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Neocons in Exile

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Abstract: *Neocons in Exile*

For more than twenty-five years, starting in 1980, neoconservatives stood at the intellectual forefront of a conservative coalition that controlled the national government. Drawing inspiration from Leo Strauss's political philosophy, neocons earned their prominent position by leading an assault on the hegemonic pluralist democratic regime. Pluralist democracy accepts ethical relativism: individuals and interest groups press their own interests and values in the democratic arena. From this array of competing interests and values, the government chooses to pursue those goals that emerge through certain established processes. While attacking pluralist democracy, neocons simultaneously advocated for a return to republican democracy, which had predominated before the 1930s. According to republican democratic theory, virtuous citizens and officials pursue the common good rather than their private interests. Thus, neocons rejected the ethical relativism that supports the pluralist democratic regime and instead championed traditional American virtues that were to direct us toward the common good. But given the election results of 2008, neoconservatives find themselves shorn of power in Congress and the executive branch. Yet, they are not completely impotent: exiled neoconservative justices will continue to control the Supreme Court for years to come. This Article explores how these justices have shaped constitutional adjudication over the previous years, and how they will do so in the future. The Article concludes by examining how progressives might confront the challenge of a largely neoconservative Court.

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Neocons in Exile

For more than twenty-five years, starting in 1980, neoconservatives stood at the intellectual forefront of a conservative coalition that controlled the national government.[1] Neocons earned this prominent position by leading an assault on the hegemonic pluralist democratic regime, which had taken hold of the nation in the 1930s.[2] Pluralist democracy accepts ethical relativism: individuals and interest groups press their own interests and values in the democratic arena. From this array of competing interests and values, the government chooses to pursue those goals that emerge through certain established processes. No preexisting or higher principles limit the interests, values, and goals that can be urged. Process determines legitimacy.[3]

While neoconservatives began to assail pluralist democracy in the sixties and seventies, they simultaneously advocated for a return to republican democracy, predominant before the 1930s. Republican democratic theory holds that virtuous citizens and officials pursue the common good rather than their private interests.[4] Thus, neocons rejected the ethical relativism that supports the pluralist democratic regime and instead championed traditional American values or virtues that were to direct us toward the common good. Yet, the neocons never succeeded in undermining the pluralist democratic framework. To the contrary, the necons themselves operated as just one more interest group competing within the (pluralist) democratic arena, albeit a highly successful one. And now that political winds have shifted, the neoconservatives find themselves shorn of power in Congress and the executive branch. But they will do more than merely survive, bereft of power: neoconservative justices will continue to sit on the Supreme Court for years to come. What consequences, then, will follow from having exiled neocons controlling the Court?

Initially, neoconservativism should be distinguished from other political outlooks. Start with a distinction between progressivism (or liberalism) and conservatism. In general, progressives resist governmental efforts to impose moral values but favor governmental intervention in the economic marketplace when necessary to promote equity. Meanwhile, conservatives often favor both governmental and non-governmental promoting of traditional

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[1]Neoconservative texts and helpful sources discussing neoconservatism include the following: Daniel Bell, The Cultural Contradictions of Capitalism (1978; 1st ed. 1976); Allan Bloom, The Closing of the American Mind (1987); Murray Friedman, The Neoconservative Revolution (2005); Francis Fukuyama, America at the Crossroads (2006) [hereinafter Crossroads]; Nathan Glazer, Affirmative Discrimination (1978 ed.; 1st ed. 1975); Jacob Heilbrunn, They Knew They Were Right (2008) [hereinafter Right]; Gertrude Himmelfarb, Poverty and Compassion (1991); Irving Kristol, Neoconservatism: The Autobiography of an Idea (1995); Douglas Murray, Neoconservatism: Why We Need It (2006); George H. Nash, The Conservative Intellectual Movement in America Since 1945 (2008 ed.; 1st ed. 1976); Norman Podhoretz, The Norman Podhoretz Reader (Thomas L. Jeffers ed., 2004); The Future of Conservatism (Charles W. Dunn ed., 2007) [hereinafter Dunn]; The Neocon Reader (Irwin Stelzer ed., 2004) [hereinafter Reader]; Peter Berkowitz, *Introduction*, *in* Varieties of Conservatism in America xiii (2004); Francis Fukuyama, *The End of History?*, 16 The National Interest 3 (Summer 1989) <http://www.wesjones.com/eoh.htm> (accessed February 4, 2009); Jacob Heilbrunn, *Neoconservatism*, *in* Varieties of Conservatism in America 105 (Peter Berkowitz ed., 2004) [hereinafter Neoconservatism].

[2]*See* Right, *supra* note 1, at 164-66 (emphasizing neoconservative efforts to provide the ideas that could hold together the conservative coalition).

[3]*See* Stephen M. Feldman, Free Expression and Democracy in America: A History 291-382 (2008) (discussing pluralist democracy).

[4]*See id*. at 14-45, 153-208 (discussing republican democracy).

moral and religious values, yet prefer an unregulated economic marketplace because it ostensibly rewards individual merit.[5] To understand neoconservatism per se, though, it must be distinguished from other forms of conservatism. After World War II, traditionalist conservatives such as Russell Kirk expressed a Burkean reverence for tradition and religion as sources of values.[6] They preferred minimal or restrained government, but they brooded that individuals will abuse liberty and become licentious.[7] Libertarian conservatives, inspired by Friedrich Hayek's *Road to Serfdom*, emphasized the protection of individual liberties, especially economic liberties.[8] They worried little about license, and for that reason, they stressed minimal government above all else.[9] In contrast, neoconservatives were more willing to accept an assertive government, but one that pursues (conservative) goals embodied in the concept of the common good.[10] Neocons believed that, through reason, elite leaders can discern universal truths and the best policies for achieving desired goals consistent with those truths. Since not all individuals can recognize the universal truths, some neocons advocated for the use of tradition and religion to inculcate suitable values.[11]

To be sure, these are rough definitions, and such generalizations can be misleading. For instance, as is often noted, conservatives tend to protect and celebrate the status quo, while progressives question it. Yet, over recent decades, neoconservatives have led the charge against the pluralist democratic regime—that is, against the status quo. Besides, in the 1980s, President Ronald Reagan managed to fuse the various forms of conservatism under a big tent of conservative politics.[12] Undercurrents of disagreement always remained, but the competing conservative movements, in a sense, cross-pollinated.[13] Traditionalists, libertarians, and the general public adopted many neoconservative views, which became well-publicized in the mainstream media, while neoconservatives shifted to adopt positions more closely aligned with their conservative competitors.[14] This cross-pollination arose partly because of Reagan's charisma; somehow, all conservatives could accept him as their leader.[15] Then the reality of Reagan's political success contributed to further conservative intermixing. When conservatives first tasted political power with Reagan, they naturally hungered for more.[16] "The task," explained neocon Irving Kristol, "was to create … a Republican majority—so political effectiveness was the priority."[17] Conservatives of diverse ilks realized that they could garner

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[5]Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 123-24 (1999). I use 'progressivism' and 'liberalism' interchangeably throughout this Article.

[6]Nash, *supra* note 1, at 104-15; Adam Wolfson, *Conservatives and Neoconservatives* (2004), *reprinted in* Reader, *supra* note 1, at 213, 217.

[7]Berkowitz, *supra* note 1, at xiv-xvi; Neoconservatism, *supra* note 1, at 107.

[8]Friedrich A. Hayek, The Road to Serfdom (1944); Wolfson, *supra* note 6, at 216, 221.

[9]Berkowitz, *supra* note 1, at xvii-xviii.

[10]Wolfson, *supra* note 6, at 223-24

[11]Berkowitz, *supra* note 1, at xxi-xxii; Neoconservatism, *supra* note 1, at 105, 123-26.

[12]Nash, *supra* note 1, at 559; Dunn, *supra* note 1, at vi, viii.

[13]Tension between neocons and paleoconservatives was present even during the Reagan era. Like traditionalists, paleos such as Patrick Buchanan emphasized traditional and religious values, but paleos tended to be bitter and angry. Wolfson, *supra* note 6, at 219; Murray, *supra* note 1, at xiv.

[14]Crossroads, *supra* note 1, at 38-39; *see* Friedman, *supra* note 1, at 129-30 (discussing how traditionalists and neocons moved closer); Norman Podhoretz, *Neoconservatism: A Eulogy* (1996), *reprinted in* Podhoretz, *supra* note 1, at 269, 270, 277-78 (describing how neocons adopted broader conservative position opposing welfare state, while other conservatives accepted neoconservative argument on affirmative action).

[15]George H. Nash, *The Uneasy Future of American Conservatism*, *in* Dunn, *supra* note 1, at 1, 9-11.

[16]Barbara Sinclair, Party Wars 52-53 (2006).

[17]Friedman, *supra* note 1, at 183 (quoting Kristol).

more power only by working together with other conservatives, which at least remained possible while all were within the aura of the Reagan mystique. Francis Fukuyama, a neoconservative intellectual leader during the eighties and nineties, admitted that, after a while, "it became increasingly hard to disentangle neoconservatism from other, more traditional varieties of American conservatism."[18] During this time, the categorization of particular conservatives as one type or another became problematic. Even so, with Republicans occupying the White House for so many years since 1980, numerous Supreme Court as well as other federal judicial appointees were unequivocally conservative, if not neoconservative.

Part I of this Article discusses the transition from republican to pluralist democracy. Part II, explaining neoconservatism as a reaction against the pluralist democratic regime, focuses on the "godfather" of neoconservatism, Leo Strauss, neoconservative principles and policies, and neoconservative constitutional theory.[19] Part III discusses neoconservative influences on the Supreme Court over the last twenty-five years and, then, neoconservative ramifications for the future. Finally, Part IV, the conclusion, suggests how progressives might confront the challenge of a Court dominated by neocons. Two caveats can help clarify my purposes. First, while this Article explains how neoconservatives have drawn sustenance from Strauss's writings, one should not mistake influence for intent. Strauss rarely wrote with the purpose of directly intervening in American political debates.[20] Second, this Article does not critically analyze either neoconservatism or the neoconservative reliance on Straussian themes. I do not attempt to demonstrate that certain neoconservative policy prescriptions might fail to follow from broader neoconservative principles, to tie logically together in a coherent whole, or to reflect Strauss's writings accurately. Rather, this Article presents a narrative history describing neoconservatism, including its effects on constitutional theory and Supreme Court adjudication. Significantly, this narrative explains why neoconservatives, as a practical matter, could not possibly attain some of their overarching (Straussian) goals, particularly in the forum of the Supreme Court. Finally, based on the narrative, I am able to infer the future influence of neoconservatism on the Court (and how progressives might confront the neoconservative justices).

I. From Republican to Pluralist Democracy

From the framing through the 1920s, the United States operated as a republican democracy. Citizens and elected officials were supposed to be virtuous: in the political realm, they were to pursue the common good or public welfare rather than their own "partial or private interests."[21] For certain, in the early decades of nationhood, many Americans believed they were especially well-suited for this form of government. An agrarian economy where "almost every man is a freeholder" engendered a material equality unknown elsewhere, particularly in Europe.[22] This widespread land ownership imbued individuals, moreover, with an independence that intertwined with the community and promoted a virtuous commitment to the common good.[23] "I think our governments will remain virtuous for many centuries," wrote Thomas Jefferson, "as long as they are chiefly agricultural; and this will be as long as there shall be

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[18]Crossroads, *supra* note 1, at 38; Murray, *supra* note 1, at 61.

[19]Murray, *supra* note 1, at 30. A discussion of neoconservative foreign policy is beyond the scope of this Article, though during the Bush II era, neocons became perhaps more renowned for their influence in this realm.

[20]McAllister, *supra* note 62, at 221-23, 271.

[21]Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 59 (1969); *e.g.*, Virginia Bill of Rights (1776), *reprinted in* 2 The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States 1908, 1908 (Ben Perley Poore ed., 2d ed. 1878) (emphasizing government for "the common benefit").

[22]Wood, *supra* note 21, at 100 (quoting Josiah Quincy).

[23]Edmund S. Morgan, The Birth of the Republic, 1763-89, at 7 (rev. ed. 1977).

vacant lands in any part of America."[24] And with an overwhelming number of Americans being committed to Protestantism and tracing their ancestral roots to Western or Northern Europe, the people seemed sufficiently homogeneous to join together in the pursuit of the common good.[25]

Of course, some Americans did not fit the mold. Not all were white Protestant Anglo-Saxons. Exclusion, however, preserved at least a surface homogeneity. According to republican democratic theory, non-virtuous individuals (or non-virtuous societal groups) would not be willing to forgo the pursuit of their own private interests. Instead, they would form factions bent on corrupting republican democratic government.[26] Thus, an alleged lack of civic virtue could justify the forced exclusion of a group from the polity. On this pretext, African Americans, Irish-Catholic immigrants, women, and other peripheral groups were precluded from participating in republican democracy for much of American history.[27] Typically, then, particular conceptions of virtue and the common good mirrored mainstream white Protestant values and interests.

With its strong basis in the rural, agrarian, and relatively homogeneous American society, republican democracy persisted, but a variety of forces strained the regime over time, especially in the late-nineteenth and early-twentieth centuries.[28] These forces, including industrialization, urbanization, and immigration, redounded upon each other, their effects rippling through society. After the Civil War, for instance, the industrial revolution hit the United States. In 1859, the value added from manufacturing (equaling the value of shipments minus the cost of materials and the like) for the entire nation totaled less than 8.6 million dollars. By 1899, that total stood at approximately 4.6 billion. It leaped to over 8 billion in 1909, and then to nearly 24 billion in 1919.[29] Meanwhile, partly because industrial leaders steadfastly encouraged immigration to maintain a large pool of surplus factory workers, immigrants continually streamed into the cities.[30] In 1870, more than 28 million Americans lived in rural settings, with only 9.9 million living in urban areas,[31] yet by 1920, a majority of Americans lived in cities.[32] And immigration not only swelled the (urban) populations—from 1905 to 1914, more than one million immigrants arrived annually six different times[33]—but also changed the demographic makeup of America. During the antebellum period, most immigrants had come from Ireland, Germany, Scandinavia, and Britain, and as late at 1882, 87 percent of all immigrants arrived from Western Europe. Within twenty years, however, that number had dwindled to barely one-fifth of the total, with 78

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[24]Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 2 Great Issues in American History 112, 115 (Richard Hofstadter ed., 1982).

[25]Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 219 (1986); Stephen M. Feldman, Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State 161-68 (1997); *see* The Federalist No. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961) (emphasizing the homogeneity of the American people).

[26]The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[27]Stephen M. Feldman, *The Theory and Politics of First-Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. Pa. J. Const. L. 431, 434-35 (2006).

