Section 2: 2008 Election and the Supreme Court

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II. 2008 ELECTION AND THE SUPREME COURT

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Among the starkest contrasts between John McCain and Barack Obama is the dramatic difference in their promised approaches to judicial appointments, especially to the closely divided Supreme Court.

McCain, eager to establish credibility with conservatives, has bashed liberal "activist judges" who intrude into "policy questions that should be decided democratically," and essentially vowed to move the Court sharply to the right in judicial philosophy.

The presumptive Republican nominee has identified Bush-appointed Chief Justice John Roberts and Justice Samuel Alito as models.

Obama, who voted against both men during their Senate confirmation hearings, has said that they and the Court too often side with "the powerful against the powerless" and lack "empathy" for ordinary people. The presumptive Democratic nominee exudes determination to move the Court sharply to the left if he gets the chance.

At a time when the Court is precariously balanced—with four conservatives, four liberals (including the two oldest justices), and the ideologically eclectic Anthony Kennedy—these contrasting approaches have provided opposing activists with nightmare visions to rally the Democratic and Republican bases during the presidential race.

The liberal nightmare (and conservative dream) is McCain replacing one or more aging liberals with conservatives who proceed to overrule or hollow out Roe v. Wade and other liberal precedents; throw gay rights into reverse; discard the constitutional right to privacy; outlaw all racial preferences and school integration programs; narrow the reach of civil-rights protections for women, minorities, and disabled people; bless virtually unrestricted government funding of religious schools and sponsorship of crosses and other religious symbols on public property; stop shrinking and start expanding the death penalty; mow down gun control laws; roll back the four decisions since 2004 that have checked Bush administration efforts to expand presidential power in the name of fighting terrorism; and make it ever harder for consumers and workers to sue businesses.

The conservative nightmare (and liberal dream) is an Obama Court requiring taxpayers to fund essentially unlimited abortion rights throughout pregnancy; ordering all 50 states to bless gay marriage; expanding and perpetuating the use of racial preferences far beyond the 25-year phaseout suggested by the justices five years ago; prohibiting tuition vouchers for religious schools; stripping "under God" from the Pledge of Allegiance; banning the death penalty; striking down the new federal wiretap law; expanding judicial oversight of military detentions, CIA interrogations, and perhaps other operations worldwide; opening the floodgates to big-dollar lawsuits against business; eroding property rights; and perhaps creating new constitutional rights to physician-assisted suicide, human cloning, and massive government welfare and medical care programs.

Chances are that any change in the Court's direction will be less extreme than these
competing visions suggest, for two big reasons: A Democratic-controlled Senate might well block McCain from putting another strong conservative on the Court, and Obama may never have an opportunity to replace one of the Court’s current conservatives.

That said, the advanced ages of some of the liberal justices suggest that McCain would have a better chance of pushing the Court at least some distance to the right than Obama would have of pushing it to the left, especially during the next four years.

“The election is really a one-way street when it comes to the Supreme Court,” says Thomas Goldstein, a leading Court practitioner and analyst. “Because the plausible retirements are all on the left, McCain can hope to move the Court significantly to the right. But the best case for Obama is to freeze its ideology in place.”

Obama and McCain, of course, do not say in so many words that they will name “liberal” or “conservative” justices. And no such simplistic label can capture the complexity of any judge’s philosophy or voting patterns. The four “liberal” justices, for example, are too cautious to slake the thirst of many Democrats for a vision of crusading, Court-driven social reform. But in politically charged cases on which the justices are closely divided, eight of them—all but Kennedy—happen to split 4-4, with considerable consistency, along lines corresponding to liberal and conservative policy outcomes. That’s why these admittedly imperfect labels are the best available shorthand for generalizing about differing approaches to judging.

Battles Ahead?

All nine justices appear to be in good health. But the two oldest—88-year-old John Paul Stevens and 75-year-old Ruth Bader Ginsburg—are liberals. So is 68-year-old David Souter, who has told friends that he longs to go home to New Hampshire. By contrast, Kennedy and the four conservatives seem reasonable bets to serve another four to eight years or more. Kennedy and conservative firebrand Antonin Scalia are 72. Clarence Thomas, the Court’s most conservative member, Alito, and Roberts are a relatively frisky 60, 58, and 53, respectively. Six of the last eight justices to retire or die in office ranged in age from 79 to 85.

Given this age distribution, a President McCain would have at least one potentially balance-tipping vacancy to fill unless the vigorous Stevens smashes the oldest-serving-justice record set by Oliver Wendell Holmes Jr., who retired at 90. But it’s doubtful that McCain could get the Senate to confirm a nominee with strong conservative credentials, especially to replace one of the liberals or Kennedy.

Precisely because of the dramatic impact that a conservative nominee could have on issues including abortion rights and racial preferences, the pressure from liberal activists for Senate Democrats to stop any conservative—by filibustering, if necessary—would be extremely intense.

So, the battle over any strongly conservative McCain nominee could be even more ferocious than the one that ended in the defeat of conservative Judge Robert Bork in 1987 by a 58-42 vote. Democrats had a 54-46 Senate majority then, and they hope to gain enough seats in this year’s elections to have a comparable majority in 2009, even if McCain wins the presidency.

President Reagan cared more about moving
the Court to the right than does McCain, who showed little interest in the courts until he needed the judicial-appointment issue to woo conservatives who have never trusted him. But even Reagan was forced to turn to a more moderate, less predictable figure after Bork’s defeat. He chose Kennedy, who has alternately sided with and infuriated conservatives.

McCain would also have to wrestle with the fact that potential nominees whom conservatives find pleasing would also be good bets to strike down part or all of McCain’s signature legislative achievement: the 2002 McCain-Feingold campaign finance law.

Adding to the problems the Republican might have in finding a confirmable conservative is the strong political pressure that he (or Obama) will feel to name a woman. At a time when nearly half of the nation’s law students are women, the Court’s 8-1 male-female ratio strikes many people as offensive, or at best odd. There will also be pressure to put a Hispanic-American or another African-American on the Court.

There is no shortage of well-qualified female lawyers. However, there is a glaring shortage of well-qualified female lawyers who are also identifiably conservative, clearly confirmable, old enough (over 40) to seem sufficiently experienced, and young enough (under 65) to serve for many years. Indeed, Republican experts are hard-pressed to name a single woman—or an African-American or Hispanic-American male, for that matter—who fits all of these criteria. Some fear that if Democrats’ Senate majority grows, “confirmable conservative” may be an oxymoron.

Beyond that, conservative judges have been smeared as monsters ever since Sen. Edward Kennedy, D-Mass., declared: “Robert Bork’s America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, [and] rogue police could break down citizens’ doors in midnight raids.” Some outstanding potential McCain nominees don’t want to subject themselves to the ordeal that the confirmation process has become.

Miguel Estrada, a brilliant, solidly conservative appellate lawyer who soared to the top of his Harvard Law School class after emigrating from Honduras as a teenager, was seen by admirers as the perfect prospect to be the first Hispanic-American justice. But when he was nominated in 2001 for a federal Appeals Court, he was trashed by liberal groups and ultimately blocked by a Democratic filibuster.

In 2005, Estrada flatly refused when the White House pressed him to consider taking the nomination to succeed Justice Sandra Day O’Connor, according to *Supreme Conflict*, a penetrating 2007 book about the Court by Jan Crawford Greenburg, now of ABC News. Part of the reason was the tragic death of Estrada’s wife the year before. Part of it was that he did not want to go through the confirmation wringer again. Maura Corrigan, an impressive Michigan Supreme Court justice, also refused.

Democrats do not have a monopoly on character assassination, of course. In 1999, to pick just one example, then-Sen. John Ashcroft called a well-qualified Clinton nominee named Ronnie White “pro-criminal and activist,” with “a tremendous bent toward criminal activity.” Democrats have taken their revenge by smearing some equally worthy Bush nominees. Thus has the
confirmation process become ever more vicious, occasionally marked by a temporary truce.

“I would hope that if Senator McCain is elected president, the Democrats in the Senate would respect a highly qualified nominee of McCain’s as much as the Republicans in the Senate would respect a highly qualified nominee of a President Obama,” says Theodore Olson, a leading conservative lawyer and former Bush solicitor general who is McCain’s most prominent adviser on judicial appointments.

Olson noted that Republican senators voted overwhelmingly for Clinton’s Supreme Court nominees, Ginsburg and Stephen Breyer, in 1993 and 1994. But the judicial confirmation wars have become uglier since then, and Olson seems likely to be disappointed.

A President Obama, on the other hand, would be less likely to have an opportunity to make a balance-tipping nomination but far more likely to get the Senate to confirm just about anyone he chose. Democrats are likely to pick up three to six more Senate seats in November if an Obama win provides them with coattails.

The door would be open for Obama, if he were so inclined, to appoint the kind of crusading liberal that the Court has not seen since Justices William Brennan and Thurgood Marshall retired in 1990 and 1991—or, for that matter, to appoint Hillary Rodham Clinton if she wanted the job.

Replacing one or more of the current liberals with such a figure would solidify the liberal bloc. And a Scalia or Kennedy retirement would enable Obama to move the Court dramatically to the left, creating a solid liberal majority for the first time since Chief Justice Earl Warren retired in 1969.

