the Sixth Circuit's ruling. These critiques were likely directed at a politically engaged and aware audience, but are worthy of attention because they spell out ways in which the court's legitimacy, understood beyond the activism/restraint dichotomy, can be questioned. Material of this sort is probably better understood as a source of framing for progressive elites, who might then cue wider audiences, rather than as material likely to be consumed directly by large segments of the public.

Jay Michaelson, columnist for the *Daily Beast*, identified Judge Jeffrey Sutton as a "respected conservative thinker," and a "judge's judge, a consummate professional," and then proceeded to review *seriatim* the multiple arguments in Sutton's opinion.²⁹¹ He placed particular emphasis on a normative argument about the role of courts:

²⁸⁸ Senator Sherrod Brown (D-Ohio), *Brown Statement on Sixth Circuit Court Ruling to Uphold Ban on Same-Sex Marriage* (Nov 6, 2014) (available at <https://www.brown.senate.gov/newsroom/press/release/brown-statement-on-sixth-circuit-court-ruling-to-uphold-ban-on-same-sex-marriage>).

²⁸⁹ Representative Dan Kildee (D-Mich), *Statement by Congressman Dan Kildee on Sixth Circuit Ruling on Gay Marriage* (Nov 6, 2014) (available at <https://dankildee.house.gov/media/press-releases/statement-congressman-dan-kildee-sixth-circuit-ruling-gay-marriage>).

²⁹⁰ *Id.*

²⁹¹ Jay Michaelson, *All The Wrong Reasons to Ban Gay Marriage*, *Daily Beast* (Nov 7, 2014) (available at <https://www.thedailybeast.com/all-the-wrong-reasons-to-ban-gay-unions>).

[Sutton] argues that it is better “to allow the democratic processes begun in the states to continue” debating the merits of same-sex marriage, rather than “take a poll of the three judges on this panel.” As noted by Judge Martha Craig Daughtrey in dissent, this is an outrageous position. The whole point of courts is to be counter-majoritarian, i.e., to interpret the constitutional principles that constrain majorities from oppressing minorities.²⁹²

Michaelson then pivoted to considering originalism, noting that Sutton had argued that:

“From the founding of the Republic to 2003, every state defined marriage as a relationship between a man and a woman,” and concludes that “the Fourteenth Amendment permits, though it does not require, states to define marriage in that way.” Wait, what? From the founding of the Republic until 1967, many states defined marriage as a relationship between two people of the same race. . . .

This is why “originalism” is so beloved of cultural conservatives: All it really means is “keep the status quo.”²⁹³

Note the key claims: Sutton is conservative, majoritarianism in the context of state-sanctioned inequality is outrageous, allowing a ban on same-sex marriage reeks of the bias of segregation, and originalism is a disingenuous form of resisting change. Consider another online writer unhappy with the opinion, Mark Joseph Stern, writing in *Slate*:

Thursday’s 2–1 decision by the 6th Circuit upholding four states’ gay marriage bans is a deeply obnoxious slog. . . . Its author, Judge Jeffrey Sutton, seems to fundamentally misunderstand the constitutional arguments behind marriage equality. . . . After a while, Sutton’s repeated insistence that it’s not a federal judge’s duty to enforce the constitution makes you want to grab him by the shoulders and ask, *then what in the world were you hired for?*²⁹⁴

Stern made a version of Michaelson’s core point: This is an indefensible abdication of the judicial role.

The various elements of the attack on the Sixth Circuit were, thus, to emphasize the partisanship of the judges, to accuse the majority of bias, and to argue that the judges have violated their obligation to protect constitutional rights. This sketch suggests that, in the context

²⁹² Id.

²⁹³ Id.

²⁹⁴ Mark Joseph Stern, *Read the Hilarious, Humane Dissent from the 6th Circuit’s Awful Gay Marriage Ruling*, *Slate* (Nov 7, 2014, 8:30 a.m.) (available at http://www.slate.com/blogs/outward/2014/11/07/the_sixth_circuit_gay_marriage_case_dissent_is_hilarious_and_humane.html).

of sharply polarized parties and divisive issues, there may well be *no* resolution that does not lead one side to react in ways that question the Court's legitimacy. Abdication is a version of a legitimacy argument, though not one that sounds in the logic of activism and restraint. There are undoubtedly others. The Roberts-style plea to leave it to democracy in the name of judicial legitimacy assumes that citizens operate within an activism/restraint dichotomy and assess judges based on it. Yet the dynamics of contemporary politics furnish little reason to believe that is the case.

IV. CONCLUSION

The political dynamics explored here reflect points of sharp contrast between the two eras. The heart of the difference relates to the changes in how the two major parties approach judicial issues and, in a more fundamental sense, how the parties approach one another. As we have seen, the party polarization that has been on the rise for the last four decades is in full force on judicial issues, and is reflected vividly in such settings as confirmation hearings and the identification of party platform positions about courts. Since the 1968 presidential campaign, it has been the Republican Party that has pressed claims of activism and criticized the courts with increasing stridency and vigor. All of this contrasts with the earlier period.

To observe this change over time, however, is not to say that the positions of the parties are immune from further shifts. Indeed, it is not difficult to imagine a progressive faction of Democrats invoking an economic populist case against an increasingly conservative Court it brands as activist. That might make an interesting counterpoint to the *cultural* populist claims that underwrite claims about judicial activism from the right. Both would scorn a set of loathed elites, albeit not the same set. Certainly, some scholars and activists have staked out versions of such a claim.²⁹⁵ Similarly, the tried-and-true attacks by Republicans on judicial activism may at some point be reframed or abandoned. Already, some on the right wish to retire the idea and

²⁹⁵ See, for example, Ian Milhiser, *Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted* 229 (Nation Books, 2015) ("the wealthiest Americans, thanks to the Roberts Court, now enjoy an unprecedented ability to corrupt elections. . . . Why bother to rig an election when you can simply buy it?"). Cf. Fishkin and Forbath, 94 *BU L Rev* (cited in note 136) (de-emphasizing courts and calling for a political movement supporting "constitutional political economy" and an "anti-oligarchy" principle).

rhetoric of activism in favor of what some call “judicial engagement” and “constitutional conservatism.”²⁹⁶ The anchoring principle would be some version of a robust protection of liberty, including economic liberty, and the retreat from presumptive deference to regulatory legislation.

Should the parties refashion their positions in these directions, we would find ourselves in a political moment that looks in some ways more like the *Lochner* era than anything has in a long time. But because of decades of polarization, and the technology of contemporary politics, the political process surrounding the Court will never again look like the one that existed at the time of *Lochner*. Probing these changed political dynamics in the realm of constitutional politics has been the principal task of this article. These changes cast doubt on simple analogies and warnings about the institutional risks of a perceived return to *Lochner* because they do not account for the political dynamics that surround the Court and inevitably shape public perceptions about the Court and the law more generally.

²⁹⁶ Randy Barnett, “*Judicial Engagement*” Is Not the Same as “*Judicial Activism*,” The Volokh Conspiracy, Wash Post (Jan 28, 2014) (available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/28/judicial-engagement-is-not-the-same-as-judicial-activism/?utm_term=.8309301f74cc) (advocating terms signaling that “judges are restrained to follow the Constitution, whether this leads to upholding or invalidating legislation”).