[28]Feldman, *supra* note 3, at 166-97 (discussing in greater detail the development and effects of industrialization, urbanization, and immigration).

[29]The Statistical History of the United States from Colonial Times to the Present 409 (1965) (Table: Manufactures Summary: 1849 to 1954) [hereinafter Statistical History].

[30]Richard F. Bensel, The Political Economy of American Industrialization, 1877-1900, at 207-08 (2000); Stephen Steinberg, The Ethnic Myth 36-38 (1989 ed.)

[31]Statistical History, *supra* note 29, at 14 (Table: Population in Urban and Rural Territory).

[32]*Id*.

[33]*Id*.

percent instead coming from Southern and Eastern Europe.[34] From the perspective of white Anglo-Saxon Protestant Americans, these new arrivals were racially distinct—and inferior. The United States Immigration Commission issued a 1910 report worrying that "Jewish immigration now exceeds in number annually that of any other race with the exception of the Italian."[35] Italians, the report added, were unlikely to become virtuous American citizens because of their proclivity for criminal activity, illiteracy, and poverty.[36] Given such attitudes toward various immigrant groups, calls for limits on immigration, especially on Southern and Eastern Europeans, became more common and aggressive.[37]

Nevertheless, republican democracy proved flexible and resilient. Through the nineteenth century and into the 1920s, virtue and the common good remained the overarching principles of government, though their specific meanings changed in response to the cultural, social, and economic pressures.[38] Eventually, however, in the early 1930s, the republican democratic regime collapsed and a new one—pluralist democratic—emerged as a social and political reality. By this time, the reality was that the American population was more heterogeneous than ever before. The reality was that the majority of Americans lived in cities. The reality was that more Americans were working for wages in factories than working their own farmland. And then, finally, two additional factors triggered the transition to pluralist democracy. First, the nation plunged into a monumental economic depression; unemployment, for instance, swelled to nearly 25 percent, and in some industrial cities, it soared above 50 percent for unskilled workers.[39] Second, the right leader for the time, Franklin Delano Roosevelt, arrived on the scene.

Instead of dismissing the preferences and values of immigrants, indigents, religious minorities, and other peripheral groups as being non-virtuous, instead of dismissing their desires and goals as contravening the common good, FDR and his New Deal colleagues sought to incorporate these groups into the polity and to satisfy their interests. Instead of preaching morality to immigrants and their children and trying to convert them to Protestant values—as the Progressives had tried to do earlier in the twentieth century—FDR focused on economic issues. As one of FDR's close advisers, Rex Tugwell, said, "the New Deal is attempting to do nothing to people, and does not seek at all to alter their way of life, their wants and desires."[40] Consequently, FDR led the nation toward a more open and inclusive form of democracy. Mainstream and old-stock Protestant values, long the foundation for the ideals of virtue and the common good, were now to be balanced with the values of other Americans who constituted the demographically diverse population. No single set of cultural values was authoritative. Ethical relativism took hold as a political reality: all values, all interests—or at least a plurality of values

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[34]Erik W. Austin, Political Facts of the United States Since 1789, at 472 (1986) (Table 7.5, Number of Immigrants from Selected Countries Arriving in the United States by Decade, 1820-1980); United States Immigration Commission (Chair: Senator William P. Dillingham), *Dictionary of Races or Peoples* 32-33 (Dec. 5, 1910) (printed 1911) [hereinafter Dictionary].

[35]Dictionary, *supra* note 34, at 74.

[36]*Id*. at 82-83.

[37]John Higham, Strangers in the Land 59-61 (1992 ed.).

[38]For example, political parties were initially considered to be illegitimate factions, Stanley Elkins & Eric McKitrick, The Age of Federalism 596-617 (1993), but they became an accepted republican democratic institution in the 1820s and 1830s. Edward Pessen, Jacksonian America 197-232 (rev. ed. 1985); Harry L. Watson, Liberty and Power 171-74 (1990).

[39]Statistical History, *supra* note 29, at 73 (Table: Unemployment); Lizabeth Cohen, Making a New Deal 240-43 (1990).

[40]William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 339 (1963).

and interests—mattered to Roosevelt and the New Dealers.[41] Democracy now revolved around the assertion of interests and values by sundry individuals and groups. The pursuit of self-interest no longer amounted to corruption; rather it defined the nature of (pluralist) democracy. Diverse voluntary organizations and interest groups openly sought to press their claims through the democratic process—given the chance, they thrust through the doors to political action.[42] In cities, for instance, one might find a Polish Democratic Club or a Lithuanian Democratic League as well as organizations representing business and labor. Lobbying became open, aggressive, and institutionalized.[43]

When it came to the economy, Roosevelt subscribed fully to a modernist attitude, which entailed a commitment to historicism and empiricism. From the historicist perspective, history demonstrated that social, cultural, and political arrangements were contingent and changeable and that human inventiveness could produce endless (though not inevitable) progress.[44] Empiricists believed that the path to knowledge lay in experience: the empirical study of external reality. Thus, Roosevelt pushed for progress, for immediate action guided by empirical experts: he relied on legal and social-science experts to shape and administer legislation that responded to the economic needs of a multitude of American constituencies. The New Dealers passed fifteen legislative acts during the first 100 days of Roosevelt's first term, and they continued enacting legislation in accordance with the needs and interests of the American people fighting a depression.[45] Under the new pluralist democracy, the individual's goal, it appeared, was to participate in politics: to express one's values and interests, to have governmental officials listen to those expressions of values and interests, and to have the government, acting through experts, fulfill one's desires in a reasonable number of instances.

What about a *theory* of pluralist democracy? While pluralist democracy emerged as a social and political reality in the early 1930s, scholars began to explicate and justify this new form of democratic practice with a coherent theory only subsequently, in the late 1930s. Among intellectuals, the commitment to empiricism engendered an ineluctable acceptance of ethical relativism; facts and values were distinct. Thus, just as an ostensible value-relativism took hold as a political reality, it took hold as a persistent intellectual outlook. If knowledge must be grounded on experience, then ethical values seemingly could not be verified. Individuals could and did assert values, but scientists could not empirically test the validity of those values.[46] For intellectuals in the early 1930s, ethical relativism seemed little more than an untroubling logical corollary to empiricism. By the end of the decade, however, it had become problematic. Because of the rise of totalitarian governments in Europe, American intellectuals recognized that

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[41]*E.g.*, Franklin D. Roosevelt, *Commonwealth Club Speech* (Sept. 23, 1932), *reprinted in* III Great Issues in American History 335, 341-42 (Richard Hofstadter ed., 1982). Roosevelt was far more solicitous of African American interests than any previous president, yet he often sacrificed black interests and values so as to keep white Southerners aligned with the Democratic party. Feldman, *supra* note 3, at 327-28. Also, Roosevelt eventually broke with and became antagonistic toward big business. *Id*. at 318-19, 324.

[42]*See* Cohen, *supra* note 39, at 254-57, 362-66 (discussing the transformation of ethnic urbanites into active participants on the national political stage).

[43]*Id*. at 362.

[44]Stephen M. Feldman, American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage 19, 84-85 (2000); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 Va. L. Rev. 485, 506 (2002).

[45]*E.g.*, The Social Security Act (Aug. 14, 1935), 49 Stat. 620; The National Labor Relations Act (July 5, 1935), 49 Stat. 449.

[46]*See* Walter Lippmann, A Preface to Morals 3-4, 8 (1929) (arguing that individuals admitted that their own moral codes lacked foundations).

they needed to justify the superiority of democracy.[47] One could not merely describe democracy in relativistic terms, as no better and no worse than fascism, communism, or Nazism. Yet, American (modernist) intellectuals could not turn back the clock to premodern times: they were committed to empiricism, and ethical relativism clung to its coattails. Joseph Schumpeter noted that, under republican democracy, the common good had been conceptualized as objective: "every [governmental] measure taken or to be taken [could] unequivocally be classed as 'good' or 'bad.'"[48] But relativism undermined a belief in such a common good: "to different individuals and groups the common good is bound to mean different things."[49] Republican democracy now seemed impossible, but what democratic theory could replace it?

Ironically, political theorists solved this conundrum by embracing relativism: the superiority of democracy, they reasoned, arose from its acceptance of a plurality of values. Totalitarian governments claimed knowledge of objective values and forcefully imposed those values and concomitant goals on their peoples. But democratic governments allowed their citizens to express multitudes of values and goals.[50] The key to democracy lay not in the specification of supposedly objective goals, such as the common good, but rather in the following of processes that allowed all citizens to voice their particular values and interests within a free and open democratic arena. Thus, in 1939, John Dewey contrasted authoritarian methods with the "plural, partial, and experimental methods" of democracy.[51] After World War II, numerous political theorists subscribed to and elaborated pluralist democratic theory, often celebrating it as the best means for accommodating "our multigroup society."[52] The only way to determine public values and goals, they explained, is "through the free competition of interest groups."[53] By "composing or compromising" their different values and interests,[54] the "competing groups [would] coordinate their aims in programs they can all support."[55] Legislative decisions therefore turned on negotiation, persuasion, and the exertion of pressure through the normal channels of the democratic process.[56]

No one articulated pluralist democratic theory more comprehensively than Robert A. Dahl.[57] Because pluralist (or polyarchal) democracy accepted the inevitable pursuit of self-interest—rather than the pursuit of an ideal substantive goal (the common good)—pluralist democracy required the institutionalization of a "process" that would allow the people to determine which interests would be at least temporarily enshrined as communal goals.[58] A communal goal was legitimate only if the conditions for democracy were satisfied—if the proper process were followed. Thus, Dahl's primary aim was to identify conditions, such as the

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[47]Edward A. Purcell, Jr., The Crisis of Democratic Theory 197-217 (1973).

[48]Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 250 (3d ed. 1950) (1st ed. in 1942).

[49]*Id*. at 251.

[50]John Dewey anticipated this argument as early as 1932, explaining that totalitarian dictators "assume that since they are in possession of final truth, whether from revelation or from some other source, dissent is a dangerous heresy which must be suppressed." John Dewey & James H. Tufts, Ethics (1932 ed.), *reprinted in* John Dewey, 7 The Later Works, 1925-1953, at 1, 359 (Jo Ann Boydston ed., 1985).

[51]John Dewey, Freedom and Culture 176 (1939).

[52]Wilfred E. Binkley & Malcolm C. Moos, A Grammar of American Politics 9 (1949).

[53]*Id*.

[54]*Id*.

[55]*Id*. at 8.

[56]*Id*. at 10-11.

[57]Robert A. Dahl, Democracy and its Critics (1989) [hereinafter Democracy]; Robert A. Dahl, A Preface to Democratic Theory (1956) [hereinafter Preface].

[58]Democracy, *supra* note 57, at 83, 106; Preface, *supra* note 57, at 67-71.

identical weighing of each vote and the choice of the option receiving the greatest number of votes, that were prerequisite to the operation of a democratic process.[59] The most important component of the democratic process, according to Dahl, is "effective participation": citizens must have "adequate" and "equal" opportunities "for expressing their preferences … for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another."[60]

II. On Neoconservatism

A. Leo Strauss

Pluralist democracy achieved hegemony during the post-World War II era as the correct theory and practice of government, but it did not go unchallenged. European émigrés such as Leo Strauss, who had fled Nazi Germany in the 1930s, raised the most persistent oppositional views.[61] By the end of the 1940s, Strauss was an established political philosopher within the American intellectual community. Thus, he experienced the rise and entrenchment of pluralist democracy from both an insider perspective, living and working in the United States, and an outsider perspective, having matured intellectually in Europe. While Strauss appreciated the American constitutional system—the United States had provided him with refuge—he could not accept unbridled celebrations of democracy. Strauss, after all, had witnessed the collapse of the democratic Weimar Republic into Nazi totalitarianism and had suffered personal hardships and dislocations because of the Nazi perversions of the state.[62]

Strauss launched a sustained critique of the interrelated intellectual components of modernity that supported pluralist democracy. Historicism, Strauss explained, "seems to show that all human thought is dependent on unique historical contexts that are preceded by more or less different contexts and that emerge out of their antecedents in a fundamentally unpredictable way."[63] Put in different words, historicism stresses the (historical) context of all perceptions and experiences. With everything becoming contextual and therefore contingent, historicism allows us to look constantly toward the future.[64] Awareness of the past can liberate us from that past. To be sure, we are not guaranteed to progress in the future, epoch by epoch,[65] but we can nonetheless aim "toward ever greater prosperity; [enabling] everyone to share in all the advantages of society or life."[66]

Yet, Strauss warned, historicism undermines the very possibility of knowledge and understanding. For example, historicism leads us to conclude that we cannot specify the content

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[59]Preface, *supra* note 57, at 67; *see* Democracy, *supra* note 57, at 109-11 (discussing voting equality).

[60]Democracy, *supra* note 57, at 109.

[61]John G. Gunnell, The Descent of Political Theory 194-98 (1993). Hannah Arendt was another émigré who criticized pluralist democracy. Hannah Arendt, The Human Condition (1958); Hannah Arendt, The Origins of Totalitarianism (1951).

[62]Shadia B. Drury, Leo Strauss and the American Right 4 (1997); Ted V. McAllister, Revolt Against Modernity 34-35, 160-61 (1996). Strauss's writings include the following: Leo Strauss, Liberalism Ancient and Modern (1968) [hereinafter Liberalism]; Leo Strauss, The City and Man (1964) [hereinafter City]; Leo Strauss, What Is Political Philosophy (1959) [hereinafter Political]; Leo Strauss, Natural Right and History (1953) [hereinafter Natural]. Other helpful discussions of Strauss's work include the following: Thomas L. Pangle, Leo Strauss (2006); Steven B. Smith, Reading Leo Strauss (2006); Daniel Tanguay, Leo Strauss (Christopher Nadon trans., 2007); Nathan Tarcov & Thomas L. Pangle, *Leo Strauss and the History of Political Philosophy*, *in* History of Political Philosophy 907 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

[63]Natural, *supra* note 62, at 19.

[64]Political, *supra* note 62, at 59.

[65]*Id*. at 67.