Senate Republicans would fight hard—and some might fight dirty—to stop a crusading liberal nominee. But they would probably lose. Not only will Republicans almost certainly be in the minority; they will also have a hard time mustering 41 votes for a filibuster. Senate GOP leaders assailed filibusters of nominees as unconstitutional when Democrats were doing it to some of Bush’s Appellate Court choices. The filibusters ceased as part of a bipartisan deal in 2005 among 14 mostly moderate senators, one of whom was McCain.

While that informal deal would not stop Republicans from trying to filibuster an Obama Supreme Court nominee, a mass Republican flip-flop on such a matter of constitutional principle would look awfully hypocritical.

For these and other reasons, “It would be an exciting search and an exciting process to gather names of potential nominees for President Obama to consider, because there are a lot of highly qualified and confirmable candidates,” says Gregory Craig, a Washington lawyer who is one of Obama’s main foreign-policy advisers.

It’s unclear whether a President Obama would be in crusading-liberal mode or in consensus-builder mode in choosing a justice. An appointee likely to push the law hard to the left would delight liberals while aggravating the Court’s ideological polarization. A moderate-liberal consensus-builder might disappoint some of Obama’s most fervent supporters.

**Sharp Contrasts**

Apart from the Supreme Court, the next president will fill a steady stream of vacancies—and perhaps a batch of newly created seats—on the federal District and Appeals courts. The cumulative impact of
those choices may well be more important than any one Supreme Court appointment, although far less visible.

U.S. District and Appeals Court judges have broad discretion to decide the many legal issues left unresolved by the relatively small number of Supreme Court decisions. The 70 cases decided by the Court over the last year—the fewest in more than half a century—amount to about one-tenth of 1 percent of the 60,000 or so appeals filed annually in the regional federal Appeals courts, and less than 4 percent of the petitions for Supreme Court review.

After almost eight years of Bush appointments—and Democratic defeats of especially conservative nominees—Republican-appointed judges hold 54 percent of the 674 full-time federal District Court judgeships and 56 percent of the 179 full-time seats on the 13 federal Circuit Courts of Appeals, which play a far more important role in setting legal policy.

GOP appointees have lopsided majorities on six of these federal circuits and smaller majorities on four others. Democratic appointees dominate only the expansive 9th Circuit, with 16 of its 29 seats. The remaining two circuits are closely balanced. The next president will have at least a dozen Appellate vacancies waiting for him when he takes office, and Congress may create more judgeships next year.

Given normal rates of attrition, a President Obama might be able to replace enough Republican judges over eight years to leave the Appeals courts about evenly balanced, perhaps with a majority of Democratic appointees. A President McCain would be in a position to leave strong majorities of Republican appointees on all 13 circuits.

McCain has been especially outspoken on the campaign trail about judicial appointments, in keeping with his need to rally the Republican base. Obama, who was president of the *Harvard Law Review* and has taught constitutional law at the University of Chicago, has also made his approach pretty clear.

The contrast between them was particularly striking when they reacted to the Court’s 5-4 decision on June 12 that Guantanamo detainees have rights to full federal judicial review of their petitions for release—a strong rebuff to Bush. Obama praised the liberal justices (plus Kennedy) for “an important step toward re-establishing our credibility as a nation committed to the rule of law.” McCain condemned them for “one of the worst decisions in the history of this country.”

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WASHINGTON—It could be seen as the sincerest form of flattery: Ask some activists on the left the kind of Supreme Court justice they would like to see a President Obama appoint, and the name you hear most is the same justice they most often denounce.

They want their own Antonin Scalia. Or rather, an anti-Scalia, an individual who can easily articulate a liberal interpretation of the Constitution, offer a quick sound bite and be prepared to mix it up with conservative activists beyond the marble and red velvet of the Supreme Court.

Some have even mentioned Sen. Hillary Rodham Clinton for the role, although there is no evidence it would interest her or that Obama would consider his former rival for the Democratic presidential nomination for the court. But as the Supreme Court takes its traditional spot in the background of the presidential campaign, there is a longing on the left for a justice who would energize not only the court’s liberal wing, but also the debate over interpreting the Constitution.

“Someone with vision,” said Doug Kendall, who recently helped found a new liberal think tank called the Constitutional Accountability Center. “Someone who looks hard at the text and history of the Constitution, as Justice Scalia does, and articulates a very clear idea of how that text points to liberal and progressive outcomes.”

Liberal legal activists have consistently lagged behind conservatives in convincing their partisans that the court should be a voting issue. The court remains ideologically split, but any openings presented to the next president are almost sure to come from within the court’s liberal wing. The two oldest members of the court are Justices John Paul Stevens, 88, and Ruth Bader Ginsburg, 75.

If John McCain were elected, the appointment of a conservative justice could immediately reshape the court. The senator from Arizona might be forced to temper his choice to accommodate confirmation by a solidly Democratic Senate, but his nominee would undoubtedly be far to the right of either Stevens or Ginsburg, potentially solidifying a five-member conservative majority. President Bush’s appointments to court, Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., are both relatively young and are expected to be fixtures for decades.

If Obama had the opportunity to make an appointment, it would be only the fourth nomination from a Democratic president in more than 40 years. And for activists on the left, it could signal the opportunity to create a new dynamic for the court.

“It is a court with no true liberal on it, the most conservative court in 75 years,” said Geoffrey Stone, a law professor at the University of Chicago, where Obama once taught constitutional law. “What we call liberals on this court are moderates, or moderate liberals, if you want to get refined about it.”

Stone notes, as he said Stevens has, that every justice on the current court with the
exception of Ginsburg is more conservative than the justice he replaced—a natural evolution given that seven of the nine were appointed by Republican presidents.

Harvard law professor Lani Guinier hopes to get scholars, as well as judges, to rethink the role of a Supreme Court justice, a role she describes as “the justice as a teacher in a national seminar, an educator.”

“They’re not just making laws and delivering those tablets from Mount Olympus,” Guinier said. “The project of being a Supreme Court justice is also a project of being an important citizen in a democracy.”

While Guinier said she would not necessarily argue that the next president should nominate a politician, she said it was important to “make the court more democratically accountable.”

“I think Hillary Clinton would bring to the court a range of experiences that the court doesn’t presently have access to,” Guinier said, noting that Clinton has run for two political offices and traveled all over the country engaging ordinary people in conversations “about real challenges that affect their lives.”

James Andrew Miller, an assistant to former Senate Majority Leader Howard H. Baker Jr., wrote an op-ed in The Washington Post in May suggesting Clinton for the court, and said he was “just blown away” by the response.

Massachusetts Gov. Deval Patrick, D, a former Justice Department official and prominent Obama friend, has also been mentioned as a potential court appointee, and such a move would not be unprecedented. There is a substantial list of justices who once held political office. Most famously, President Eisenhower made good on his promise of an appointment to his onetime rival, California Gov. Earl Warren.

But the jobs could hardly be more different—the somewhat solitary pursuits of a justice versus the glad-handing and collaborative responsibilities of a politician. But someone who has been tested by campaigns for public office might be more comfortable in the public arena, argued Dawn Johnsen, a former Clinton administration official who now teaches law at Indiana University, who said there “is a desire to have justices talking to the American people beyond their opinions.”

Cass R. Sunstein, an informal Obama adviser now at Harvard Law School, last year instigated the debate by lamenting the “absence of anything like a heroic vision on the court’s left” to counteract Scalia and Justice Clarence Thomas.

John Podesta, once President Bill Clinton’s chief of staff and now president of the Center for American Progress, recently told the liberal American Constitution Society that the idea of “balancing” the courts with judges on the extreme left was not a good idea.

“We don’t need to play that same game,” he said—a notion not particularly well-received by those in the audience.

Christopher L. Eisgruber, provost at Princeton University and author of a book about Supreme Court nominations titled The Next Justice, said liberal activists seemed split between “breaking the mold a little between liberals and conservatives” and putting “somebody in the opposite corner in the boxing ring with Antonin Scalia.”

Obama himself has been opaque and even contradictory about his criteria for a justice.
He voted against both Roberts and Alito, and has said he sees Ginsburg and Justices Stephen G. Breyer and David H. Souter as the kinds of "sensible" justices he would favor.

Yet, as the court's term ended last month, he praised the court's decision in support of an individual right to gun ownership that struck down the District of Columbia's handgun ban, a decision in which Roberts and Alito were in the majority and liberals dissented.

Likewise, he disagreed with the court's decision that the death penalty may not be applied to child rapists, where Ginsburg, Breyer and Souter were in the majority and the conservative justices were in dissent.

Obama has said that justices will be in agreement 95 percent of the time, and in the other cases he looks for a judge "to bring in his or her own perspectives, his ethics, his or her moral bearings."

Republican critics have mocked that description for not including the word "Constitution" and contrasted it with McCain's vow to appoint judges "who have a proven record of strict interpretation of the Constitution of the United States."

Kendall winced at Obama's words. He said they make it sound as if one must look outside the law and the Constitution to get the results political progressives are looking for while they are provided for in guarantees of equal protection and due process. McCain's description will always be more palatable to the public, Kendall said.
Now that the Supreme Court has recessed for the summer and last Term's decisions have been preliminarily digested, it is only natural for Supreme Court commentators to start looking over the horizon to see where the Court might be headed next.

In this vein, Tom Goldstein, a leading Supreme Court advocate and the founder of Scotusblog (as well as my law partner), has kicked off a robust debate in the blogosphere about what the 2008 election will mean for the Supreme Court.

The answer is either a whole heckuva a lot, or almost nothing at all—depending of course on who wins the election.

The First Question: Which Justices Might Retire During the Next Presidential Term?