[66]City, *supra* note 62, at 4.

of justice because it appears to vary from society to society, from context to context.[67] Justice means one thing in the United States, another thing in China, and another thing in Egypt—or so the historicist claims.[68] More broadly, "[a]ll understanding, all knowledge …, presupposes a frame of reference …, a comprehensive view within which understanding and knowing take place."[69] Thomas Kuhn would soon refer to this overarching frame of reference as a paradigm.[70] The problem with this outlook, Strauss argued, is that "[t]he comprehensive view of the whole [or, in other words, a paradigm] cannot be validated by reasoning, since it is the basis of all reasoning."[71] We always must choose among competing viewpoints, but we are left "without any rational guidance."[72] Each viewpoint is "as legitimate as any other."[73] But then, Strauss asked, is not historicism "self-contradictory"?[74] How can historicism claim that it is a valid viewpoint itself?[75] And even more important, when humanity is ostensibly freed of all "permanencies," such as knowing "the distinction between the noble and the base," then we are too apt to spiral into terror, as happened with Hitler and the Nazis.[76] "It was the contempt for these permanencies which permitted the most radical historicist in 1933 [to rise]."[77]

Strauss attacked the pretensions of modern social science with equal vigor. Social scientists claim that facts and values must be separated: "the Is and the Ought" cannot be joined.[78] They posit that all knowledge must be empirical, based on experience of facts, and that therefore social science must be "value-free" and "ethically neutral."[79] But to Strauss, modern social science is wrong-headed on several counts. Most simply, he argued that value-free social science is impossible. Values seep into any social or political analysis in numerous ways, from the choice of research questions to the definition of terms.[80] At a deeper level, to insist on value-free social science, including political science, would be to render it meaningless: "It is impossible to study social phenomena, i.e., all important social phenomena, without making value judgments. … A man who refuses to distinguish between great statesmen, mediocrities, and insane impostors may be a good bibliographer; he cannot say anything relevant about politics and political history."[81]

And even if value-free social science were possible, the single-minded focus on empirical research, on facts, would necessarily preclude any knowledge of values and ends. From the modern standpoint, values, which are the sources of our goals or ends, are not subject to scientific (empirical) determination and therefore are not knowable.[82] Modern social science leads us, then, to ethical relativism.

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[67]*See* Natural, *supra* note 62, at 97 (explaining how the conventionalist position undermines claims of justice).

[68]*See* Political, *supra* note 62, at 63 (arguing that historicism ties political philosophies to specific places and times).

[69]Natural, *supra* note 62, at 26.

[70]Thomas S. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970).

[71]Natural, *supra* note 62, at 27.

[72]*Id*.

[73]*Id*.

[74]*Id*.

[75]*Id*.

[76]Political, *supra* note 62, at 26.

[77]*Id*. at 27.

[78]Natural, *supra* note 62, at 41.

[79]Political, *supra* note 62, at 19; Natural, *supra* note 62, at 16-17, 40-41.

[80]Political, *supra* note 62, at 21-25.

[81]*Id*. at 21.

[82]Natural, *supra* note 62, at 40-41.

> [T]here cannot be any genuine knowledge of the Ought. [The modern social scientist] denied to man any science, empirical or rational, any knowledge, scientific or philosophic, of the true value system: the true value system does not exist; there is a variety of values which are of the same rank, whose demands conflict with one another, and whose conflict cannot be solved by human reason. Social science or social philosophy can do no more than clarify that conflict and all its implications; the solution has to be left to the free, non-rational decision of each individual.[83]

Modern social science, with its desire to be empirical and "neutral in the conflict between good and evil," relegates us to a radical and irrational individualism—where each person acts on arbitrary preferences—and ultimately, to nihilism.[84] Not only must we "recognize all preferences or all 'civilizations' as equally respectable," we must accept that "[i]f our principles have no other support than our blind preferences, everything a man is willing to dare will be permissible."[85]

Strauss, in sum, concluded that modernity is imploding: its own premises inevitably cause the edifice of modernity to collapse upon itself. But as Strauss would insist, the rise of the Nazis and the ensuing Holocaust were not wrong merely from a relative perspective. We must have more than irrational individual preferences and culturally relative values that would leave us sliding toward nihilism and an acceptance of genocide. And as modernity goes, Strauss added, so goes pluralist democracy. Built on the modernist premises of historicism, empiricism, and relativism, not only is pluralist democracy indefensible from a Straussian standpoint, but it also perches us precariously on the edge of a moral abyss.[86] But then what should we do? Strauss did not want to repudiate democracy, though he found its current instantiation in the United States to be frail and dangerous.[87] To a degree, he sought to modify and therefore save democracy. Strauss, it seems, wanted answers. After all, Strauss criticized modernity for leaving us with only contingencies, for undermining the certainty of ostensible answers. But what solutions did Strauss propose in response to the problem of democracy and the crisis of modernity?

Unfortunately, at this very point, Strauss's writings became far murkier. He turned to philosophy—specifically classical political philosophy—because, he argued, it could lead us from opinion to truth.[88] Strauss feared that the methods of modern social science structure our understandings of politics and government by injecting the fact-value dichotomy.[89] To avoid being led astray in this manner, we must return to a "pre-scientific understanding" of politics—"a coherent and comprehensive understanding of what is frequently called the common sense view of political things."[90] And ancient or classical philosophy can provide us with that pre-scientific or "original form of political science," so to speak.[91] Yet, Strauss acknowledged that

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[83] *Id*. at 41-42.

[84] Political, *supra* note 62, at 18; Natural, *supra* note 62, at 4-5.

[85] Natural, *supra* note 62, at 4-5.

[86] *E.g.*, Political, *supra* note 62, at 37-38; *see* Liberalism, *supra* note 62, at 3-25 (discussing liberal education); Pangle, *supra* note 62, at 77-78 (discussing Strauss's emphasis on the degeneration of democracy).

[87] "We are not permitted to be flatterers of democracy precisely because we are friends and allies of liberal democracy." Liberalism, *supra* note 62, at 24; *see* Smith, *supra* note 62, at ix (describing Strauss as friend to democracy). *But see* Drury, *supra* note 62, at 133-35 (arguing that Strauss was hostile to democracy).

[88] Political, *supra* note 62, at 11-12, 66.

[89] City, *supra* note 62, at 11-12.

[90] *Id*. at 11.

[91] *Id*. at 12.

classical political philosophy cannot provide us with clear and direct access to solutions for our current difficulties.[92] We cannot solve our problems by pretending to live in a Greek polis; a global economy, nuclear weapons, and the proliferation of nation-states present us with unique political dilemmas. Even so, we must quest after "universal knowledge" of the truth, quest for answers to our dilemmas, and ancient philosophy might guide us on our journey.[93] But the end of the quest might never be reached—it might never become visible.[94]

In his quest for truth, Strauss insisted that we consider whether the ancients had correctly linked political philosophy with natural right, even though modernists had rejected natural law and natural rights.[95] He emphasized that the mere disagreement among individuals and societies about the content of natural right does not logically necessitate its repudiation.[96] Because the rejection of natural right eventually leads, he argued, to the monumental modernist problems of historicism and relativism, we should demand stronger proof before jettisoning the possibility of natural right, and from Strauss's perspective, such proof is not forthcoming.[97] Not only did Strauss, then, want to contemplate the truth and implications of natural right, he reconsidered the fundamental republican democratic principles, which historically had been rooted in natural right.[98] In opposition to pluralist democracy and its countenanced pursuit of self-interest, Strauss sought to resurrect the common good.[99] "Laws are just to the extent that they are conducive to the common good. But if the just is identical with the common good," he reasoned, "the just or right cannot be conventional: the conventions of a city cannot make good for the city what is, in fact, fatal for it and vice versa. The nature of things and not convention then determines in each case what is just."[100] Consequently, Strauss continued, the political activities of citizens and governmental officials should be virtuous, aiming for perfection and justice.[101]

B. Neoconservative Principles and Policies

Some neoconservatives maintain that they never truly constituted a political movement because they disagreed about so many particular policy agendas.[102] Rather, neoconservatism was (and is) a "persuasion"[103] or "a way of looking at the world"[104] composed of certain overarching principles. While one can fruitfully discuss the specific policy agendas of leading neoconservatives—despite the protestations of some neocons—a thorough understanding of neoconservatism should begin with the core principles, all of which derive from Straussian thought.

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[92] *Id*. at 11; Pangle, *supra* note 62, at 26-28; Tarcov & Pangle, *supra* note 62, at 918-19.

[93] Political, *supra* note 62, at 11; City, *supra* note 62, at 11; Pangle, *supra* note 62, at at 76-77; Tarcov & Pangle, *supra* note 62, at 910-13.

[94] Straussians might claim that Strauss himself engaged in esoteric writing. He distinguished the exoteric—political writings or teachings that were useful and palatable in the philosopher's particular context—from the esoteric—political writings or teachings that aimed for universal truths but were left more obscure. Political, *supra* note 62, at 226-29; Pangle, *supra* note 62, at 56-65.

[95] *See* Natural, *supra* note 62, at 81-89 (discussing the origin of natural right).

[96] *Id*. at 97.

[97] *Id*. at 9-34.

[98] *See* Aristotle, The Politics, at bk. III, ch. 7 (Carnes Lord trans., 1984) (discussing republican government).

[99] Natural, *supra* note 62, at 106-08.

[100] *Id*. at 102; *see* Tarcov & Pangle, *supra* note 62, at 920, 923-25 (discussing common good).

[101] Natural, *supra* note 62, at 133-34; Political, *supra* note 62, at 40, 94.

[102] Irwin Stelzer, *Neoconservatives and Their Critics*, *in* Reader, *supra* note 1, at 3, 4.

[103] Irving Kristol, *The Neoconservative Persuasion* (Aug. 25, 2003), *reprinted in* Reader, *supra* note 1, at 31, 33.

[104] Murray, *supra* note 1, at ix.

1. The Inherent Instability of Pluralist (Liberal) Democracy

Like Strauss, neoconservatives argued that debilitating inherent tensions riddle modernism and pluralist (liberal) democracy. Daniel Bell elaborated this theme in his 1976 book, *The Cultural Contradictions of Capitalism*.[105] Bell divided society into three realms: the techno-economic (or social), the cultural, and the political.[106] The three realms, he suggested, will contribute to a stable society if they either remain separate or operate in ways that reinforce each other. For instance, early in the development of capitalism, a culture of hard work, self-discipline, and self-denial—characterized by Max Weber as the Protestant ethic—bolstered the capitalist economy by encouraging individuals to devote themselves to employment in bureaucratically organized workplaces.[107] By the second half of the twentieth century, however, the three realms overlapped and intersected in ways that were not mutually reinforcing; rather, they contradicted each other, causing societal instability.[108] The main contradiction of modern life, according to Bell, was between the capitalist economy and the modernist culture, which imbued individuals with a hedonistic desire for self-gratification.[109]

> In the world of capitalist enterprise, the nominal ethos in the spheres of production and organization is still one of work, delayed gratification, career orientation, devotion to the enterprise. Yet, on the marketing side, the sale of goods, packaged in the glossy images of glamour and sex, promotes a hedonistic way of life whose promise is the voluptuous gratification of the lineaments of desire. The consequence of this contradiction … is that a corporation finds its people being straight by day and swingers by night.[110]

Bell also accentuated tensions between the economic and political realms. The operative principle of the capitalist economy was efficiency, maximizing one's benefits while minimizing costs,[111] while the operative principle of the pluralist democratic polity in post-World War II America was equality, requiring that all individuals be "able to participate fully" as citizens.[112] If the two realms had remained distinct, each could successfully fulfill its respective principle. But the two realms bled into each other, Bell argued, thus producing discordance: capitalism, aiming for efficiency, relied on hierarchically structured bureaucratic organizations that collided with the political desire for participatory equality. Moreover, as the two realms intermingled, an increasing number of issues, previously settled in the capitalist marketplace, shifted into the political realm.[113] Consequently, instead of being decided pursuant to "technocratic rationality" leading to economic efficiency, they were (and are) resolved through a political "bargaining" process that facilitates participation.[114] Economic decisions, therefore, were (and are) made for the wrong reasons. This problem was greatly exacerbated, according to Bell, because the modernist culture of self-gratification induced individuals and societal groups to express an ever-increasing number of excessive demands within the political realm.[115] Demands for equal participation gave way to demands for "rising entitlements," including "a basic minimum family

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[105]Bell, *supra* note 1.
[106]*Id*. at xxx-xxxi, 10-13.
[107]*Id*. at 54-65; Max Weber, The Protestant Ethic and the Spirit of Capitalism (Talcott Parsons trans., 1958).
[108]Bell, *supra* note 1, at 11-16, 37, 71-72.
[109]*Id*. at xxiv-xxv, xxx, 14.
[110]*Id*. at xxv.
[111]*Id*. at xxx, 11.
[112]*Id*. at 11.
[113]*Id*. at 23-25.
[114]*Id*. at 12.
[115]*Id*. at 11-12, 197-98.

income," a minimal "standard of living," and so on.[116] These never-ending demands then generated group conflict and societal instability.[117]

Bell sent an unequivocal message: problems emanated from all three realms, but America's most serious societal difficulties arose from the modernist culture. Bell reserved his most caustic denunciations, in particular, for the counterculture that had emerged in the 1960s. The counterculture, Bell wrote, "announced a strident opposition to bourgeois values and to the traditional codes of American life."[118] But to Bell, the counterculture was a mere manifestation of modernism; despite its pretensions, the counterculture was neither "daring" nor "revolutionary."[119] Bell's personal disgust was evident: "The counter-culture proved to be a conceit. It was an effort, largely a product of the youth movement, to transform a liberal life-style into a world of immediate gratification and exhibitionistic display. In the end, it produced little culture and countered nothing."[120]

2. The Attack on Relativism

Drawing again on Straussian thought, a wide array of neoconservatives maintained that one source of liberal instability was ethical relativism. In the words of Douglas Murray, relativism is "the predominant thought-disease" infecting American society.[121] No neoconservative has explored and critiqued relativism as extensively as Allan Bloom in his book, *The Closing of the American Mind*. Relativists, according to Bloom, claim that "[v]alues are not discovered by reason, and it is fruitless to seek them, to find the truth or the good life."[122] Relativism is necessary for tolerance of other individuals and openness to other cultural outlooks: "it [is] the only plausible stance in the face of various claims to truth and various ways of life and kinds of human beings."[123] Relativism thus becomes the springboard for the type of pluralist (liberal) democracy articulated by Robert Dahl.[124]

But Bloom was no less critical of relativism than Strauss had been. Relativists cannot prove relativism. Instead, ironically, the American commitment to relativism is a product of our educational culture.[125] We teach students, Bloom emphasized, both before and after they enter college that "truth is relative."[126] In fact, students learn that relativism is equivalent to "a moral postulate, the condition of a free society."[127] If we were to abandon relativism, students are taught, then we would sacrifice tolerant peacefulness and be doomed to war.[128] For it is the "true believer," the relativist asserts, who "is the real danger;"[129] the true believer will fight to crush all apostates. But from Bloom's perspective, these arguments are perverse. Similar to Strauss, Bloom reasoned that "the fact that there have been different opinions about good and bad in different times and places in no way proves that none is true or superior to others."[130] But

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[116]*Id*. at 233.
[117]*Id*. at 196-97.
[118]*Id*. at 73.
[119]*Id*.
[120]*Id*. at 81; Norbert Wiley, *Review*, 6 Contemporary Sociology 416, 418 (1977).
[121]Murray, *supra* note 1, at 99-107.
[122]Bloom, *supra* note 1, at 143.
[123]*Id*. at 26.
[124]*See id*. at 31-32 (discussing Dahl).
[125]*Id*. at 25-137.
[126]*Id*. at 25.
[127]*Id*.
[128]*Id*. at 141-42.
[129]*Id*. at 26.
[130]*Id*. at 39.

relativism forces us to doubt reason itself. We question whether we can differentiate right from wrong, good from evil. We become indiscriminate because we supposedly lack any ground for discriminating other than our prejudices.[131] Ultimately, Bloom concluded, relativism will lead us to nihilism and then war: when we can no longer reason with others, then our disagreements can be settled only in battle.[132]

Short of war, relativism has other dangerous implications. Again like Strauss, neoconservatives linked it with social-science empiricism. According to the fact-value dichotomy, only facts can be objectively known, while values are necessarily subjective.[133] Given the neoconservatives' animosity toward relativism, they unsurprisingly were also skeptical of social science. Whereas the pluralist democratic regime relies on social-science experts to guide regulatory and administrative programs, neocons worried that expert-created and -led social programs often produce unanticipated and detrimental results.[134] Bloom declared that "the fact-value distinction" is "the suicide of science," much less social science.[135]

What is the solution for relativism? In one way or another, all neocons have argued for "moral clarity."[136] Virtues and universal values exist, and contrary to the fact-value dichotomy, we can objectively know them. Bloom, for instance, asserted that not only is there a human nature but that reasoning about human nature can lead us to appreciate the difference between good and evil, between right and wrong.[137] Daniel Bell, meanwhile, sought to reinvigorate our commitment to religion and the sacred. Religion had been in the past and could be again in the future the source of "character," a concern for morality and discipline.[138] As such, "religion can restore … the continuity of generations, returning us to the existential predicaments which are the ground of humility and care for others."[139] Without religion, Bell lamented, "we are left with the shambles of appetite and self-interest and the destruction of the moral circle which engirds mankind. Can we—must we not—reestablish that which is sacred and that which is profane?"[140] Yet, it should be noted, Bell did not emphasize religion because of his own unshakable faith. Rather, he believed that religion could be instrumentally useful: it could help correct for the excesses of modernist culture and inject a degree of stability into American society.[141]

3. Resuscitating Republican Democracy

The critique of pluralist (liberal) democracy, the repudiation of relativism, and the commitment to moral clarity all lead to an overarching neoconservative goal: the resuscitation of republican democracy. Once again, the neoconservative debt to Strauss is unmistakable. Bloom might have been drawing from his days studying at Strauss's feet when he wrote:

> The United States is one of the highest and most extreme achievements of the rational quest for the good life according to nature. What makes its political structure possible is the use of the rational principles of natural right to found a people, thus uniting the good

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[131] *Id*. at 30.
[132] *Id*. at 202.
[133] Natural, *supra* note 62, at 39-41.
[134] *E.g.*, Glazer, *supra* note 1, at71-76 (emphasizing the unforeseen consequences of affirmative action programs).
[135] Bloom, *supra* note 1, at 39.
[136] *E.g.*, William Kristol, *Postscript: Neoconservatism Remains the Bedrock of U.S. Foreign Policy* (2004), *reprinted in* Reader, *supra* note 1, at 75, 75; Murray, *supra* note 1, at 46.
[137] Bloom, *supra* note 1, at 19-20, 194.
[138] Bell, *supra* note 1, at xxiv.
[139] *Id*. at 30.
[140] *Id*. at 171.
[141] Wiley, *supra* note 120, at 419.

> with one's own. Or, to put it otherwise, the regime established here promised untrammeled freedom to reason—not to everything indiscriminately, but [nonetheless] to reason.[142]

When Bloom referred to "the regime established here,"[143] he clearly was not referring to the post-World War II pluralist democratic regime built on relativism, historicism, and social-science empiricism. He was looking back to the republican democratic regime, which he equated with Strauss's concept of the "best regime."[144]

In this vein, Irving Kristol repeatedly invoked republican democratic principles. In one essay, he encouraged Americans to recollect the nation's original "revolutionary message."[145] The "founding fathers," Kristol explained, "understood that republican self-government could not exist if humanity did not possess—at some moments, and to a fair degree—the traditional 'republican virtues' of self-control, self-reliance, and a disinterested concern for the public good."[146] But how can Americans cultivate civic republican virtue? We do so "through the shaping influence of religion, education, and [our] own daily experience."[147] That is, we must teach or inculcate virtue and then allow people to practice "self-government."[148]

In another essay, Kristol denounced a "'managerial' conception of democracy" that reduces to no more than "a set of rules and procedures."[149] As Kristol phrased it, "[t]he purpose of democracy cannot possibly be the endless functioning of its own political machinery."[150] In other words, Kristol repudiated pluralist democracy and advocated instead for republican democracy, the purpose of which "is to achieve some version of the good life and the good society."[151] In a republican democratic regime, the focus is not on the proper democratic processes but "on the character of the people."[152] Kristol elaborated: "This idea starts from the proposition that democracy is a form of self-government, and that if you want to be a meritorious polity, you have to care about what kind of people govern it."[153] The government, from this standpoint, must attend to societal values, to the education of a virtuous people.[154]

4. Neoconservative Domestic Policy

Neocons were confident and aggressive: they believed they had identified the best form of American government; they believed they knew the values or virtues that would support such a government; and they believed they could design domestic (and foreign) policies that would cultivate the desired values and form of government. Confident of their own views, neoconservatives brought a renewed skepticism to *liberal* domestic policies by questioning whether programs engendered by good intentions nonetheless brought negative results. Nathan Glazer argued against affirmative action programs on this ground. He insisted that the

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[142]Bloom, *supra* note 1, at 39.

[143]*Id*.

[144]Natural, *supra* note 62, at 144.

[145]Irving Kristol, *The American Revolution as a Successful Revolution* (1976), *reprinted in* Kristol, *supra* note 1, at 235, 247.

[146]*Id*. at 238.

[147]*Id*. at 248.

[148]*Id*.

[149]Irving Kristol, *Pornography, Obscenity, and the Case for Censorship* (March 28, 1971), *reprinted in* Reader, *supra* note 1, at 167, 175-76.

[150]*Id*. at 176.

[151]*Id*.

[152]*Id*.

[153]*Id*.

[154]Therefore, Kristol argued for the restriction of pornography because it undermined virtue. *Id*. at 175-77.

government, in the fields of employment, education, and housing, should guarantee equal opportunity and remedy personal discrimination but should not enforce set statistical distributions based on group memberships.[155] In short, Glazer argued against any affirmative action programs that smacked of quotas.[156] The problem with such programs, Glazer reasoned, is that they produce unanticipated and detrimental societal consequences. First, affirmative-action advocates maintain that such programs are necessary to improve the employment, educational, and housing conditions of impoverished inner-city blacks. Yet, in reality, such programs rarely benefit such individuals. Instead, professional and middle-class blacks reap the advantages. In other words, those who do not need assistance are helped, while those desperate for assistance gain nothing.[157] Second, according to Glazer, affirmative action programs encourage a culture of victimhood. Individuals begin to accentuate their "group affiliation" because membership in a victimized group justifies governmental assistance.[158] "New lines of conflict are created, by government action," wrote Glazer.[159] "New resentments are created; new turfs are to be protected; new angers arise; and one sees them on both sides of the line that divides protected and affected from nonprotected and nonaffected."[160] Finally, Glazer argued that affirmative action engenders white resentment and backlash, especially among white ethnics.[161] Many whites believed that they had earned their jobs, education, and housing without governmental assistance, and they did not understand why racial minorities, particularly African Americans, should be treated any differently. In a word, whites thought affirmative action programs to be inequitable.[162] Glazer admitted that such white perceptions were based on a "crude and unfair comparison" because, unlike white immigrants, blacks were forced to come to America as slaves and then purposefully and legally subjugated for centuries.[163] Even so, from Glazer's perspective, white resentment and backlash were both real and understandable and therefore needed to be accounted for when assessing the costs and benefits of affirmative action. Ultimately, as other neocons would declare, governmental actions and policies must be colorblind.[164]

While neocons were skeptical about whether various domestic programs could achieve their professed liberal goals, they confidently asserted an alternative goal: imbue such programs with a newfound degree of moral clarity.[165] Domestic programs should cultivate the virtues necessary for a republican democratic regime dedicated to the common good. To promote virtue and to avoid producing unintended negative consequences, neocons insisted that we need to "get the incentives right," regardless of whether we are discussing welfare, affirmative action, or any other domestic policy.[166] Thus, when it came to the policing of urban neighborhoods, neoconservatives articulated a "broken windows" approach: the police should work to maintain

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[155]Glazer, *supra* note 1, at 67-68, 168.
[156]*Id*. at ix, 67.
[157]*Id*. at 71-73, 167.
[158]*Id*. at 75.
[159]*Id*.
[160]*Id*. at 75-76.
[161]*Id*. at 168-95.
[162]*Id*. at 194-95.
[163]*Id*. at 194.
[164]*E.g.*, Charles Krauthammer, *Lott Fiasco Exposes Conservative Split*, Jewish World Review, Dec. 19, 2002 <http://www.jewishworldreview.com/cols/krauthammer121902.asp> (accessed May 19, 2009).
[165]Murray, *supra* note 1, at 45-46; Stelzer, *supra* note 102, at 4.
[166]Stelzer, *supra* note 102, at 20.

social order and uphold community values and not merely fight crime.[167] "The essence of the police role … is to reinforce the informal control mechanisms of the community itself."[168] If one broken window is left unfixed, neocons argued, then community values and controls will begin to weaken and, before long, all of the windows in the neighborhood will be shattered.[169]

This neoconservative emphasis on moral clarity was most prominent in the debates about welfare. Neocons argued that, despite our best intentions, welfare programs generated moral decay.[170] Gertrude Himmelfarb, in particular, emphasized that the social-science experts who constructed and administered the welfare system had failed to account sufficiently for the moral dimension.

> After making the most arduous attempt to objectify the problem of poverty, to divorce poverty from any moral assumptions and conditions, we are learning how inseparable the moral and material dimensions of that problem are. And after trying to devise social policies that are scrupulously neutral and 'value-free,' we are finding these policies fraught with moral implications that have grave material and social consequences.[171]

Neocons were willing to "accept the welfare state," but they sought to "return it to its Victorian roots by concentrating resources on the deserving poor."[172] Spurred by Himmelfarb's historical writings on Victorian values,[173] Kristol explained how a redesigned welfare system could be "consistent with the basic moral principles of our civilization and the basic political principles of our nation."[174] Under Kristol's proposed plan, "able-bodied men and mentally healthy men would have no entitlement whatever to welfare. If they are alcoholics or drug addicts or just allergic to responsibilities, they can rely on private charities."[175] Meanwhile, women who married and had children but were then "divorced or widowed or abandoned by their husbands" still frequently followed "family values," according to Kristol, and therefore should be eligible for welfare.[176]

C. Neoconservative Constitutional Theory

An important manifestation of neoconservative thought arose in the realm of constitutional theory. As was true of much of neoconservativism, the ideas slowly emerged, eventually spread, then became intertwined with other strands of conservative constitutional theory. Judicial review in the republican democratic regime had revolved around the principles of virtue and the common good. Courts, including the Supreme Court, sought to uphold governmental actions that supposedly promoted virtue and the common good while invalidating governmental actions that failed to do so. As it was frequently explained, courts were to invalidate "class legislation": legislation that furthered partial or private (or factional) interests

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[167]James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety* (March 1982), *reprinted in* Reader, *supra* note 1, at 149, 153-54, 158-59.

[168]*Id*. at 159.

[169]*Id*. at 153-54.

[170]Himmelfarb, *supra* note 1, at 388; Irving Kristol, *A Conservative Welfare State* (June 14, 1993), *reprinted in* Reader, *supra* note 1, at 143, 146.

[171]Himmelfarb, *supra* note 1, at 389.

[172]Stelzer, *supra* note 102, at 20.

[173]*See, e.g.*, Gertrude Himmelfarb, The De-Moralization of Society 4-12 (1995) (explaining Victorian values or virtues).

[174]Kristol, *supra* note 170, at 145.

[175]*Id*. at 148.

[176]*Id*. at 147; *see* Friedman, *supra* note 1, at 189 (discussing neoconservatism and family-values movement).

rather than the public good.[177] In exercising the power of judicial review, the justices usually applied an a priori formalism that assumed the existence of readily discernible objective categories (or dichotomies), whether the common good versus partial or private interests, or otherwise. For example, in *Lochner v. New York*, decided in 1905, the Court invalidated a state law that restricted the number of hours employees could work in bakeries (ten per day and sixty per week).[178] The state argued that the law furthered the common good, justifying any interference with employer- or employee-liberty to enter contracts.[179] In fact, the state presented substantial evidence showing that the law was an effective health measure: long hours of employment in a bakery were dangerous because of flour dust.[180] Nonetheless, the Court reasoned that "[t]o the common understanding the trade of a baker has never been regarded as an unhealthy one."[181] In other words, the justices formalistically discerned the border between the common good and partial and private interests, despite the evidence. The Court therefore concluded that the statute constituted impermissible class legislation favoring employees over employers. "It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees."[182]

Once pluralist democracy had supplanted the republican democratic regime during the 1930s, the Supreme Court came under increasing pressure to accept the parameters of the new democracy. The persistent resistance of the Court's conservative justices engendered FDR's proposed court-packing plan, a blatant political effort to pressure the justices to accept New Deal legislation.[183] Regardless of whether the justices were responding to this political pressure, they turned in 1937, accepting the practices of pluralist democracy.[184] Given this transition, the Court's exercise of its power of judicial review became a conundrum. After all, the structure of judicial review could no longer logically follow from the republican democratic opposition between the common good and partial or private interests. Under pluralist democracy, the Court could not condemn a statute as class legislation because all legislation was a product of competing interests, pressed by opposed groups. So, what was the Court to do?

Over the next few years, the justices hashed out several approaches to pluralist democratic judicial review. When it came to economic and social welfare legislation—typified by New Deal statutes often invalidated earlier in the 1930s under republican democratic judicial review—the Court consistently deferred to the democratic process. As the Court explained in a 1942 case adjudicating the scope of congressional power, the "effective restraints" on the legislative power arose "from political rather than from judicial processes."[185] The Court also eschewed the a priori formalism that it had applied during the republican democratic regime and instead began, in many cases, to balance competing interests, as if the justices themselves were

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[177]Howard Gillman, The Constitution Besieged 12-13 (1993); *see* Feldman, *supra* note 3, at 155, 199-208 (discussing republican democratic judicial review).