Let's start with the always perilous question of which justices might retire in the first term of the next President. To begin, it's worth noting that in the past, many retiring Justices have deteriorated quickly after stepping down from the bench—and that surely is a disincentive for any current Justice contemplating such a move. At the same time, retirements are certainly possible.

On this score, the conventional wisdom has focused on Justice John Paul Stevens, the 87-year-old leader of the Court's more liberal wing. Robust as he is, it seems improbable that even this mentally-sharp avid tennis player will stay on the Court another five years, even if a conservative wins the presidency.

Next on the potential retirement list has been Justice Ruth Bader Ginsburg, now 74. Ginsburg is a cancer survivor who, despite her formidable intellectual powers, sometimes looks like she'd fall over in a stiff wind. In my view, however, unless heath issues force Ginsburg off the Court, she's likely to stay for the foreseeable future.

This term, Ginsburg finally found her voice as a Justice—as the Court's lone woman fighting for the equality and autonomy of all women. She wrote powerful dissents in a case upholding harsh rules for bringing claims of gender-based pay discrimination, and another upholding a federal ban on partial-birth abortion even though it did not include a health-of-the-mother exception.

Justice Ginsburg told USA TODAY that, with Justice O'Connor gone, "The word I would use to describe my position on the bench is lonely." She added, "Neither of us ever thought this would happen again. I didn't realize how much I would miss her until she was gone." Yet this powerful advocate for women's rights won't be defeated by loneliness alone. It seems highly unlikely that, barring very serious health issues, she would voluntarily leave the Court until there were to be another woman justice (maybe two) to pick up that mantle. Indeed, I think Ginsburg would relish the chance to share the bench with another female justice for a few years—and might even feel some
obligation to do so.

The wild card here (as Tom Goldstein astutely notes) is Justice David Souter, yet another relatively liberal justice. Although only 67 (which seems to be the “new 40” for Supreme Court justices, in the sense that 40 is proclaimed to be the “new 30” for health-conscious Generation X-ers), Souter does not care for Washington, and does not seem to enjoy his job much. In addition, it has been reported that Souter, unlike so many others appointed to the Court, has never viewed the job as necessarily one that will consume the remainder of his working life. And at least since Bush v. Gore, he has seemed increasingly frustrated and disillusioned with the Court’s more conservative (and, in the case of Bush v. Gore, less-principled) direction.

Accordingly, it is not hard to imagine Souter stepping down, especially if a Democrat wins in 2008. On the other hand, if Stevens retires, Souter will become the senior member of the liberal wing. With that seniority will come the prerogative of writing a lead opinion (either the majority or the dissent) in almost every major case. Stevens has used this assignment power very effectively, to build a substantial legacy for himself. Perhaps Souter would be enticed to stay on the Court by the prospect of following suit.

It appears unlikely that any of the other justices (Chief Justice Roberts and Justices Alito, Breyer, Kennedy, Scalia, and Thomas) would contemplate retirement before the 2012 election. The oldest of these six is Justice Scalia, at 71, but he shows no signs of slowing down, and surely is eager to pursue further the Court’s rightward swing. Justice Anthony Kennedy, at 70, is the pivotal justice in almost every significant case—and seems to relish the enormous power associated with this role. The other Justices, too, have miles to go before they rest.

In sum, the next president is almost certain to get at least one Supreme Court appointment, and may get as many as three. It is also virtually certain that every retiring justice will belong to the Court’s liberal wing. Against this backdrop, what effect any retirement will have on the Court depends entirely on who wins the 2008 Presidential election.

**The Potential Effect of a Republican Win on the Supreme Court**

If a Republican wins, the Court will likely take yet another significant step further to the right, even if the next president gets only one appointment. Cases that currently result in 5-4 decisions, with Justice Kennedy as the “swing vote,” may either come out the other way (on topics where Justice Kennedy swung to the left), or come out the same way, but more aggressively so, fueled by a new 6-3 conservative bloc including Kennedy. Moreover, the rightward move will only be stronger and more certain if the Republican candidate both wins and gets more than one appointment due to multiple retirements.

Indeed, if one of the current liberal justices (and, again, all three of the likely retirees are liberal) is replaced by another conservative of the Roberts/Alito stripe, truly radical change would become a distinct possibility. Roe v. Wade would be in real jeopardy. So would Lawrence v. Texas, which gave constitutional protection to persons engaged in private, consensual acts of gay sex. So would whatever is left of affirmative action in private, consensual acts of gay sex. So would whatever is left of affirmative action after the recent pupil assignment decisions. So would the exclusionary rule in criminal cases as well as, perhaps, Miranda v.
Arizona. So would the ban on public school prayer established by Engel v. Vitale, now more than 40 years old.

No less important, the Court could easily reverse course on the recent decisions rejecting claims of unreviewable executive authority—whether in the prosecution of the war on terror, or in resisting Congressional investigations or other Congressional oversight of the Executive Branch. The Court could also erase what is left of Congress’s power to reform the campaign finance system.

A few caveats must be noted: A Democratic Senate might prevent the appointment of a hardcore conservative, though recent history suggests otherwise. Also, Roberts, Alito and any new appointee(s) might decide to respect the Court’s precedents, despite their own jurisprudential preferences, though once again, recent history instills no great confidence.

Overall, however, the Court is at a tipping point between a significant move rightward and a radical move rightward. A Republican winner in 2008 will have the power to push the Court over this edge.

The Effect of Democratic Victory in 2008 (and/or 2012) Upon the Supreme Court: Likely Very Minor

A Democratic victory in 2008, in contrast, will have no commensurate impact. Most likely, a Democratic president will find herself or himself replacing relatively liberal justices with likeminded nominees. The Court might well become more diverse, as there are highly-qualified Hispanic, Asian, African-American, and female candidates who might be tapped. But its ideological make-up would not change. Moreover, the same observation holds even if a Democrat wins again, in 2012. In 2016, Scalia and Kennedy, the two oldest conservatives, will still be younger than were Justices William Brennan, Thurgood Marshall, and Harry Blackmun when they retired. It’s a realistic assumption that neither Scalia nor Kennedy would have much interest in voluntarily stepping aside during a Democratic administration. Thus, as a practical matter, in order to meaningfully reverse the Court’s current conservative course, Democrats might very well have to win the next three presidential elections. The Democrats have not managed this feat since FDR won a third term in 1940.

To be sure, a Democratic presidential victory (or two) would go a long way towards creating greater ideological balance on the federal courts of appeals, almost all of which are now dominated by conservatives. But at the Supreme Court, conservatism will be the order of the day for as far, historically, as the eye can see.

What Voters Should Keep in Mind in 2008

Of course, it is too soon to tell what will happen in the 2008 election. But one thing is clear: Conservative voters who are tempted to vote for a moderate Democrat, yet fear that the Supreme Court will veer left as a result, have no reason to worry. Conversely, liberal voters who are tempted to vote for a moderate Republican should know that if such a candidate wins, the Supreme Court may well veer sharply rightward.

What if the Democrats do take the White House in 2008, and also increase their slim majorities in Congress—especially in the Senate, where many more Republicans than
Democrats are up for re-election? The Court will still be ripe for a rightward turn in 2012 or 2016, as I mentioned above. Meanwhile, during the new Democratic President’s first term, an unsettling conflict in our body politic may well emerge.

As in the 1930s, a liberalizing national politics may bump up against a deeply and possibly intractably conservative Supreme Court.

When this configuration occurred in the 1930s, a political meltdown was famously averted by the “switch in time that saved nine”—when, in the face of FDR’s court-packing threats, Justice Owen Roberts switched sides, and started voting to approve previously-stymied New Deal economic reforms.

Who knows what might happen this time around? But one thing is certain. In the past, arguments for greater progressive reliance on the political branches, rather than the courts, have largely been based on democratic theory. Now simple necessity must be added to the mix: Unless we see three Democratic victories in a row, the Court will probably remain majority-conservative for the next generation at least.
Barack Obama’s rightward drift in recent weeks has hardly gone unnoticed or unrewarded. What’s most fascinating about his efforts to appeal to the American center is the extent to which Obama, as a constitutional law professor and Harvard Law Review president, has repeatedly chosen the Bill of Rights as his vehicle for doing so. It’s not an overstatement to say that in the past month Obama has tugged the First, Second, Fourth, and Eighth amendments to the center. Not a day goes by, it seems, without a constitutional wink to the right on guns (he thinks there is an individual right to own one), the wall of separation between church and state (he thinks it can be lowered), the Fourth Amendment prohibition on warrantless wiretapping (he’s changed his position on FISA), and on the death penalty for noncapital child rape cases (he thinks it’s constitutional) as well as a possible shift this week on the right to abortion (which could further limit the reach of Roe v. Wade). Such accommodations are not all unexpected. Some of these positions (like his stance on capital punishment) have long been a part of his unorthodox constitutional thinking. Others (such as the hair-splitting on guns) are politically expedient. Nor are such nuanced views unwelcome. Obama is well aware that the ways in which liberals talk about the Constitution are sometimes mired in 1960s mushiness and feel-goodery that no longer resonates with the American public.

But Obama appears to be compromising on the wrong constitutional issues while backing away from fights on the right ones. A liberal re-examination of constitutional philosophy need not involve a capitulation to conservative values. Obama can certainly move to the right on gun-control policy or support a limited death penalty if politics demand that he do so. But he should not, in so doing, shift to the right on the Constitution itself.