[178]198 U.S. 45 (1905).

[179]*Id*. at 57-64.

[180]*See id*. at 70-72 (Harlan, J., dissenting) (arguing that the evidence justified deferring to the state).

[181]*Id*. at 59.

[182]*Id*. at 64.

[183]81 Cong. Rec. 877 (1937).

[184]*See* Feldman, *supra* note 3, at 354-59 (discussing the 1937 switch).

[185]Wickard v. Filburn, 317 U.S. 111, 120 (1942) .

legislators reweighing the claims of various interest groups.[186] In some cases, the Court examined whether the proper democratic processes had been followed, while yet in others, the Court held that certain rights and liberties, so-called "preferred freedoms" such as free expression and religious freedom, were beyond the reach of pluralist democratic majorities, even if the proper processes had been followed.[187]

Meanwhile, constitutional theorists became increasingly focused on the puzzle of pluralist democratic judicial review. After World War II, legal scholars so closely followed the pluralist democratic focus on process that the predominant postwar jurisprudential approach became known as "legal process."[188] Consequently, some constitutional theorists, like John Hart Ely, argued that the Court should do no more than "police" the pluralist democratic process to insure that all citizens could fairly and equally participate.[189] From this perspective, constitutional adjudication could be pure process-based and therefore value-free; any judicial reliance on substantive values or principles, whether the common good or otherwise, would contravene the tenets of ethical relativism.[190] According to Ely, the Court could invalidate a legislative action if the process had been defective—for instance, if a relevant societal group (a discrete and insular minority) had not been allowed to vote for the legislators—but the Court was otherwise to defer to the legislature, even if the justices disagreed with the substance or content of the legislative action.[191] Other legal process theorists admitted that the justices might occasionally refer to values or principles, but only in the narrowest fashion. For example, Alexander Bickel asked what role the Supreme Court could play in a constitutional system where values were relative and legislative decisions arose from unprincipled battles among self-interested political actors. He theorized that the Court could articulate and enforce enduring American principles, so long as such principles were neutral, thus supposedly remaining consistent with relativism.[192]

While Bickel thus began his career supporting pluralist democracy and liberalism, he gravitated rightward and began articulating neoconservative positions. Even the more mature Bickel, however, never repudiated pluralist democracy and never became a full-fledged neocon, though his conservative drift might have continued if he had not died prematurely in 1974.[193] While still affirming pluralist democracy, the later Bickel worried about the implications of its underlying ethical relativism.[194] By necessity, democracy in America might need to accept a plurality of values, but democracy and civil society could not survive without "a foundation of

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[186]*E.g.*, Schneider v. State, 308 U.S. 147, 161 (1939) (applying balancing test in free-expression case); *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987).

[187]*E.g.*, Thomas v. Collins, 323 U.S. 516, 529-30 (1945) (using preferred freedoms language).

[188]Henry M. Hart, Jr. & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (Tentative ed. 1958); *see* Feldman, *supra* note 44, at 119-23 (discussing legal process school of thought).

[189]John H. Ely, Democracy and Distrust 106 (1980).

[190]*Id*. at 73-75, 136.

[191]*Id*. at 117; *see* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (discussing discrete and insular minorities).

[192]Alexander M. Bickel, The Least Dangerous Branch 25-26, 49-59 (2d ed. 1986; 1st ed. 1962); *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

[193]*See* Alexander M. Bickel, The Morality of Consent vii (1975) (dating Bickel's death) [hereinafter Morality]; Nash, *supra* note 1, at 527 (discussing Bickel with other neocons); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 Harv. C.R.-C.L. L. Rev. 521, 556, 559-60 (1976) (discussing Bickel's politics and his death).

[194]*See* Morality, *supra* note 193, at 77 (arguing that America needs values but not "moral certitudes"); Purcell, *supra* note 193, at 553-54, 559-60 (discussing Bickel's acceptance of pluralism).

moral values."[195] "A valueless politics and valueless institutions are shameful and shameless and, what is more, man's nature is such that he finds them, and life with and under them, insupportable."[196] But where, then, do Americans discover their moral values? We must "find our visions of good and evil," Bickel asserted, "in the experience of the past, in our tradition, in the secular religion of the American republic."[197] Thus, like Allan Bloom, Bickel denounced the empty rationalism, supposedly bereft of values, of the multiculturalist university professors who, when "being confronted with various demands for instant change, found that they believed nothing and could not judge any change as better or worse than another."[198]

More important for purposes of constitutional theory, Bickel argued that his neoconservative-tinged notion of pluralist democracy engendered certain implications for judicial review. He had earlier argued that the Court should decide cases based on neutral principles, but he now questioned the feasibility of such an approach. After all, how could a principle (or value) have any substantive content yet be neutral?[199] Furthermore, in an argument that resonated with mainstream neoconservative criticisms of domestic programs, Bickel insisted that the Court should not attempt to craft cases that would chart the course of societal "progress."[200] According to Bickel, numerous Warren Court decisions, including *Brown v. Board of Education*,[201] were failing to achieve their social-engineering goals.[202] Instead, the decisions were "heading toward obsolescence, and in large measure abandonment."[203] Societal change was necessarily slow—tradition evolved gradually[204]—small adjustments to social values and policies were to be made through "the political process" rather than through the courts.[205] Ultimately, then, Bickel called for judicial restraint: in most circumstances, the Court should defer to "the political institutions" and allow them to engage in "policy-making."[206] When the Burger Court decided *Roe v. Wade*,[207] holding that a constitutional right of privacy protected a woman's interest in choosing whether to have an abortion, Bickel unsurprisingly agreed with the dissenting view: the decision was illegitimate because it was "legislative rather than judicial action."[208] In rare circumstances, the Court could proceed "cautiously and with some skepticism" to articulate principles, but even then, the justices should be wary, communicating the principles "more as cautions than as rules."[209]

Bickel, it should be added, moved rightward during an era when constitutional theory itself became overtly politicized. Before the 1960s, constitutional theorists often claimed political neutrality. Herbert Wechsler, for example, claimed to agree with the political aim of

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[195]Morality, *supra* note 193, at 23.

[196]*Id*. at 24.

[197]*Id*.

[198]*Id*. at 24-25.

[199]Alexander M. Bickel, The Supreme Court and the Idea of Progress 99, 165 (1978; 1st ed. 1970) [hereinafter Progress]; *see* Purcell, *supra* note 193, at 551-53 (explaining that Bickel lost faith in neutral principles).

[200]Progress, *supra* note 199, at 13; *see id*. at 103 (giving examples).

[201]347 U.S. 483 (1954).

[202]Progress, *supra* note 199, at 148-51, 165, 173.

[203]*Id*. at 173.

[204]*Id*. at 175; Purcell, *supra* note 193, at 552.

[205]Morality, *supra* note 193, at 25.

[206]*Id*. at 25-26.

[207]410 U.S. 113 (1973).

[208]Morality, *supra* note 193, at 28 (citing Roe v. Wade, 410 U.S. 113, 171, 174 (1973) (Rehnquist, J., dissenting).

[209]*Id*. at 26.

Brown, holding de jure segregated public schools to be unconstitutional, but Wechsler nonetheless argued that legal reasoning could not adequately justify the result.[210] He would not allow his political desires to influence his legal theory, or at least so he declared. Yet, when the ostensible societal consensus of the 1950s crumbled into the jagged shards of the 1960s, the political fragmentation seemed to trigger a boom not only in the volume but also in the political openness of constitutional theory.[211] Everybody knew that Frank Michelman and Ronald Dworkin were liberals while Robert Bork and Lino Graglia were conservatives.[212]

Indeed, Bork, in his early writings, closely followed the later Bickel, his friend and colleague on the Yale Law School faculty. The early Bork accepted Bickel's commitment to pluralist democracy and ethical relativism and even cited approvingly to Dahl.[213] Given this commitment, Bork insisted that the Court's exercise of judicial power, which needed to reconcile majority rule with minority rights, could be legitimate only if the justices applied neutral principles.[214] But the concept of neutrality must be pushed to its logical extreme. "[I]f a neutral judge must demonstrate why principle X applies to cases A and B but not to case C," Bork wrote, "he must, by the same token, also explain why the principle is defined as X rather than as X minus, which would cover A but not cases B and C, or as X plus, which would cover all cases, A, B and C."[215] The crux of the matter, according to Bork, was that the Court could never satisfy this demand for neutrality without violating the tenets of relativism.

> There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy.[216]

For that reason, Bork insisted that the Court should defer to the value choices derived through the pluralist democratic process. The early Bork became one of the most vigorous advocates for judicial restraint: the Court should never *choose* "fundamental values."[217] Such choices should be left to the legislatures.[218] The Court could legitimately invalidate a legislative choice or action only if it conflicted with a constitutionally protected value or right, of which there were only two types. First, the Court should enforce any "specific values" or "specified

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[210]Brown v. Board of Education, 347 U.S. 483 (1954); Wechsler, *supra* note 192.

[211]Cornell W. Clayton, *Law, Politics and the Rehnquist Court: Structural Influences on Supreme Court Decision Making*, *in* The Supreme Court in American Politics: New Institutionalist Interpretations 151, 153-55 (Howard Gillman & Cornell Clayton eds., 1999).

[212]*E.g.*, Ronald Dworkin, Taking Rights Seriously (1977); Lino A. Graglia, Disaster by Decree (1976); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

[213]Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 2-3 nn.4-5 (1971) [hereinafter Neutral]; *see* Robert Bork, The Tempting of America 188 (1990) [hereinafter Tempting] (discussing friendship with Bickel). Other writings by Bork include the following: Robert H. Bork, Slouching Towards Gomorrah (1996) [hereinafter Slouching].

[214]Neutral, *supra* note 213, at 3.

[215]*Id*. at 8.

[216]*Id*. at 10.

[217]*Id*. at 6, 8.

[218]*Id*. at 10-11.

rights" that "text or history show the framers actually to have intended [to protect] and which are capable of being translated into principled rules."[219] Second, the Court should enforce "secondary or derived individual rights" that were necessary to preserve the constitutionally established "governmental process."[220] If the justices were to follow this originalist approach, enforcing only these two types of rights, they would never personally choose what to enforce. Rather, Bork emphasized, they would necessarily "stick close to the text and the history, and their fair implications."[221] The justices, though, all too frequently shunned the strictures of originalism and instead pursued an illegitimate activist course, expanding the first amendment, for instance, to protect morally harmful speech and writing such as pornography.[222]

While the early Bork already leaned toward neoconservatism—given his criticisms of liberal Supreme Court jurisprudence and his emphasis on allowing legislatures to enforce moral values—the later Bork fit more comfortably into the neocon camp.[223] He joined the American Enterprise Institute (AEI), started citing frequently to Himmelfarb and Kristol, and published in neoconservative journals.[224] The largest change between the early and later Bork lay in his attitude toward ethical relativism. The early Bork acquiesced in the widespread acceptance of relativism and built his theory of judicial review upon it. The later Bork displayed unmitigated hostility toward relativism.

The later Bork continued to argue that the Court, in exercising its power of judicial review, must reconcile majority rule with the protection of minority rights.[225] To do so, the judiciary must articulate and rely on a constitutional theory that produces politically neutral results.[226] The only such theory, according to Bork, is originalism.[227] As now modified by Bork, originalism demands that the justices uphold the original public meaning of the Constitution rather than the subjective intentions of the constitutional framers.[228] "All that counts is how the words used in the Constitution would have been understood at the time."[229] Ever since 1937, however, when the Court switched from a republican to a pluralist democratic approach, the justices have consistently refused to be bound by originalism.[230] Instead, the justices have imposed a modern liberal cultural agenda that simultaneously encompasses both "radical egalitarianism (the equality of outcomes rather than of opportunities) and radical individualism (the drastic reduction of limits to personal gratification)."[231] In typical

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[219] *Id*. at 17.

[220] *Id*.

[221] *Id*. at 8; *see* Raoul Berger, Government By Judiciary 45, 363-72 (1977) (arguing to follow the framers' original intentions); Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 Studies in American Political Development 61, 76 (2009) [hereinafter Transformative] (emphasizing importance of Bork's advocacy of originalism to the conservative legal movement).

[222] Neutral, *supra* note 213, at 20-29.

[223] *See* Right, *supra* note 1, at 158 (listing Bork as a neocon).

[224] Tempting, *supra* note 213, at 321 (discussing AEI); Slouching, *supra* note 213, at 59-60, 63, 70, 160, 268, 276. For Bork essays in neoconservative journals, see Robert H. Bork, *Olympians on the March: The Courts and the Culture Wars*, New Criterion, May 2004, at 5 [hereinafter Olympians]; Robert H. Bork, *Adversary Jurisprudence*, New Criterion, May 2002, at 4 [hereinafter Adversary].

[225] Tempting, *supra* note 213, at 139.

[226] *Id*. at 2, 140-41.

[227] *Id*. at 5-6, 143-44.

[228] *Id*. at 6, 144; *see* Transformative, *supra* note 221, at 80 (arguing that Scalia first suggested originalism should focus on original meanings rather than original intentions).

[229] Tempting, *supra* note 213, at 144.

[230] *Id*. at 2, 6.