Consider the fact that Obama spent the final days of the Supreme Court term celebrating conservative constitutional outcomes rather than calling out dubious conservative methodology. Who was better situated to chide the court’s conservatives for what sure seems to be an activist ruling that saved Exxon $2 billion in damages stemming from the Valdez oil spill? Just as Obama was reiterating his support for guns (certainly a tenable liberal position these days), he was missing an opportunity to turn the conversation to another 5-4 case decided that day—in which the court struck down the so-called millionaire’s amendment—an important part of the McCain-Feingold campaign-finance law. That case was a constitutional minefield for John McCain: His dream judges ruled an important portion of his most significant legislative accomplishment unconstitutional. But all we heard were crickets chirping in Chicago.

Obama also needed to do far more than he did to highlight McCain’s shocking assertion that the court’s ruling in the Guantanamo detainees’ case was one of the “worst in the nation’s history.” As George Will effectively chronicled, that was a patently ridiculous statement that revealed a
deep misunderstanding of both the law and the courts. Had Obama directly addressed McCain and—by extension—McCain’s model judges on that issue, it would have gone a long way toward assuring Americans that in his administration the Bill of Rights will not be a luxury reserved only for the sunny days.

But perhaps the most important fight over the Constitution facing Obama is not about the Constitution itself, but over the composition of the Supreme Court. McCain has signaled that he plans to campaign hard on the issue—taking numerous opportunities to excoriate “judicial activists” and promise more jurists like Chief Justice John Roberts and Samuel Alito. McCain pledges that he wants to appoint only judges who would “strictly interpret the Constitution of the United States” (whatever that means). And Obama should welcome this debate; it’s one he should win hands down, but he won’t be able to capitalize on his strengths unless he can change the way progressive candidates talk about judging and the Supreme Court.

Obama’s scattered statements so far on his philosophy for appointing Supreme Court justices instantly reveal the problem. In response to one of McCain’s stemwinders on liberal activist judges, Obama started with the boilerplate argument that he will nominate judges who are “competent and capable” and who “interpret the law.” So far, so good. He then shifted to “those 5 percent of cases or 1 percent of cases where the law isn’t clear.” In those cases, Obama asserted, judges must rely on “his or her own perspectives, his ethics, his or her moral bearings,” and thus he wants judges who are “sympathetic enough to those who are on the outside, those who are vulnerable, those who are powerless, those who can’t have access to political power, and, as a consequence, can’t protect themselves from being—from being dealt with sometimes unfairly, that the courts become a refuge.”

Remarks such as these make Obama sound like the careful law professor he’s been in the past, patiently explaining to his students why it is inevitable in some cases that judges will rule based on their gut leanings. But this is precisely the wrong way to talk to Americans about judging, and it’s guaranteed to turn Obama’s advantage into a disadvantage. Inevitable or not, Americans just don’t like it when judges rule based on their personal political preferences rather than being guided by the Constitution and the law. A recent Rasmussen poll tested, side-by-side, the McCain and Obama messages about the court. The results: 69 percent of Americans agreed with McCain’s message; only 41 percent agreed with Obama’s. Obama will lose the war over the Constitution if he keeps pushing, as he’s done, for judges with “empathy.” Voters see that as code for “latte-sipping, out-of-touch, smarty-pants elitism.”

Obama doesn’t have to stumble here. Nor should he maintain the curious silence that leaves his supporters wondering about his constitutional values. A growing number of Americans believe the Roberts Court is too conservative. Polls indicate that the public likes progressive judicial results: The public responds favorably to questions asking whether judges should strongly protect civil rights and civil liberties, rule for the powerless over the powerful, and ensure broad access to justice. Put simply, Americans want to live in Justice Stevens’ America, not in Clarence Thomas’.

If McCain genuinely thinks it’s smart politics to run against the Warren Court in 2008, Obama simply needs to run against the Roberts Court. He must promise to nominate Supreme Court justices who will
protect civil liberties, civil rights, and ensure equal access to courts and justice. He needs to talk and talk about these issues not because these are tender, liberal values he wants his judges to share, but because they are values enshrined in the Constitution, values that have been corroded and neglected in recent years.

When Obama talks about nominating justices who will protect the powerless as much as the powerful, he shouldn’t just cite pregnant teenage mothers but instead quote the preamble, which lists establishing justice as a pre-eminent goal of the Constitution, and the words “Equal Justice Under Law” enshrined in marble over the Supreme Court’s entrance. When he talks about courts protecting civil rights, civil liberties, and equal protection, he should explain that we fought a Civil War over these principles and we amended the Constitution to enshrine them in our founding document. In recent weeks, it’s become easy to forget that Obama is campaigning as a visionary. He needs to carry this over into how he talks about the Constitution and the Supreme Court rather than falling back into careful, hyper-technical law professor mode.

By rooting the results he seeks from the judiciary in the words of the Constitution—by marrying method to results, rather than divorcing these concepts—Obama can mobilize progressives and also reach beyond his base in speaking about what’s at stake at the Supreme Court. By meandering to the right on some of the most important provisions in the Bill of Rights while mumbling about appointing judges who rule based on their “own perspectives,” he risks alienating both groups and weakening the Constitution right along with his political prospects.

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Despite his background as a lawyer and law lecturer at the University of Chicago, Barack Obama has said little from the stump about legal issues, particularly what sort of justices he’d want on the Supreme Court, whose makeup is likely to be shaped for decades to come by the next president’s nominees.

John McCain, who has no legal background and who generally has not made matters of jurisprudence one of his signature issues in the Senate, has recently been more aggressive in offering his views on the law while campaigning.

He’s done so in part to assuage lingering concerns among conservatives stemming from his participation in the so-called “gang of 14,” a group made up of seven senators from each party who brokered a deal on judicial nominations that conservatives considered a betrayal of the prerogatives of the Senate’s then-Republican majority.

“This is mostly about base politics,” said Thomas Goldstein, who heads the Supreme Court practice at Akin Gump Strauss and a founder of the well-read SCOTUSblog. “Conservatives have always cared more about judges—have always recognized their lifetime appointments and their power much more than Democrats and progressives.”

McCain mostly soothed his base’s concerns when, flanked by admired elders of the conservative legal movement, he delivered a May 6 speech that Jeffery Toobin wrote in the New Yorker “amounted to a dog whistle for the right” that made clear that he’d nominate judges who are skeptical of the “right to privacy” that upholds the landmark abortion rights decision Roe v. Wade.

“McCain wants to appoint people like [Bush nominees] Roberts and Alito,” University of Chicago law professor and informal Obama advisor Cass Sunstein told Politico. “If you want a Court that would rethink Roe and defer to the president on large questions of presidential power, that’s more likely with McCain.”

But while Supreme Court nominees—and particularly their views on Roe v. Wade—have been a hot issue in previous presidential elections, “there are some overriding issues this year: the war in Iraq, the economy, we’re in a bit of an energy crises,” said Larry Hart, director of government relations at the American Conservative Union. “That has shunted other issues, including judicial ones, to the back burner.”

But even if their impact is not front page news now, Supreme Court nominees will be a defining issue for the next president, since six of the sitting Justices are in their seventies. “If the next president serves eight years, he’ll have the potential to cast a lasting mark on Supreme Court, so you’ll see more talk in the coming months,” said Robert Alt, deputy director of the Center for Legal and Judicial studies at the conservative Heritage Foundation. “There are other things that will press people on a daily basis like gas prices. But judges will be the big-ticket long-range issue.”

In recent weeks both candidates have commented on a series of high-profile
Supreme Court decisions. McCain criticized a ruling granting detainees in Guantanamo Bay access to U.S. courts, while Obama praised it. Both candidates opposed a decision that found the death penalty to be unconstitutional in individual crimes (unlike treason or espionage) where the victim’s life was not taken. And both men praised the Supreme Court’s declaration that the Washington, D.C. handgun ban was a violation of the Second Amendment.

Even when Obama, who voted against confirming both Roberts and Alito, has taken the same positions as McCain, however, McCain has aggressively sought to underscore differences.

He told the National Sheriffs Association on July 1, that the death penalty ruling was typical of what Obama’s Supreme Court appointees would likely decide. “My opponent may not care for this particular decision, but it was exactly the kind of opinion we could expect from an Obama Court.”

After Obama praised the handgun ban decision, McCain accused the Democrat of “one in a long . . . series in reversals of positions,” pointing to an earlier statement from an unnamed Obama staffer who’d told the Chicago Tribune that “Obama believes the D.C. handgun law is constitutional.” The Obama campaign, which had not otherwise made that claim, called the earlier statement an “inartful attempt” to characterize his position.

Part of the reason McCain may be aggressively bringing up these cases is that of those “that were in front of the Supreme Court this year, the left has a much less politically palatable set of positions,” said Goldstein.

Whatever his reasons, Obama had mostly shied away from discussions of legal matters. Judicial nominations are not part of his stump speech, and even when opportunities have arisen, he has mostly found ways not to elaborate on his support for nominating Justices who would oppose overturning Roe.

Thus far, legal activists on the left have held their fire about Obama’s agreement with conservatives on the Court’s death penalty and gun control rulings. Nan Aron, President of the Alliance for Justice, said that she is not concerned by the fact that Obama sided with conservatives on the death penalty and gun control decisions. “I think a more accurate predictor is to look at the votes he’s cast so far,” she said. “He cast ‘no’ votes on Roberts and Alito, which offers a very sharp contrast with John McCain. McCain wants to appoint more justices like Alito and Roberts, while Obama wants to appoint more justices like Earl Warren.”