[231] Slouching, *supra* note 213, at 5; Tempting, *supra* note 213, at 245-46.

neoconservative fashion, Bork rued the 1960s counterculture for promoting these hallmarks of liberal culture, which together engender moral relativism.[232] Because egalitarianism "is hostile to hierarchies and distinctions," it produces a relativist acceptance of diverse ideas and moral values.[233] Likewise, because individualism entails "the privatization of morality," it engenders relativism: "One person's morality being as good as another's, the community may not adopt moral standards in legislation."[234] According to Bork, these aspects of modern liberalism have caused America's "cultural degeneration"—indeed, Bork depicted a cultural disaster.[235]

> Sometimes the impulses of radical individualism and radical egalitarianism cooperate. Both, for example, are antagonistic to society's traditional morality—the individualist because his pleasures can be maximized only by freedom from authority, the egalitarian because he resents any distinction among people or forms of behavior that suggests superiority in one or the other. When egalitarianism reinforces individualism, denying the possibility that one culture or moral view can be superior to another, the result is cultural or moral chaos, both prominent and destructive features of our time.[236]

To be clear, the later Bork insisted that various societal institutions, including legislatures, churches, and schools, could uphold the moral values that prevent "rootless hedonism."[237] And in fact, these societal institutions sometimes attempted to do just that. The problem was that the Court used its power of judicial review to invalidate these attempts: the Court imposed relativism on the rest of society. To Bork, almost all of the justices (even most Republican-appointed justices) were members of a liberal cultural elite, and as such, they enforced the relativist tenets of liberalism, encompassing radical egalitarianism and individualism. "[T]he judge who looks outside the historic Constitution always looks inside himself and nowhere else. And when he looks inside himself he sees an intellectual, with, as often as not, some measure of intellectual class attitudes."[238] To Bork, the Court's skewed interpretation of the establishment clause perfectly illustrates the judicial enforcement of relativism. "[F]or society, as a whole," Bork wrote, "the major and perhaps only alternative to 'intellectual and moral relativism and/or nihilism' is religious faith."[239] Religion supplies individuals with the moral premises needed to guide conduct.[240] If the Court were to interpret the establishment clause in accord with its original meaning, Bork argued, then the government would be free to promote religion over irreligion by publicly displaying religious symbols, encouraging prayer, and otherwise fostering faith. In other words, Bork maintained that the first amendment originally embodied the so-called non-preferentialist position: "[a proscribed] establishment of religion was understood to be the preference by government of one or more religions over others," not the mere preference of religion over irreligion.[241] But instead of following the original meaning, the justices have interpreted the establishment clause to command a complete "separation of religion and society"[242]—to create a "wall of separation

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[232]Slouching, *supra* note 213, at 17-65.
[233]Tempting, *supra* note 213, at 245.
[234]*Id*. at 246.
[235]Slouching, *supra* note 213, at 276.
[236]*Id*. at 5.
[237]*Id*. at 8.
[238]Tempting, *supra* note 213, at 242.
[239]Slouching, *supra* note 213, at 277.
[240]*Id*. at 278.
[241]*Id*. at 289.
[242]*Id*.

between Church and State."[243] This judicial hostility to religion has not only led the Court to hold mistakenly that "a short, bland, non-sectarian prayer at a public-school commencement amounted to a forbidden establishment of religion,"[244] but has also sent a pernicious "message [to Americans] that religion is dangerous, perhaps sinister."[245]

Despite his neoconservative arguments, Bork could also be categorized as a traditionalist conservative. His concerns about upholding moral values harmonized with traditionalism; thus, he unsurprisingly brooded in one essay about "the prospects for the survival of traditional American culture."[246] In fact, conservative constitutional theorists might be split roughly into two groups, neither of which is explicitly neoconservative. One group advocates for judicial restraint, seeking to limit the Court's power so that other societal institutions can be venues for the exercise of democracy and the sustenance of moral values. This traditionalist group includes Bork and Graglia.[247] The second group advocates for judicial activism, so long as the Court acts to constrain Congress and other governmental institutions for the purpose of maximizing individual liberty. This libertarian group includes Richard Epstein and Randy Barnett.[248] Questioning the effectiveness of governmental programs, these latter theorists believe that most programs diminish individual autonomy.

Even so, traditionalist and libertarian conservative constitutional theories both overlap considerably with neoconservatism. Like neoconservatives, traditionalists emphasize moral clarity and the cultivation of values. Similarly, like neoconservatives, libertarians doubt the worthiness of governmental programs that attempt to implement various social engineering visions. But most important, neoconservative links with both traditionalism and libertarianism unite in one overarching theme: a desire to resurrect pre-1937 republican democratic methods of judicial review. Many conservatives, in both the traditionalist and libertarian camps, advocate for a return to republican democracy through the interpretive method of originalism. Originalists initially interpreted the Constitution in accordance with its text and the intentions of its framers, but in response to criticisms, many originalists modified their approach. Instead of looking to the framers' subjective intentions, they began to focus on the original public meaning of the Constitution. On the traditionalist side, Bork now clearly follows this original meaning approach, while on the libertarian side, Barnett does so. Bork, for instance, admitted that one can usually discern the text's public meaning by focusing on "the ratifiers' original understanding,"[249] yet he insisted that the ultimate standard remains public meaning. "[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. … The search is not for a subjective intention. … When lawmakers use words, the law that results is what those words ordinarily mean."[250] Barnett explained similarly. "[T]he words of the Constitution should be interpreted according to

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[243]Everson v. Board of Education, 330 U.S. 1, 16 (1947).

[244]Slouching, *supra* note 213, at 102 (discussing Lee v. Weisman, 505 U.S. 577 (1992)).

[245]*Id*. at 290.

[246]Adversary, *supra* note 224.

[247]Lino A. Graglia, *"Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 Tex. L. Rev. 789 (1987).

[248]Randy E. Barnett, Restoring the Lost Constitution (2004) [hereinafter Restoring]; Randy Barnett, The Structure of Liberty (1998) [hereinafter Liberty]; Richard A. Epstein, Takings (1985) [hereinafter Takings]; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987) [hereinafter Commerce].

[249]Tempting, *supra* note 213, at 6.

[250]*Id*. at 144.

the meaning they had at the time they were enacted," Barnett wrote.[251] "'[O]riginal meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[252]

While conservative theorists of all stripes tend to stress originalism, they find that it has different implications, depending on whether they lean toward traditionalism or libertarianism. Traditionalist-oriented conservatives, with their concern for moral clarity and values, tend to see originalism as leading to an emphasis on the republican democratic concept of virtue. Bork, for one, concluded that a suitable stress on morality (or virtue) should lead to judicial restraint: courts should allow legislatures and other societal institutions to articulate and impose moral (and religious) values. Libertarian-oriented conservatives, meanwhile, with their concern for limitations on government, tend to see originalism as leading to an emphasis on the republican democratic concept of the common good. As the libertarians interpret history, the requirement that governmental action be for the common good constrains the government within narrow realms of action and therefore maximizes individual liberty. Barnett, for instance, argued that the original meaning of the Constitution connoted a particular conception of justice encompassing the protection of liberty.[253] In fact, Barnett went so far as to argue that respect for a natural right to liberty equates with the common good itself.[254] Thus, courts should actively protect liberty: if a governmental action infringes on protected liberty, then the government, by definition, has contravened the common good.[255]

But, to reiterate a key point, traditionalists and libertarians ultimately coincide in advocating for neoconservative themes. Indeed, partly because of the cross-pollination that occurred among the various types of conservatism, many conservative constitutional theorists do not rest neatly in one category or another. Thus, while Bork leaned toward traditionalism, he unquestionably manifested the neoconservative persuasion. He castigated the 60s counterculture and blamed it for promoting moral relativism. Like Strauss himself, Bork worried that relativism could ultimately provoke a desperate populace to turn to an authoritarian Nazi-like demagogue; as society spiraled downward into hedonism and nihilism, people would be willing to sacrifice freedom for security.[256] Bork assumed the existence of clear moral values that societal institutions could still regenerate, if only the Supreme Court would allow them to do so. And the Court could clear the path for other institutions if only the justices would return to the "actual Constitution."[257] To use different terminology, Bork sought a return to a Constitution that liberal post-1937 justices had sent into exile. If the Court were to stop "making up the Constitution" to correspond with liberal culture, then the justices could return "to fundamental republican principles."[258] They could revive the true or exiled pre-1937 (republican democratic) Constitution merely by upholding the original meaning of the text.[259]

In short, the crux of neoconservative constitutional theory is the restoration of the so-called "Constitution-in-exile," to use conservative Judge Douglas H. Ginsburg's controversial

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[251]Restoring, *supra* note 248, at 89.

[252]*Id*. at 92; *see* Keith E. Whittington, Constitutional Interpretation xi, 3, 35-36 (1999) (following an originalism focused on public meaning).

[253]Restoring, *supra* note 248, at 53-86; Liberty, *supra* note 248, at 1-28.

[254]Liberty, *supra* note 248, at 24.

[255]Restoring, *supra* note 248, at 85, 260-61.

[256]Slouching, *supra* note 213, at 11-12, 142.

[257]Tempting, *supra* note 213, at 6.

[258]Adversary, *supra* note 224.

[259]Olympians, *supra* note 224.

phrase, introduced in 1995.[260] And a wide array of conservative constitutional theorists have converged on this neoconservative theme: they argue that the Court blundered when it accepted pluralist democracy in 1937 and that the Court therefore should resurrect its pre-1937 republican democratic methods of judicial review. Richard Epstein wrote, for instance, that the Court should reverse "the mistakes of 1937" and should begin again invalidating "class legislation" that fails to promote virtue and the common good.[261] To be sure, depending on their respective conservative orientations, theorists differ about the implications of a return to a pre-1937 Constitution. Yet, despite these sometimes sharp differences, a unity has animated conservative constitutional theory because of the neoconservative emphasis on looking backward for guidance, an emphasis rooted in Straussian political philosophy. Walter Berns, who studied under Strauss, encapsulated this attitude when he observed that post-1937 first-amendment doctrine "has not been built on the precedents and principles of the past."[262] Bork, Epstein, Barnett, and other conservatives would agree with Berns's lament: "One looks almost in vain for references in the Court's opinions to what the great [nineteenth-century] commentators—[Joseph] Story, [James] Kent, and [Thomas] Cooley, for example—have written on freedom of speech and religion, or to what the Founders intended with the First Amendment."[263]

III. The Supreme Court and Neoconservatism

What are the political preferences of the Supreme Court justices? Few observers deny that, over all, the early-Roberts and Rehnquist Courts were conservative; Republican presidents appointed seven of the nine justices sitting at the end of the October 2008 term (John Roberts, Samuel Alito, Clarence Thomas, David Souter, Anthony Kennedy, Scalia, and John Paul Stevens).[264] In fact, the four appointees preceding Stevens (William Rehnquist, Lewis Powell, Harry Blackmun, and Warren Burger) were all Republicans, as was Sandra Day O'Connor, appointed after Stevens. Political scientists Jeffrey Segal and Albert Cover have empirically scored Supreme Court nominees' perceived political ideologies at the time of appointment, with .000 being most conservative (for example, Scalia) and 1.000 being most liberal (for example, LBJ's confidant, Abe Fortas).[265] Just before the recent appointment of Justice Sonia Sotomayor, the average score for the then-nine justices was remarkably conservative, .275, with only Ruth Bader Ginsburg scoring on the liberal end (.680). Stephen Breyer, the sole other Democratic appointee at the time, scored as a moderate conservative (.475). The two Republican appointees who were considered liberal, Souter and Stevens, scored as solid conservatives: .325 and .250

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[260]Douglas H. Ginsburg, *Delegation Running Riot*, Regulation, No. 1, 1995, at 83, 84; *see* Bruce Ackerman, *The Art of Stealth*, London Review of Books, Feb. 17, 2005 <http://www.lrb.co.uk/v27/n04/acke01_.html> (accessed April 15, 2009) (arguing that neoconservatives seek to restore the Constitution in exile).

[261]Richard A. Epstein, *The Mistakes of 1937*, 11 Geo. Mason U. L. Rev. 5, 20 (1988-1989). While Barnett did not expressly use the term, "Constitution in exile," he entitled his recent book, *Restoring the Lost Constitution*, denoting his goal of resurrecting the pre-1937 (republican democratic) Constitution. Restoring, *supra* note 248.

[262]Walter Berns, The First Amendment and the Future of American Democracy 233 (1976).

[263]*Id*.

[264]Information on the Supreme Court and the justices is drawn from the following webcites: <http://www.supremecourtus.gov/index.html> (accessed April 16, 2009); <http://www.oyez.org/> (accessed April 16, 2009). Of course, some commentators find the current Court insufficiently conservative. *E.g.*, Lino Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 Harv. J. L. & Public Policy 281 (2003).

[265]*Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005* <http://www.sunysb.edu/polsci/jsegal/qualtable.pdf> (accessed April 15, 2009) [hereinafter Scores] (data drawn from Jeffrey Segal & Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 Am. Pol. Sci. Rev. 557-565 (1989); updated in Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (2005)).

respectively. Thus, as expected, during Souter's first term on the Court, he voted consistently with the conservative stalwarts, Rehnquist and Scalia.[266] The two most recent Republican appointees, Roberts and Alito, scored .120 and .100 respectively.[267] Significantly, Souter's retirement and replacement with Sotomayor, sporting a solid liberal .78 score, is unlikely to affect the political alignment of the Court: quite simply, one liberal (or progressive) replaced another (since Souter moved leftward during his tenure).[268] And if President Barack Obama has the opportunity to appoint any more (Democratic) justices, he will almost certainly be replacing liberals, as Stevens and Ginsburg appear to be the prime candidates for retirement. Consequently, for the foreseeable future, the Court is likely to retain its current alignment, with five conservatives and four liberals, and of course, the fact that conservatives hold a majority is crucial. With regard to Kennedy, the conservative now considered most apt to swing his vote on occasion to the progressive side, Segal and Cover scored him at .365 (more conservative than O'Connor's .415).[269]

Given that the majority of the current (Roberts Court) justices share Republican pedigrees and parade such low Segal-Cover political ideology scores, the early-Roberts Court has predictably produced a steady stream of conservative decisions. Here is one description of the Court's first two terms:

> [T]he Court … resolved [seven antitrust cases] all in favor of the corporate defendants and in the process overruled an almost 100-year-old precedent holding minimum price restraints to be per se anticompetitive. Consumers lost when the Court held that regulatory action by a federal agency preempted a state tort action against an allegedly defective medical product in one case, and in another when the Court afforded insurance companies a good-faith defense for a mistaken reading of a regulatory statute. The Court has continued to protect corporate defendants against large punitive damage awards. … In a sharp departure from a decision just seven years earlier, the Court upheld a law criminalizing abortion by means of intact dilation and evacuation, despite the fact that the statute made no exception for the need to protect the health of the mother. Important decisions on the Fourth Amendment have run against criminal defendants. The Court held voluntarily adopted school integration efforts in Seattle, Washington, and Louisville, Kentucky, to be unconstitutional, over a passionate dissent by the moderate Justices. In a failure to follow what was arguably a controlling precedent, the Court held that taxpayers had no standing to bring an Establishment Clause challenge to a federal agency's use of federal money to fund conferences to promote the President's faith-based initiatives.[270]

Not only is the Roberts Court unequivocally conservative, it can reasonably be categorized as predominantly neoconservative. Three justices, Scalia, Thomas, and Alito, are

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[266]Thomas R. Hensley, The Rehnquist Court 19 (2006); *see* The Oxford Companion to the Supreme Court of the United States 804 (Kermit L. Hall ed., 1992) (noting that Souter, during his first term, voted with Rehnquist in 86 percent of the cases).

[267]Scores, *supra* note 265.

[268]The Faculty Lounge <http://www.thefacultylounge.org/2009/08/sotomayor.html> (accessed August 18, 2009).

[269]*Id*.; Charles Lane, *Kennedy Seen as the Next Justince in the Court's Middle*, Washington Post, Jan. 31, 2006, at A4 <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001356.html> (accessed June 12, 2009).

[270]Michael Avery, *Book Review: The Rise of the Conservative Legal Movement*, 42 Suffolk U. L. Rev. 89, 89-91 (2008); *see, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (dismissing antitrust conspiracy action); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding restictions on partial-birth abortion).

members of the Federalist Society, while Roberts has been listed on the organization's leadership directory.[271] Numerous commentators have explicitly labeled four of the justices as neoconservatives or Straussians: Scalia, Thomas, Roberts, and Alito.[272] Neocons tend to score extremely low (or conservative) in the Segal-Cover political ideology rankings. For instance, going back to the 1930s, the only nominees to score zeros (.000) were Scalia and Douglas H. Ginsburg, who coined the term, "Constitution in exile," while Bork scored a .095.[273] Given Rehnquist's political ideology score, .045—lower or more conservative than Bork's—as well as his voting record, Rehnquist could fairly be categorized as a neocon, too. If so, then the Court has been imbued with a strong neoconservative orientation since at least the beginning of the 1990s (Thomas was appointed in 1991).[274]

Even so, for several reasons, the identification of particular decisions as specifically neoconservative, traditionalist, or libertarian might often be difficult, if not impossible. Partly because of cross-pollination, the overlaps among the various forms of conservatism are so substantial in some areas that distinctions are beside the point. Particular legal and political viewpoints might fall simultaneously into multiple conservative categories. This blurring of the boundaries among the forms of conservatism is, as already discussed, especially severe in the realm of constitutional theory; neoconservative theorists share views with traditionalists and libertarians. Consequently, some theorists fit easily into multiple categories. One can, for instance, label Bork as both neoconservative and traditionalist. The same is true for the Supreme Court justices. Scalia might sometimes seem both neoconservative and traditionalist (and even libertarian). Moreover, partly because of their lifetime appointments, justices can diverge from partisan positions more readily than can other governmental officials. Republicans might criticize but cannot seriously punish a conservative justice who votes progressive in a certain case, much less punish a neocon justice for voting libertarian (or vice versa).[275] Thus, the labels that might stick tightly to governmental officials (and political commentators)—liberal or conservative? neocon, traditionalist, or libertarian?—can slide off the robes of some Supreme Court justices. Perhaps partly for this reason, some commentators have divided the justices into different conservative categories, distinguishing arch-conservatives, who combine economic and social conservatism, from "country-club Republicans," who are economically conservative but indifferent or moderate on many social issues.[276] Among current and former justices, Scalia and Thomas would be arch-conservatives, while O'Connor, Kennedy, Blackmun, and Powell would be moderate or country-club conservatives (and the justices most often identified as swing voters). Of course, from this perspective, the alternative categorizations of *neo*conservative and *arch*-conservative strongly overlap (neoconservative justices tend to be arch-conservatives, and vice versa).

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[271]Avery, *supra* note 270, at 95 & n.36.

[272]Drury, *supra* note 62, at 3 (Thomas); Friedman, *supra* note 1, at 131 (Scalia); Bruce Ackerman, *The Stealth Revolution, Continued*, London Review of Books, Feb. 9, 2006 <http://www.lrb.co.uk/v28/n03/acke01_.html> (accessed April 15, 2009) (Roberts and Alito); Ackerman, *supra* note 260 (Scalia and Thomas).

[273]Ginsburg, *supra* note 260; Scores, *supra* note 265. After the Senate rejected Bork for the Court, Reagan nominated Douglas Ginsburg, but Ginsburg soon withdrew because he had used marijuana. At that point, Reagan nominated Kennedy, a more moderate conservative. David M. O'Brien, Storm Center 76-77 (8th ed. 2008).

[274]Indeed, given that Souter consistently voted with Rehnquist and Scalia during his first term, 1990-1991, one might categorize him during that term as a neocon for voting purposes.

[275]Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 75 (2005).

[276]Mark Tushnet, Taking the Constitution Away From the Courts 148 (1999); Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. Pa. J. Const. L. 314, 325 (2002).

The nature of judicial opinion writing only compounds this categorization problem. In practice, any justice writing an opinion might temper his or her strongest views in order to garner the votes of other justices. Thomas might wish to write a majority opinion focused solely on original meaning, but if he cannot retain the votes of at least four other justices, he would need to modify his reasoning (or he would no longer be writing the majority opinion).[277] Moreover, when the justices write their opinions, they couch them in acceptable modes of legal argument rather than in overt political terms.[278] For instance, in an equal protection case focused on affirmative action, the majority opinion will likely discuss the relevant legal doctrine (the so-called strict scrutiny test), the Court's earlier equal protection precedents, and the history of the framing of the fourteenth amendment (including the equal protection clause).[279] The opinion will not declare that it must invalidate (or uphold) the disputed affirmative action program because it is inconsistent (or consistent) with the Republican party platform. A dissenting opinion would reason similarly: it might argue that the majority either applied the wrong doctrinal test, applied the correct doctrine but did so improperly, or perhaps misunderstood the history.

To be clear, I do not mean to suggest that the justices' legal arguments are mere pretexts for bald political decisions. On the contrary, the justices' legal arguments are most often sincere, but even so, their legal arguments manifest the justices' respective political outlooks.[280] Law (or more precisely, legal interpretation) and politics are integrally and thoroughly intertwined. A justice ordinarily interprets legal texts consistently with his or her politics because politics is part of and shapes interpretation (which explains why Thurgood Marshall and Antonin Scalia could sincerely interpret the same precedents, apply the same legal doctrines, but reach opposite results).[281] Sometimes, though, a justice's choice of particular legal arguments reflects his or her political orientation. If a majority opinion, for instance, dwells on the original meaning of a constitutional provision, then one might surmise that the Court was deciding the case in accord with neoconservative constitutional theory. But in any specific case, this conclusion might be warranted—or unwarranted: even neoconservatives such as Scalia and Thomas do not always apply an originalist approach, while liberal-progressive justices such as Stevens will readily discuss original meaning and the framers' intentions.

Given such uncertainties, one should consider at least three factors when attempting to categorize specific decisions as neoconservative or otherwise. First, what is the result in the case? Does it harmonize generally with neoconservative political positions? Second, when focusing on an opinion—majority, concurring, or dissenting—what is the method of reasoning? Does the justice, for instance, invoke arguments that were more common before than after 1937? Third, who wrote the opinion? Based on the individual justice's background and history, is he or she likely to view the world from a neoconservative perspective?

A. Supreme Court Decisions

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[277] *See* O'Brien, *supra* note 273, at 265-66 (discussing the need to compromise when writing opinions).

[278] Philip Bobbitt, Constitutional Interpretation 12-13 (1991) (specifying six acceptable modalities of constitutional argument).

[279] *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[280] Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & Soc. Inquiry 89, 96-98 (2005); Thomas M. Keck, *Party, Policy, or Duty*, 101 Am. Pol. Sci. Rev. 321, 337 (2007) (arguing that the Court's decisions often reflect "a 'legal sensibility' rather than a 'partisan platform'").

[281] Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. Cal. Interdisc. L.J. 17, 32 (2008); Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257, 257-60 (2005).

1. Congressional Power Cases

Recent cases adjudicating Congress's power under the commerce clause demonstrate the Court's neoconservative direction.[282] During the republican democratic regime, the Court enforced two substantive constraints on Congress. First, Congress was to promote the common good rather than partial and private interests, and second, Congress was to act pursuant to one of its specifically enumerated powers. In applying these limitations, the justices confidently implemented the a priori formalism characteristic of the republican democratic era. For instance, in *Railroad Retirement Board v. Alton Railroad Company*, decided in 1935, the Court invalidated the Railroad Retirement Act as class legislation contravening the common good and thus beyond Congress's commerce power.[283] The Court reasoned that the legislation promoted only "the social welfare of the worker"[284] rather than fostering "the railroads' duty to serve the public [good] in interstate transportation."[285] The next year, in *Carter v. Carter Coal Company*, the Court distinguished national and local activities as if they were preexisting a priori categories.[286] Mining, like manufacturing, growing crops, and other types of production, was "a purely local activity," the Court explained, and therefore Congress's statutory regulation of bituminous coal mining exceeded its power under the commerce clause.[287] Meanwhile, in other cases that plumbed the limits of Congress's enumerated powers, the Court sometimes emphasized that the tenth amendment precluded Congress from using any of its powers to intrude into a judicially protected realm of state sovereignty. In *Hammer v. Dagenhart*, the Court invalidated a federal statute proscribing the shipment in interstate commerce of goods produced in factories employing child labor.[288] If the Court were to uphold this statute, the majority reasoned, it "would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress."[289] In effect, the Court itself demarcated and enforced a line separating congressional power and state sovereignty as the crux of our federalist system.

Ever since the Court switched to a pluralist democratic approach to judicial review in 1937, however, the justices eschewed imposing such judicial limitations on congressional power. Since Congress now might legitimately legislate for no better reason than that well-placed interest groups wanted a statute, the Court would police the pluralist democratic process but would not define and enforce substantive limitations on congressional power, whether rooted in the commerce clause, the tenth amendment, or otherwise (though the Court would enforce limits arising from preferred freedoms or individual rights, such as free speech).[290] In adopting this approach, deferential to Congress, the Court repudiated the formalism that had led to bold judicial proclamations of a priori categories; now, even the definition of interstate commerce would be determined through the pluralist democratic process. As the Court explained in 1942: "[Q]uestions of the power of Congress are not to be decided by reference to any formula which

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[282] U.S. Const. art. I, § 8, cl. 3.

[283] 295 U.S. 330, 374 (1935).

[284] *Id.* at 368.

[285] *Id.* at 374.

[286] 298 U.S. 238 (1936) (invalidating Bituminous Coal Conservation Act).

[287] *Id.* at 304.

[288] 247 U.S. 251 (1918).

[289] *Id.* at 276; *see* United States v. Butler, 297 U.S. 1, 68-73 (1936) (invalidating congressional exercise of taxing power as invading protected state sovereignty).

[290] *E.g.*, Wickard v. Filburn, 317 U.S. 111, 120-29 (1942) (upholding an application of Agricultural Adjustment Act of 1938).

would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."[291] Hence, the scope of Congress's commerce power would be prescribed politically rather than judicially. From this perspective, the tenth amendment was nothing but a "truism," neither adding to nor subtracting from congressional power.[292]

The Court still entertained cases challenging Congress's exercise of its commerce power, but the justices resolved such cases pursuant to a rational basis test: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[293] In application, this rational basis test became a rubber stamp: from 1937 until 1995, the Court invalidated only one exercise of Congress's commerce power. In that case, *National League of Cities v. Usery*, the Court (with Rehnquist writing for a five-justice majority) held that Congress, by requiring state governments to pay a minimum wage and overtime rates to its employees, had unconstitutionally intruded into a protected realm of "traditional governmental functions" integral to state sovereignty.[294] But within a decade, in 1985, the Court overruled this one instance of a judicially imposed limitation on congressional power and once again declared that the line separating congressional power and state sovereignty could (and would) shift in response to the political desires of the people.[295] The pluralist democratic process would determine the scope of congressional power (and would define the realm of state sovereignty).

By the early 1990s, however, with new Republican-appointed justices on board, the Court was ready to implement neoconservative visions of congressional power. In *New York v. United States*, decided in 1992, the Court invalidated a federal statute requiring state governments either to regulate the disposal of low-level radioactive waste pursuant to congressional directives or to take title to the waste and then pay for any subsequent damages.[296] O'Connor's majority opinion, joined by Rehnquist, Scalia, Thomas, Souter, and Kennedy, reasoned that the tenth amendment prescribed a judicially enforceable limit on Congress's commerce power. Specifically, Congress could not commandeer state legislatures and force them to do Congress's bidding. The case manifested neoconservatism in three interrelated ways.[297] First, the Court claimed that an originalist interpretive approach mandated the conclusion. Thus, when it came to federalism, the Court was not concerned with "devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[298] The Court even quoted from *United States v. Butler*, a 1936 case renowned for its ostensible adherence to mechanistic formalism: "'The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.'"[299] Second, the Court returned to a central component of pre-1937 jurisprudence: the Constitution raised judicially enforceable limits on congressional power. Displaying a neoconservative

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[291] *Id.* at 120.

[292] United States v. Darby, 312 U.S. 100, 124 (1941).

[293] Hodel v. Indiana, 452 U.S. 314, 323-24 (1981); *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (articulating the rational basis test in different terms).

[294] 426 U.S. 833, 852 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[295] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985).

[296] 505 U.S. 144 (1992).

[297] *Id.* at 161, 175-77, 188.

[298] *Id.* at 157.

[299] *Id.* (quoting United States v. Butler, 297 U.S. 1, 63 (1936)).

wariness toward legislative power, the Court would not readily defer to the pluralist democratic process. Third, in terms of the precise limit on congressional power, the Court resurrected the tenth amendment, a barrier that the pre-1937 Court had relied upon. According to O'Connor, the judicial enforcement of the federalist system was of the utmost importance because it indirectly promoted individual liberty. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[300]

The *New York* Court reasoned that its decision, precluding Congress from commandeering state legislatures, did not necessarily diminish Congress's commerce power to enact generally applicable laws.[301] But the latter situation soon arose, and the Court concluded otherwise in the landmark case, *United States v. Lopez*.[302] Decided in 1995, *Lopez* held that Congress had exceeded its commerce power when it enacted the Gun-Free School Zones Act (GFSZA), a generally applicable law that proscribed the possession of firearms at school. Rehnquist's majority opinion, joined by Scalia, Thomas, Kennedy, and O'Connor, began by asserting that the Court would apply the rational basis test, but the Court now reformulated it. Under this new or modified rational basis test, as the Court explained, Congress can regulate "three broad categories of activity."[303]

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[304]

The Court quickly concluded that the GFSZA did not fit into the first two categories: by restricting the possession of firearms at schools, the law targeted neither the channels nor the instrumentalities of interstate commerce.[305] Consequently, the Court focused on the third and potentially broadest category: activities substantially affecting interstate commerce.[306] The Court, however, reached the neoconservative result, holding explicitly for the first time since 1937 that Congress had exceeded its commerce power (the *New York* and *Usery* Courts had relied primarily on the tenth amendment rather than the commerce clause).[307] In concluding that the possession of firearms at schools did not substantially affect interstate commerce, Rehnquist's majority opinion discussed three factors—a distinction between economic and non-economic activities; a distinction between national and local concerns; and a judicial desire for congressional findings—all of which spotlighted the Court's neoconservative leanings. Rehnquist began by reasoning that gun possession at schools is a non-economic enterprise "that "has nothing to do with 'commerce.'"[308] By thus demarcating an ostensible dichotomy separating economic from non-economic activities, Rehnquist relied on a formal conceptualism that resonated with pre-1937 Supreme Court commerce power decisions.[309] To Rehnquist,

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[300] *Id*. at 181 (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991)).
[301] *Id*. at 160.
[302] 514 U.S. 549 (1995).
[303] *Id*. at 558.
[304] *Id*. at 558-59.
[305] *Id*. at 559.
[306] *Id*. at 561-65.
[307] *Id*. at 567-68.
[308] *Id*. at 561.
[309] *Id*. at 627-28 (Breyer, J., dissenting) (criticizing Rehnquist's formalism).