“What the left is concerned about going into the 2008 elections,” said Goldstein, “are two things that don’t have anything to do with the Supreme Court: the War in Iraq, and people’s pockets.”

Even if Obama continues to focus elsewhere, it’s not clear what further political gains McCain can extract from his aggressive stumping on matters of jurisprudence.

“There is not an independent voter in America, said Goldstein, “who is going to choose a president on the basis of the Supreme Court.”
“Over Guantanamo, Justices Come Under Election-Year Spotlight”

New York Times
June 14, 2008
Linda Greenhouse

Thanks in no small part to Justice Antonin Scalia’s dire warning that granting Guantanamo detainees access to habeas corpus “will almost certainly cause more Americans to be killed,” the Supreme Court finds itself on the verge of becoming something that it has not been for many election cycles—a campaign issue.

Senator John McCain, the presumed Republican presidential nominee, opened a town-hall-style meeting in New Jersey on Friday morning by telling the crowd of 1,500 people that the Supreme Court “rendered a decision yesterday that I think is one of the worst decisions in the history of this country.”

Mr. McCain’s initial response to the court’s 5-to-4 ruling in Boumediene v. Bush had been considerably milder. The decision “obviously concerns me,” he said on Thursday afternoon.

But overnight, the prospect of using the decision as a rallying point seemed to occur to many conservatives simultaneously. The ruling has “teed up the Supreme Court issue nicely for the G.O.P.,” Curt Levey of the Committee for Justice, a group that advocates for Republican judicial nominees, wrote on his blog. The Wall Street Journal’s editorial page quoted Justice Robert H. Jackson’s famous observation that the Constitution is not a suicide pact and added, with reference to the author of Thursday’s majority opinion, “About Anthony Kennedy’s Constitution, we’re not so sure.”

On the other end of the spectrum, liberals warned that the vision of civil liberties embraced by the court’s narrow majority—security requires “fidelity to freedom’s first principles,” Justice Kennedy wrote—was hanging by a thread. “One more Bush justice on the court and the decision would likely have gone the other way,” said Kathryn Kolbert, president of People for the American Way. Senator Barack Obama, the presumed Democratic nominee, praised the decision as “an important step toward re-establishing our credibility as a nation committed to the rule of law.”

Although Mr. McCain has criticized the Bush administration for employing harsh interrogation techniques, he has consistently supported barring the Guantanamo detainees from access to federal court. Justice Scalia’s dissenting opinion, which called the decision “disastrous,” “devastating” and tragic, was reminiscent of the tone of his dissenting opinion almost exactly five years ago, when the court overturned a Texas criminal sodomy law and set out a constitutional foundation for gay rights.

That decision, Lawrence v. Texas, portended a “massive disruption of the current social order,” Justice Scalia wrote then. State laws “against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” were all “called into question by today’s decision,” he warned.

While those comments helped fan the flames
of the culture wars, as Justice Scalia may or
may not have intended, they also may have
had the effect of investing at least one item
on his list with an aura of plausibility it had
not previously enjoyed; barely five months
later, the Massachusetts Supreme Judicial
Court interpreted the state’s Constitution as
encompassing a right to same-sex marriage.

Justice Scalia’s consistent behavior
demonstrates his enjoyment of “the instant
gratification of getting something off his
chest,” Professor Laurence H. Tribe of
Harvard Law School said in an interview.
“His tendency in case after case is to paint
his dissenting view in the most
inflammatory terms possible,” Professor
Tribe added, “giving red meat to those who
want to make the Supreme Court their
whipping boy.”

In his dissent in the Guantanamo case,
Justice Scalia accused the majority of
harboring the “ultimate, unexpressed goal”
of extending the ruling far beyond the
United States naval base in Guantanamo
Bay, Cuba, to give courts “the power to
review the confinement of enemy prisoners
held by the Executive anywhere in the
world.”

To the contrary, Justice Kennedy’s analysis
made clear that the decision was limited to
Guantanamo by the special nature of the
American installation there as well as by the
remoteness of the base from any zone of
hostilities. But critics of the decision quickly
picked up on Justice Scalia’s words, warning, as the editorial in The Wall Street
Journal did, that prisoners at the Bagram Air
Base in Afghanistan or in Iraq would soon
have access to federal courts—a proposition
that would be unlikely to get any votes, let
alone five, from the current justices.

If a sustained election-year spotlight is to be
trained on the Supreme Court, it would be a
novelty in recent political history. In 1968, a
time of great public concern about crime and
violence, Richard M. Nixon ran for
president as a critic of the Warren court’s
rulings in favor of criminal defendants.
(Nixon made it to the White House, but
nearly all the decisions he ran against are
still on the books; Friday was the Miranda
ruling’s 42nd anniversary.) But since then,
even the superheated abortion issue has
failed to resonate much beyond each party’s
base, notwithstanding frequent predictions
to the contrary.

“Five hundred lawyers on my side and 500
on the other side care about the court, but
I’ve never seen it go much beyond that,”
Richard Samp, chief counsel of the
conservative Washington Legal Foundation,
said in an interview. Nonetheless, Mr. Samp,
who is strongly critical of the Guantanamo
ruling, predicted that “as a political matter, it
will help to rally those inclined to believe
the Supreme Court is out of control.”

Habeas corpus, as such, is an unlikely
crowd-mover. But the decision clearly
tapped into deep feelings about the entire
course of the Bush administration’s plan for
the fight against terrorism. The debate
among the justices was ostensibly over the
fine points of constitutional history and
interpretation. But what it revealed was a
court as divided as the rest of the country, on
the eve of a historic and perhaps close
election, over the very nature of the post-
Sept. 11 world.
WASHINGTON—John McCain and Barack Obama, the two leading presidential candidates, have set out sharply contrasting views on the role of the Supreme Court and the kind of justices they would appoint.

Sen. McCain (R-Ariz.), in a speech two weeks ago, echoed the views of conservatives who say “judicial activism” is the central problem facing the judiciary. He called it the “common and systematic abuse... by an elite group... we entrust with judicial power.” On Thursday, he criticized the California Supreme Court for giving gays and lesbians the right to marry, saying he doesn’t “believe judges should be making these decisions.”

Sen. Obama (D-Ill.) said he was most concerned about a conservative court that tilted to the side of “the powerful against the powerless,” and to corporations and the government against individuals. “What's truly elitist is to appoint judges who will protect the powerful and leave ordinary Americans to fend for themselves,” he said in response to McCain.

During one campaign stop, Obama spoke admiringly of Chief Justice Earl Warren, the former California governor who led the court in the 1950s and ‘60s, when it struck down racial segregation and championed the cause of civil rights.

Obama has also praised current Justices Stephen G. Breyer, Ruth Bader Ginsburg and David H. Souter. “I want people on the bench who have enough empathy, enough feeling, for what ordinary people are going through,” Obama said.

It is not just a theoretical policy debate.

Whoever is elected in November will probably have the chance to appoint at least one justice in the next presidential term. The court’s two most liberal justices are its oldest: John Paul Stevens turned 88 last month, and Ruth Bader Ginsburg is 75.

McCain promised that, if elected, he would follow President Bush’s model in choosing Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr.

That could establish a large conservative majority on the court for years. With conservatives in full control, the court would probably overturn Roe vs. Wade and the national right to have an abortion. The justices also could give religion a greater role in government and the schools, and block the move toward same-sex marriage.

If elected, Obama would be hard-pressed to create a truly liberal court. But by replacing the aging liberal justices with liberals, he could preserve abortion rights and maintain a strict separation of church and state.

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The McCain-Obama comments reflect a long-standing divide between conservatives and liberals on the role of the courts. Reduced to the simplest terms, conservatives say judges should follow the law, and
liberals say they should ensure that justice is done.

Since Warren’s retirement in 1969, conservatives have been ascendant in the high court, thanks to Republican domination of the White House. For the last three decades, Republican appointees have held at least seven of the Supreme Court’s nine seats.

Nonetheless, McCain said he thought that “abuse of judicial authority” had continued unchecked. “The result, over many years, has been a series of judicial opinions and edicts wandering farther and farther from the clear meanings of the Constitution,” McCain said recently at Wake Forest University in North Carolina.

As an example, he pointed to the Supreme Court ruling three years ago that struck down the death penalty as “cruel and unusual punishment” for murderers who were under 18 at the time of their crimes. He said the 5-4 decision in the case of Roper vs. Simmons was based on “airy constructs” such as “the evolving standards of decency.”

“The result was to reduce the penalty, disregard our Constitution and brush off the standards of the people themselves and their elected representatives,” McCain said.

Obama has thrown the charge of judicial activism back at Republicans.

“The nation has just witnessed how quickly settled law can change when activists judges are confirmed,” he said last year. “In decisions covering employment discrimination to school integration, the Roberts-Alito Supreme Court has turned back the clock on decades of hard-fought civil rights progress.”

He referred to the 5-4 decision that struck down the voluntary integration guidelines that were adopted by school boards in Seattle and Louisville, Ky. The same 5-4 majority also rejected a jury’s discrimination verdict in favor of Lilly Ledbetter, a longtime manager for Goodyear Tire & Rubber Co. She showed she had been paid far less than men in the same job over many years. The court’s opinion, written by Alito, said her lawsuit was flawed because she had not filed her claim within the time frame required by law.

The Ledbetter case illustrates the difference between Obama and McCain when it comes to judges. Obama sharply criticized the decision, saying the conservative justices ignored new discrimination she suffered with each unfairly low paycheck. McCain defended the decision and called it a defeat for trial lawyers who sought to sue companies.

When Obama voted against Alito’s confirmation, he predicted the New Jersey judge would rule on the side of corporations. “If there is a case involving an employer and an employee, and the Supreme Court has not given clear direction, he’ll rule in favor of the employer,” Obama said a year before the court took up the Ledbetter case.

(The House passed a bill to overturn the Ledbetter decision, but it stalled in the Senate last month: Supporters fell just short of the 60 votes needed to halt a threatened Republican filibuster. Obama and Clinton voted to amend the law; McCain said he was opposed.)

Before his election to the Senate, Obama taught constitutional law at the University of Chicago. He said most cases, even those at the high court, could be decided by looking
at the law and precedents.

"Both a Scalia and a Ginsburg will arrive at the same place most of the time," he said during the Roberts confirmation hearings. "What matters at the Supreme Court is those 5% of cases that are truly difficult. In those cases, adherence to precedent and rules of construction will only get you through 25 miles of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works and the depth and breadth of one's empathy.

"In those difficult cases, the critical ingredient is supplied by what is in the judge's heart."

In a speech this month, McCain derisively quoted Obama's reference to a judge's "deepest values" and "empathy." "These vague words attempt to justify judicial activism. Come to think, they sound like an activist judge wrote them," McCain said.

Many conservatives praised McCain's focus on a limited role for the courts.

"Much as I like and respect Barack, I think his vision of judging couldn't be more wrong," said Bradford Berenson, a Washington lawyer who worked in the current Bush White House and knew Obama at Harvard Law School. "Whereas McCain wants our judges and Supreme Court justices to be faithful to the Constitution ... and decide cases according to law, Barack seems to think judges should systematically favor certain parties or groups and decide cases according to their personal sympathies or feelings about how who needs or deserves help."

Harvard Law School professor Laurence H. Tribe, who is an advisor to Obama, said McCain's speech "relied on simplistic and misleading slogans about judicial activism."

"Sen. Obama certainly doesn't share Sen. McCain's remarkable view that the greatest threat to American values and traditions comes from our independent federal judiciary," Tribe said. "On the contrary, Sen. Obama would find it crucial to preserve judicial independence in part to hold in check the excesses of unilateral executive power that have threatened our democracy under the Bush-Cheney administration."
WINSTON-SALEM, N.C.—Senator John McCain reached out to conservatives on Tuesday by vowing to appoint judges he characterized as strictly faithful to the Constitution and who did not engage in what Mr. McCain condemned as “the common and systemic abuse of our federal courts.”

The issue is of enormous importance to conservatives, who have rallied against what they call activist judges who they say decide cases based on their personal beliefs rather than the law. Mr. McCain has faced suspicions among conservatives about his intentions on the judicial front, and although he regularly says in his campaign appearances that he would appoint only judges who “strictly interpret” the Constitution, he has not given a lengthy speech on the subject until now.

“With a presumption that would have amazed the framers of our Constitution, and legal reasoning that would have mystified them, federal judges today issue rulings and opinions on policy questions that should be decided democratically,” Mr. McCain said before a large crowd of students assembled in Wait Chapel at Wake Forest University here. “Assured of lifetime tenures, these judges show little regard for the authority of the president, the Congress and the states. They display even less interest in the will of the people.”

Mr. McCain’s speech was a clear embrace of the judicial philosophy of President Bush and other recent Republican presidents who sought judges who generally construed laws as narrowly as possible, who for the most part favored government authority in criminal matters and who were opposed to the expansion of abortion rights.

Mr. McCain, who since the presidency of Ronald Reagan has been a loyal soldier but not a major player in the effort to put more conservatives on the federal courts, cited Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. as models of the kind of jurists he would nominate. He sharply criticized his Democratic competitors, Senators Barack Obama and Hillary Rodham Clinton, for voting against their nominations.

And confronting the concerns of conservatives, Mr. McCain also defended his central role in a 2005 deal by a bipartisan group of senators, nicknamed the Gang of 14, that protected the rights of the minority party, Democrats at the time, to continue to filibuster judicial nominees. The truce is credited for avoiding bedlam in the Senate and lasting long enough for some conservative jurists to be appointed, among them Chief Justice Roberts and Justice Alito.

“It showed that serious differences can be handled in a serious way, without allowing Senate business to unravel in a chaos of partisan anger,” Mr. McCain said in his speech.

But Mr. McCain’s participation in the agreement nonetheless angered some conservative leaders. One of them was James C. Dobson of Focus on the Family, who took note of Mr. McCain’s role in the
Gang of 14 when he announced this year that he could not under any circumstances support Mr. McCain as the Republican nominee.

Many conservatives see the courts as a bedrock counterweight to Democrats’ inroads on Capitol Hill and their efforts to retake the White House. And they fear that if Mr. McCain becomes president, he might use judicial appointments as a bargaining chip with a Democratic Congress for political compromises.

Mr. McCain’s speech on Tuesday appeared to soothe at least some conservatives who had been wary of him, among them the Rev. Richard Land, an official with the Southern Baptist Convention, who said this year that Mr. McCain had to speak out in language that indicated there would be “no more Souters.” Mr. Land was referring to Justice David H. Souter, an appointee of the first President Bush who has been a disappointment to the right.

Mr. Land, who acknowledged Tuesday in a brief telephone interview that Mr. McCain had not been his first or second choice for the Republican nomination, nonetheless said he was pleased by the speech.

“If his template is Roberts and Alito,” Mr. Land said, “and a judicial restraint and judicial humility template, that’s a more positive and less personal way of saying ‘no more Souters.’”

Bradford A. Berenson, a former associate White House counsel under former Attorney General Alberto R. Gonzales, had a similar reaction in another telephone interview. “He succeeded very well if his goal was to get conservatives energized and excited about his candidacy,” said Mr. Berenson, who originally supported Mitt Romney for the Republican nomination. “His speech was a well-articulated and orthodox endorsement of the philosophy of judicial restraint, which is really what conservatives want to hear.”

But Sheldon Goldman, a political scientist at the University of Massachusetts at Amherst, who has written extensively on judicial appointments, called Mr. McCain’s speech worthy of “Alice in Wonderland” and said that many conservative jurists were themselves “activist” judges. “They don’t consider themselves activists if they strike down a position of government that is in disagreement with their policy views,” Mr. Goldman said.

Mr. McCain made his remarks on a day when he was competing for attention in a state riveted by the primary battle between Mrs. Clinton and Mr. Obama — timing that could suggest he did not want the speech to draw notice among moderate Democrats and independents who would find his embrace of conservative judges distasteful, and whom he is wooing for November.

Whatever the reason, Mr. McCain took particular aim in his remarks at Mr. Obama for his 2005 vote against Chief Justice Roberts.

“Senator Obama in particular likes to talk up his background as a lecturer on law, and also as someone who can work across the aisle to get things done,” Mr. McCain said. “But when Judge Roberts was nominated, it seemed to bring out more the lecturer in Senator Obama than it did the guy who can get things done. He went right along with the partisan crowd, and was among the 22 senators to vote against this highly qualified nominee.”

In short, Mr. McCain said, for Mr. Obama “nobody quite fits the bill except for an elite
group of activist judges, lawyers and law professors who think they know wisdom when they see it—and they see it only in each other.”

Mr. Obama’s campaign responded that Mr. McCain had “promised his conservative base four more years of out-of-touch judges.”
Justice John Paul Stevens turns 88 in April, and by January 2009 five other justices will be from 69 to 75 years old. If Barack Obama is elected president, he will probably—with the benefit of resignations by liberal justices eager for him to be the president who chooses their successors—have the opportunity to appoint two or three Supreme Court justices in his first term, with another two or three in a potential second term. That prospect ought to focus the attention of all Americans who want a Supreme Court that practices judicial restraint and respects the proper realm of representative government. For Obama, if elected, would certainly aim to fill the Supreme Court—and the lower federal courts—with liberal judicial activists.

Although Obama has served in the Senate for barely three years, he has already established a record on judicial nominations and constitutional law that comports with his 2007 ranking by the National Journal as the most liberal of all 100 senators. Obama voted against the confirmations of Chief Justice John Roberts and Justice Samuel Alito, and he even joined in the effort to filibuster the Alito nomination. In explaining his vote against Roberts, Obama opined that deciding the “truly difficult” cases requires resort to “one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.” In short, “the critical ingredient is supplied by what is in the judge’s heart.” No clearer prescription for lawless judicial activism is possible.

Indeed, in setting forth the sort of judges he would appoint, Obama has explicitly declared: “We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old—and that’s the criterion by which I’ll be selecting my judges.” So much for the judicial virtue of dispassion. So much for a craft of judging that is distinct from politics.

In his short time in the Senate, Obama has voted against a half-dozen federal appellate-court nominees. Most tellingly, he was the first senator to join in the left’s mendacious attack in 2007 on Fifth Circuit nominee Leslie Southwick—an attack that managed to drag the judicial-confirmation process to a new low. Southwick had been widely regarded as a consensus pick. The ABA’s judicial-evaluations committee, after an investigation that included the usual inquiry into whether the nominee has “freedom from bias and commitment to equal justice under the law,” unanimously gave him its highest “well qualified” rating. The Democrats on the Senate Judiciary Committee had, just months before, unanimously approved his nomination to a federal district judgeship.

Nevertheless, when left-wing activist groups launched their attack on Southwick, Obama jumped right in. Relying on gross misrepresentations of Southwick’s record, Obama recklessly alleged that Southwick “has shown hostility towards civil rights and a disregard for equal rights for minorities, women, gays and lesbians” and that his nomination even “threaten[ed] the very basis of our freedom and democracy.”
Fortunately, some Democratic senators—most prominently, Judiciary Committee member Dianne Feinstein—had the courage to stand up against these lies from Obama and others, and Southwick was ultimately confirmed.

Obama’s constitutional activism is particularly evident on the touchstone issue of Roe v. Wade. Obama calls abortion “one of the most fundamental rights we possess” and promises to “make preserving women’s rights under Roe v. Wade a priority as president.” He has harshly criticized the Court’s 2007 ruling that the federal partial-birth abortion act (which was supported by broad bipartisan majorities in Congress, including abortion supporters like Senate Judiciary Committee chairman Patrick Leahy) is constitutionally permissible.

Obama often cloaks such extreme positions in sweet-sounding rhetoric. His chapter on “Our Constitution” in his campaign manifesto, The Audacity of Hope, provides a useful case study. There, Obama characterizes his own understanding of the Constitution in positively unctuous terms: “I confess that there is a fundamental humility to this reading of the Constitution and our democratic process.” But there is nothing humble about the judicial role that Obama embraces.

Obama purports to be “not unsympathetic to Justice Antonin Scalia’s position” that the “original understanding [of the Constitution] must be followed,” but he won’t even present Scalia’s views accurately. Let’s set aside the fact, all too common among liberal critics, that Obama doesn’t keep straight the distinction between Scalia’s original meaning species of originalism, which looks to the public meaning of a constitutional provision at the time that it was adopted, and the original understanding species, which looks to the contemporaneous understanding of the ratifiers. Obama claims to appreciate the temptation on the part of Justice Scalia and others to assume our democracy should be treated as fixed and unwavering; the fundamentalist faith that if the original understanding of the Constitution is followed without question or deviation, and if we remain true to the rules that the Founders set forth, as they intended, then we will be rewarded and all good will flow.

But Obama’s “fundamentalist” name-calling is misplaced. Originalists understand the Constitution—not “our democracy”—to be “fixed and unwavering” (apart from the amendment process it provides, of course). They recognize that, precisely because the Constitution leaves the broad bulk of policy decisions to legislators in Congress and in the states, there is lots of room to pursue and adapt different courses through the democratic processes. No originalist believes that judicial respect for the operations of representative government will guarantee that “we will be rewarded and all good will flow.” This is a straw man. The virtue of originalism lies foremost in protecting the democratic decisionmaking authority that the Constitution provides. Our legislators will be sure to mess up plenty, but at least citizens will have the ability to influence them—and replace them.

Obama finds himself compelled “to side with Justice Breyer’s view of the Constitution—that it is not a static but rather a living document, and must be read in the context of an ever-changing world.” But no one disputes that the Constitution “must be read,” and applied, “in the context of an ever-changing world.” The central question of the last several decades is, rather, whether it is legitimate for judges to alter the Constitution’s meaning willy-nilly—in particular, whether judges have unconstrained authority to invent new constitutional rights to suit their views of
what changing times require. The cliché invoked by Obama of a “living” Constitution disguises the fact that the entrenchment of leftist policy preferences as constitutional rights deprives the political processes of the very adaptability that Breyer and company pretend to favor. As Scalia has put it, “the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.”

And so on for all of Obama’s other deceptive rhetoric in his chapter on “Our Constitution” in *The Audacity of Hope*, including his galling claim to be “left then with Lincoln” in their supposed common understanding of the Constitution. On judicial nominations, Obama brazenly contends that “Democrats used the filibuster sparingly in George Bush’s first term: Of the President’s two-hundred-plus judicial nominees, only ten were prevented from getting to the floor for an up-or-down vote.” What Obama’s casting conveniently obscures from the trusting reader is that these filibusters were unprecedented in the history of the Senate. Obama even pretends that it’s obvious that Republicans would resort to the filibuster “if the situations were reversed.” But the best evidence refutes Obama: There were only four votes on cloture—on proceeding to a final vote on confirmation—on judicial nominations during the Clinton administration. All four were supported by Republican leadership, and none received more than 14 negative votes from Republican senators.

In the end, an examination of Obama’s record and rhetoric discloses the stuff he is made of—his own constitution. Beneath the congeniality and charisma, lies a leftist partisan who will readily resort to sly deceptions to advance his agenda of liberal judicial activism. Given the likelihood of so many changes in the membership of the Supreme Court over the next eight years, it is particularly important that voters this November recognize the real Obama.

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following the news of chief justice william h. rehnquist's hospitalization for thyroid cancer, conservative and liberal activists scrambled tuesday to rally support for president bush or his democratic rival, sen. john f. kerry, by reminding partisans that the presidential election could shape the future of the supreme court.

the national rifle assn. stepped up radio advertising in a number of battleground states, warning that the high court "could be the last line of defense for your right to keep and bear arms."

abortion rights group naral pro-choice america highlighted the court in get-out-the-vote mailings to 350,000 of its supporters, and the group's president headed to three key states to talk to voters about the "added urgency" of possible court vacancies, a spokesman said. the group sought to remind undecided female voters that kerry has pledged to protect the right to abortion, whereas bush opposes abortion rights.

"both bush and kerry are focusing heavily now on shoring up—and turning out—the base," said don kettl, a university of pennsylvania political science professor. "and for the core voters of both parties, rehnquist's illness is an electrifying reminder of the stakes."

the presidential candidates have had little to say about the supreme court during a campaign dominated by iraq, terrorism and the economy. they remained publicly silent tuesday on the disclosure that rehnquist, 80, had been diagnosed with thyroid cancer and had undergone a tracheotomy. court officials said he was expected to return to the bench next week, but he remained hospitalized amid speculation by medical experts about his condition.

it seemed clear that conservatives had more to lose from a rehnquist retirement because the chief justice is one of theirs, but which side might benefit at the polls was a matter of dispute.

"this should energize conservatives more than liberals," said john feehery, a spokesman for house speaker j. dennis hastert (r-ill.). a bush defeat combined with a rehnquist retirement could result in conservatives losing a supreme court seat for a decade or more.

but kettl said rehnquist's health problems were likely to stir up liberal and democratic voters "who probably worry most about how a bush victory could, in short order, transform the court."

"what will most drive female voters?" he asked. "the drive for homeland security, as bush has been betting—or abortion and other issues of social policy, as a possible rehnquist departure might affect?"

"in a race so razor-close, anything that tips the scales ever so slightly—or anything that charges up the base to boost turnout—could shape the outcome," kettl said.

liberal groups and women's rights advocates have made much of the
importance of the Supreme Court, arguing that adding more conservative Republicans to the bench could lead to making abortion illegal again.

The Republican Party platform goes beyond urging the repeal of *Roe vs. Wade*, the 1973 ruling that struck down state laws that made abortion a crime. Three current justices—Rehnquist, Antonin Scalia and Clarence Thomas—favor overturning that ruling.

If it were overturned, states would again be free to make abortion illegal. Many of them, including California, would probably preserve the right to abortion.

However, the GOP platform says all abortions should be outlawed.

If he wins, Kerry has promised, he will appoint justices who support the right to abortion set in *Roe vs. Wade*. If he were to choose Rehnquist’s successor, Scalia and Thomas would be the bench’s only opponents of abortion rights.

Some groups said they found it a delicate matter to talk about the importance of the Supreme Court as an election issue without being perceived as insensitive to Rehnquist’s health.

Nonetheless, groups on the right and left quickly did.

The Family Research Council issued a statement headlined “Rehnquist Health Battle Is Jolting Reminder to Voters,” declaring that “the domestic security of our culture demands a president and Senate that will fight aggressively for judges who strictly interpret the law.”

It warned that Kerry’s election could lead to the appointment of judges who would sanction abortion and same-sex marriage.

The group People for the American Way said Rehnquist’s illness underscored the need for voters to “understand how a court with multiple Bush nominees could reverse many of the gains America has made in civil rights, environmental protection, religious liberty, reproductive freedom and so many other vital areas of American life.”
BOSTON—The American Constitution Society hosts a panel at the Boston Public Library titled “The Constitution at the Crossroads: 2004 and the Future of American Law.” The first question after the formal presentation goes to the perennial election problem: “How do we get the issue of judges to matter to the American voter?” Why don’t people care what kinds of judges the president puts on the bench?

I have read my share of overheated articles this month—the ones about the possibility of four Supreme Court vacancies over the next four years—and if I hear one more person characterize Justice Ruth Bader Ginsburg as teetering on death’s door I will smack them. But the truth is that no one cares who appoints the next four justices, or three justices, or seven. We just don’t. So, the lawyers are, quite reasonably, wondering why.

In a sense, it’s an unfair question to ask at this convention, because the environmentalists, the stem cell folks, and the labor people are all in the same fix: This isn’t the year to get any one issue before voters, who are having enough trouble deciding what to think about the war. But, if you can ignore the war for a moment, this should have been the year in which judicial appointments mattered a whole lot. For one thing, if you cared about gay marriage, or abortion, or the right to die, or civil liberties, as much as they say you do, almost nothing else matters but who’s on the federal bench.

But more important, wasn’t this election supposed to be a referendum on Bush v. Gore? Weren’t the majority of American voters who felt that they’d been shafted by a partisan Supreme Court four years ago going to rise up this time and say “no” to ideological justices and their origami Constitution?

Apparently not, agrees the panel. People just don’t track judicial appointments as an issue, and we just don’t consider the power to appoint judges a truly important one. Professor Pam Karlan, of Stanford Law School, suggests that the remedy for this judicial apathy is that individuals whose lives have been affected by the courts need to speak out. She’s right. We hear nothing about judges who refuse to grant abortion waivers. We hear nothing about judges who refuse to be bound by civil rights law. The fact that Bill Pryor, President Bush’s recess appointee to the 11th Circuit Court of Appeals, just cast the deciding vote not to hear a case challenging the Florida law preventing gay couples from adopting went almost completely unnoticed in the national media.

Something magical happens when judges are confirmed to the bench. They become oracles, and we as a nation just stop caring about their activities. (Strangely, however, some liberal jurists need only burp at oral argument before the cries of “liberal activist” ring out.) Someone in the audience suggests that we need to do a better job of demystifying the Supreme Court. Someone else adds that it would be “nice to know who these guys and gals go fishing with on
Another audience member makes a really nice point: We tend to think of election cycles in manageable four-year units. If we don’t like the job he’s doing, we can boot him in a few short years. We forget that judicial terms are measured in decades. These bombs have extremely long fuses.

Professor Charles Ogletree of Harvard Law School points out that Republicans have simply done a better job than Democrats of articulating, committing to, and selling a coherent judicial philosophy. Democrats have used the presidency to create diversity on the bench but never to promote a unitary philosophy. Those chickens are now coming home to roost.

This is all a double-edged sword, of course. One of the very best things about the American electorate is its reverence for the judiciary. By refusing, for the most part, to be drawn into campaigns to smear, slander, and second-guess our judges, we have given them the space and independence to be fair. But by failing to care who gets a lifetime appointment to the federal bench, or to scrutinize what they do there, we have dropped the ball on the very same social issues we claim to care about most.

I keep thinking that one speaker at this convention needs to stand up at that podium tonight and say: “Ladies and Gentlemen. Abu Ghraib. Thank you. Goodnight.” Because shouldn’t this election ultimately be a referendum on the rule of law? Shouldn’t the only issue before us be whether or not there will be legal constraints on executive power? Walter Dellinger, former acting solicitor general under Bill Clinton and star Slate contributor, puts this far more eloquently when he warns that if we don’t cast our votes about Guantanamo, and Abu Ghraib and those torture memos, we will someday look back on this election as emblematic of a national moral failure.

What is at stake, in this election, is whether we value the notion of being a nation that’s ruled by law as opposed to rulers. This isn’t just a voting issue. It’s what used to launch revolutions.
There are signs that the U.S. Supreme Court may be emerging as a significant election issue for the first time in more than 30 years. During the televised debate between George W. Bush and Al Gore last week, both candidates discussed the criteria they would use in making judicial nominations. With the retirement of more than one justice likely during the next several years, and with the Court closely divided on many controversial issues, Democrats and Republicans agree that the upcoming election could have a critical impact on the Court’s direction.

If history is any guide, however, judicial issues will produce much campaign bluster but will affect few ballots.

**Uncertain Impact**

A long and largely forgotten line of presidential candidates and political activists have attempted to make the federal courts a decisive issue in many presidential elections during the past century. Their efforts have nearly always failed: The courts are not institutions that ignite the passion of voters. Bob Dole learned this lesson in our last presidential election, after voters responded with indifference when he attacked Clinton-appointed federal judges for allegedly coddling dangerous criminals.

Only three times—in 1924, 1964, and 1968—has the federal judiciary emerged as an issue that actually may have swayed votes. Even in those elections, the issue’s impact remains uncertain.

In 1924, campaigning as a third-party Progressive nominee, Sen. Robert LaFollette of Wisconsin attacked the Supreme Court for its decisions striking down social and economic regulatory legislation, and proposed allowing Congress to override the Court’s decisions by a two-thirds vote. His campaign withered, however, when President Calvin Coolidge and his fellow Republicans vigorously accused LaFollette of seeking to sabotage constitutional government. (Republicans made a similar charge with much less effect against President Franklin Roosevelt during the 1940 campaign, in an attempt to exploit popular opposition to Roosevelt’s unsuccessful 1937 Court-packing proposal.)

The decisions of the Warren Court—particularly those involving the rights of criminals, school prayer, and reapportionment—were prominent in both the 1964 and 1968 elections. In 1964, Republican nominee Barry Goldwater frequently attacked these decisions and promised to make more conservative appointments to the Court. During the 1968 campaign, after the Warren Court had continued to expand criminal rights in the wake of a major increase in crime, both Richard Nixon and George Wallace repeatedly promised to appoint justices who would be more solicitous of what Wallace called “law and order.” Discontent over the Court’s decisions may have helped Nixon win his close race against Hubert Humphrey.

There are indications that the Court is more
prominent in this year’s election than it has been since 1968, with 36 percent of voters in a recent *Newsweek* poll indicating that they regard Supreme Court appointments as a significant election issue.

Democrats are attempting to cultivate this issue by warning voters that the fate of abortion rights, affirmative action, gun control, and gay rights all hinge upon judicial appointments that the next president is likely to make. Meanwhile, Republicans may be more hesitant to discuss the Court, possibly because they fear their judicial preferences will risk alienating moderate voters.

Even so, judicial issues are unlikely to have much direct impact on the election. There are several reasons for this. First, many of the most significant and divisive issues that confront the Court are too abstruse for most voters to grasp. For example, few voters are likely to comprehend the subtleties of the Court’s recent division over profound issues of federalism. Even those voters who know that the Court recently shielded states from lawsuits arising under the federal age discrimination statute are unlikely to fathom the Court’s complex interpretation of the 11th and 14th amendments in its decision.

Moreover, the Court itself today is not a subject of unusual controversy, in contrast to past elections when the judiciary emerged as a major issue. Since the present Court is difficult to peg as “liberal” or “conservative,” the general direction of the Court no longer provides a lightning rod for criticism. Controversies instead revolve around individual decisions of the Court, which run the gamut from conservative to moderate to liberal. In this environment, Democrats must warn about the perils of a conservative take-over of the Court, a stance that is less likely to capture voter enthusiasm than a call to reverse the Court’s direction.

As in previous elections, moreover, the impact of the Court issue also may be muted because the issue is often little more than a reflection of how voters already feel about candidates. For example, a voter whose support for Gore is based largely on his or her perception that Gore is more pro-choice than Bush is not likely to prefer Gore more merely because Gore may be more likely than Bush to appoint pro-choice judges to the federal courts.

In an era of low voter turnout, however, the judicial issue may motivate some voters to show up at the polls because they perceive that judicial appointments raise the stakes of the election. The prospect of upcoming Supreme Court nominations also stimulates political activists to greater commitment and provides an incentive for fund raising. The People for the American Way, for example, has issued a 78-page report entitled Courting Disaster, which warns about the dangers of “a Scalia-Thomas Supreme Court.”

The issue of judicial appointments also may be attaining more prominence in presidential elections because the increased scrutiny of judicial candidates has reduced the traditional risk that judges will defy the expectations of the presidents who appoint them. Of course, there will always be a high degree of unpredictability in judicial performance. As the late Yale Law Professor Alexander Bickel once observed, “you fire an arrow into a very distant future when you appoint a Justice.” The performance of judges today, however, is more predictable because candidates for the Supreme Court as well as the lower courts receive far more intense scrutiny both during the presidential nominating process and Senate confirmation proceedings. Of course, even now the process is not flawless—when President Bush appointed David Souter to the Court, he surely did not expect the new justice to become so liberal.
The importance of judicial issues in this year’s elections also reflects a growing sophistication about the Court. The highly publicized brawls over the 1987 Bork nomination and the 1990 Thomas nomination helped to stimulate greater awareness of the Court, as have improved news coverage of judicial issues and the growing ubiquity of legal issues in American life. Although polls consistently show that few voters pay careful attention to judicial decisions and that even the names of most of the justices are unknown to the overwhelming majority of Americans, few voters are unaware of the Court’s vast power to affect significant public issues. Voters seem to understand generally that the Court can affect such highly charged issues as abortion, school vouchers, school prayer, and violence against women. Many voters also recognize that Supreme Court appointments are likely in the near future because of the average age of the justices.

Unanimity on Validity

The debate over the Court this year also helps to underscore the resilience of public respect for the Court and acceptance of the Court’s power to review the constitutionality of state and federal legislation. In contrast to the virile populist attacks on judicial power in so many campaigns of yesteryear, no major candidate or political movement today questions the validity of judicial review or attacks the Court as an institution. (Of course, politicians on both sides of the political divide demonize individual judges and justices.) Nearly everyone seems content to allow the Court to exercise vast powers, either because they support such powers or because they recognize the political impracticability of reining them in—which would include measures such as abolishing life tenure, abrogating judicial review, curbing jurisdiction, or implementing any of the other remedies widely advocated by two-fisted critics of judicial power until relatively recent times.

The issue today, therefore, is not the validity of judicial power itself, but rather who will exercise that power. In a variation on the old adage “if you can’t beat them, join them,” voters and politicians of all persuasions today seek to elect presidents and senators who will appoint judges who will serve their agendas.

Although few votes may pivot on judicial appointments, voters are rightly giving more consideration to the types of judicial nominations that the next president will make.