'economic' and 'non-economic' were a priori categories, and gun possession could readily be placed in one (non-economic) rather than the other (economic). Breyer's dissent argued contrariwise, emphasizing that, from a practical standpoint, educational activities closely intertwine with economic (commercial) development. "Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other."[310] Disregarding this criticism, Rehnquist used similar pre-1937 formalism when he reasoned that gun possession at schools is a local rather than a national matter and thus falls outside Congress's commerce power. Indeed, his distinction between "what is truly national and what is truly local"[311] echoed the Court's 1918 language in *Hammer v. Dagenhart* distinguishing "a purely federal matter"[312] from "a matter purely local in its character."[313]

The majority's neoconservative orientation was nowhere clearer than in its discussion of congressional findings. As the Court acknowledged, Congress in the pluralist democratic regime is generally not required to deliberate or "to make formal findings" when enacting legislation.[314] After all, Congress acts legitimately under pluralist democracy when responding to interest-group pressures without claiming to pursue some higher goal (such as the common good). Even so, Rehnquist wrote: "But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[315] In other words, the *Lopez* Court displayed a neoconservative skepticism toward Congress's ability to get things right, especially when passing this (perhaps) progressive statute, regulating guns at schools. If Congress deliberated and made specific and relevant findings, the Court seemed to suggest, then Congress would be less likely to pass a law that might produce unforeseen detrimental consequences. Moreover, by asking Congress to make findings, the Court specifically reintroduced another judicial-review mechanism that had facilitated the judicial imposition of substantive limitations on congressional power during the republican democratic era.[316] For example, in *Hill v. Wallace*, decided in 1922, the Court invalidated a statute as beyond the commerce power partly because Congress had failed to find that the evidence showed the regulated activities burdened interstate commerce.[317] While the *Lopez* Court ultimately did not appear to rest its decision on the lack of congressional findings, it refused even to admit that Congress had "accumulated institutional expertise regarding the regulation of firearms through previous enactments."[318] In short, Rehnquist and his majority colleagues showed no respect, no deference, for Congress. Instead, the Court declared: prove it to me!—prove that you (Congress) are not misfiring once again, despite ostensibly good intentions.

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[310] *Id*. at 629 (Breyer, J., dissenting).

[311] *Id*. at 567-68.

[312] 247 U.S. 251, 274 (1918).

[313] *Id*. at 276.

[314] *Lopez*, 514 U.S. at 562.

[315] *Id*. at 563.

[316] *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 356 (2001) (describing "rigorous review of the legislative record" as characteristic of pre-1937 Supreme Court decision making).

[317] 259 U.S. 44, 68-69 (1922); *cf*., Board of Trade v. Olsen, 262 U.S. 1, 31-38 (1923) (upholding statute similar to the one invalidated in *Hill* partly because Congress made sufficient findings).

[318] *Lopez*, 514 U.S. at 563.

While the *Lopez* Court's holding and Rehnquist's majority opinion manifested neoconservative elements, the Court, quite clearly, neither repudiated pluralist democracy nor resurrected a fully realized republican democratic judicial review. To the chagrin of numerous neocons, pluralist democracy endured.[319] Rehnquist acknowledged that the post-1937 Court, by expanding Congress's commerce power, had reasonably responded to "the great changes that had occurred in the way business was carried on in this country."[320] Partly for that reason, Rehnquist maintained in *Lopez* that he was applying the rational basis test, which had become the Court's primary doctrinal standard in commerce power cases only when the Court switched to pluralist democratic review in 1937. After reformulating the rational basis test, Rehnquist then concentrated on determining whether Congress had sought to regulate an activity that had substantial effects on interstate commerce.

Meanwhile, Thomas wrote a concurrence in *Lopez* that more nearly fulfilled neoconservative ideals.[321] Thomas explicitly declared that the Court took a "wrong turn" in 1937.[322] If the Court continued to apply a 'substantial effects' component as part of a rational basis standard, Thomas lamented, then Congress's commerce power would necessarily be transformed into a comprehensive police power.[323] Thomas's concurrence, in fact, closely paralleled Richard Epstein's 1987 neoconservative (libertarian) article arguing for a return to a pre-1937 concept of Congress's commerce power.[324] Most important, like Epstein, Thomas argued that the Court should interpret the commerce clause pursuant to its original meaning.[325] Thus, Thomas began his analysis by discussing the definitions of commerce that could be found in dictionaries contemporaneous with the constitutional framing.[326] Based on these sources, Thomas endorsed the pre-1937 judicial distinction between commerce and production, where commerce did not encompass manufacturing and farming.[327] He bolstered this conclusion by arguing that "exchanges during the [constitutional] ratification campaign" revealed that "[e]arly Americans" understood commerce in this narrow manner.[328] In sum, Thomas maintained that the Court should follow an originalist approach and that doing so would confine Congress to a limited commerce power, as supposedly reflected in *Carter Coal* and other pre-1937 Supreme Court decisions that Thomas countenanced.[329]

If Thomas's concurrence manifested a more robust judicial neoconservatism, then one might wonder why Rehnquist's majority opinion accepted only certain neoconservative elements. Most important, Rehnquist wrote for a five-justice majority in *Lopez* that included not only the solid neocons, Thomas and Scalia, but also the moderate (country-club) conservatives,

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[319]*Cf*., Graglia, *supra* note 264 (arguing that the Rehnquist Court was not truly conservative).

[320]*Lopez*, 514 U.S. at 556.

[321]*Cf*., Restoring, *supra* note 248, at 317 (praising Thomas for being consistent with history).

[322]*Lopez*, 514 U.S. at 599 (Thomas, J., concurring).

[323]*Id*. at 587-89. Similarly, Scalia has criticized the Court's use of balancing tests, characteristic of post-1937 pluralist democratic judicial review. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., dissenting).

[324]Commerce, *supra* note 248, at 1387-1452; Sanford Levinson, *Raoul Berger Pleads for Judicial Activism: A Comment*, 74 Tex. L. Rev. 773, 775 & n.9 (1996) (accusing Thomas of plagiarism).

[325]Commerce, *supra* note 248, at 1455.

[326]*Lopez*, 514 U.S. at 585-86 (Thomas, J., concurring).

[327]*Id*. at 586-87.

[328]*Id*. at 590.

[329]*Id*. at 598-99; *see, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that Congress could not regulate labor relations in mining); United States v E.C. Knight Co., 156 U.S. 1 (1895) (holding that Congress could not regulate sugar manufacturing).

Kennedy and O'Connor. Indeed, Kennedy wrote a concurrence joined by O'Connor stressing that *Lopez* should not be interpreted too radically, that it had a "limited holding."[330] Kennedy refused to characterize the Court's 1937 turn as an unequivocal mistake. Instead, he recognized that the post-1937 Court had struggled "to interpret the Commerce Clause during the transition from the economic system [of local markets] the Founders knew to the single, national market still emergent in our own era."[331] Given Kennedy and O'Connor's (moderately conservative) prudence, Rehnquist needed to temper any desire to write a more aggressive and confident neoconservative opinion. If he had opted to write an opinion more similar to Thomas's concurrence, he probably would have lost Kennedy's and O'Connor's votes.

Even so, the Court continued to follow its neoconservative inclinations in subsequent cases adjudicating the scope of congressional power.[332] For example, in *City of Boerne v. Flores*, the Court narrowed Congress's power to act under the fourteenth amendment, section five.[333] Holding that Congress had overreached when it enacted a statute largely protecting religious minorities, the Court again suggested, as in *Lopez*, that Congress had failed to deliberate adequately.[334] Then, in *United States v. Morrison*, the Court applied the new doctrinal tests articulated in *Lopez* and *Boerne* and held that Congress had exceeded its powers under both the commerce clause and the fourteenth amendment, section five, when it enacted the Violence Against Women Act (VAWA), protecting women from gender-motivated violence.[335] Acknowledging that Congress, in this instance, had made voluminous findings, the *Morrison* Court nonetheless disparaged the congressional conclusions because they would "obliterate" the Court's formalist distinction between national and local activities.[336] The strange case of *Gonzales v. Raich* only serves to underscore the degree to which politics, whether neocon or otherwise, permeates the Court's decision making.[337] Kennedy flipped his vote and joined the (progressive) dissenters from *Lopez* and *Morrison* (Stevens, Ginsburg, Breyer, and Souter) to uphold a congressional action. But what was the congressional statute? A law proscribing the possession of marijuana.[338] Thus, *Raich* presented conservatives (and progressives) with a paradox. The conservative justices would lean toward restricting congressional power, as they had done in *Lopez* and other cases, but some of those same conservative justices might simultaneously wish to allow the government to impose moral values by restricting the use of drugs. In the end, Kennedy joined a majority opinion written by Stevens that retained the *Lopez* reformulated rational basis framework but reasoned that marijuana possession substantially affected interstate commerce. Even Scalia, too, voted to uphold this statute, though he refused to join Stevens's opinion. Instead, Scalia's concurrence (in the judgment) emphasized that this case raised a factually unique situation, different from *Lopez* and *Morrison*, in which the necessary

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[330] 514 U.S. at 568 (Kennedy, J., concurring).

[331] *Id.*

[332] Patrick M. Garry, An Entrenched Legacy 71 (2008).

[333] 521 U.S. 527 (1997) (invalidating Religious Freedom Restoration Act of 1993). In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court held that Congress could exercise its section five power either to remedy (or deter) violations of the fourteenth amendment or to define fourteenth-amendment substantive protections (though in exercising its power to define substantively, Congress could only expand and not dilute fourteenth-amendment protections). In *Boerne*, the Court held that Congress could act only to remedy (or deter) violations of the fourteenth amendment. 521 U.S. at 517-20.

[334] 521 U.S. at 530.

[335] 529 U.S. 598 (2000) (invalidating the Violence Against Women Act).

[336] *Id.* at 615.

[337] 545 U.S. 1 (2005).

[338] *Id.* at 10-15.

and proper clause empowered Congress to regulate drug possession.[339] In sum, despite *Raich* and despite the occasional majority-opinion temporizing, needed to hold moderate-conservative votes (such as those of Kennedy and O'Connor), the Rehnquist and Roberts Courts' congressional power decisions have displayed a confident and aggressive righteousness characteristic of neoconservativism in general. Those Courts have set forth on one of the "most notable binges of congressional-law striking in history."[340] In fact, the Rehnquist Court invalidated more congressional acts than had any previous Court; from 1995 to 2001 alone, the Court struck down thirty federal laws, more than the Warren Court invalidated from 1953 to 1969.[341]

2. Affirmative Action Cases

Affirmative action programs presented the Supreme Court with a constitutional conundrum. During the post-World War II era, the Court developed relatively straightforward equal-protection doctrine for resolving cases involving racial discrimination. If a law discriminated on its face against a suspect class, including any racial minority, then the Court would apply strict scrutiny: the law would be held unconstitutional unless the government could prove that its action was necessary to achieve a compelling purpose.[342] If a law was facially neutral, the Court would apply rational basis review, the lowest level of judicial scrutiny, unless the challenger proved that the government had intentionally discriminated against a suspect class, in which case the Court would apply strict scrutiny.[343] The Court formulated this doctrine to protect "discrete and insular minorities" (suspect classes) who had been historically subjugated in American society (thus, African Americans constituted the prototypical suspect class).[344] Moreover, for sixty years, whenever the Court deemed strict scrutiny to be the appropriate level of judicial scrutiny for an equal-protection claim, the Court always held the governmental action unconstitutional.[345] This judicial consistency spawned the maxim that strict scrutiny was strict in theory, but fatal in fact.[346] But, then, what would happen when governmental institutions voluntarily adopted affirmative action programs designed to favor racial minorities as a means for remedying the harms of past societal discrimination? When whites challenged such programs as creating unconstitutional racial classifications, would the Court apply strict scrutiny and hold the programs unconstitutional?

In the first Supreme Court case raising the constitutionality of affirmative action, the justices resolved the dispute without settling the larger constitutional issues. *University of California Regents v. Bakke*, decided in 1978, arose when a white applicant to a state-supported medical school challenged the school's program allocating racial minorities a minimum number of entry-class positions.[347] Four justices (with an opinion written by Stevens) ruled for the white applicant based on a statutory claim; these justices did not reach the equal-protection issue. Four justices (with an opinion by Brennan) reached the constitutional claim, reasoned that an

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[339]*Id*. at 34-40 (Scalia, J., concurring in the judgment).

[340]Barry Friedman, *The Cycles of Constitutional Theory*, 67 Law & Contemp. Probs. 149, 161 (2004).

[341]Thomas M. Keck, The Most Activist Supreme Court in History 2 (2004); O'Brien, *supra* note 273, at 31.

[342]Palmore v. Sidoti, 466 U.S. 429 (1984); Korematsu v. United States, 323 U.S. 214 (1944).

[343]Washington v. Davis, 426 U.S. 229 (1976).

[344]United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

[345]During those sixty years, the only case to uphold governmental action was *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding relocation and incarceration of Japanese-Americans during World War II).

[346]Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 Harv. L. Rev. 1, 8 (1972).

[347]438 U.S. 265 (1978).

intermediate level of scrutiny was appropriate for an affirmative action program, and concluded that the state satisfied this standard.[348] From Brennan's perspective, while the affirmative action program created a racial classification, its benign rather than invidious purpose constitutionally distinguished this state action from a Jim Crow law.[349] Finally, the ninth justice (Powell) reached the constitutional claim, reasoned that strict scrutiny was appropriate, and ruled in favor of the white applicant because the state could not satisfy this rigorous standard.[350] Significantly, even Powell, applying strict scrutiny, reasoned that an alternative form of affirmative action, used by Harvard College, giving racial minorities a "plus" in the admissions process without creating a quota, could pass constitutional muster.[351]

For the next several years, the Court continued to move uncertainly in the area of affirmative action. The justices, for example, suggested that Congress, because of its power under the fourteenth amendment, section five, might be subject to a lesser degree of judicial scrutiny than state and local governments when mandating an affirmative action program.[352] But in the late-1980s and early-1990s, with new conservative appointees on board, the Court turned rightward in affirmative action cases. In *City of Richmond v. J.A. Croson Company*, decided in 1989, Richmond instituted a plan mandating that contractors with the city subcontract at least thirty percent of the dollar amount of any prime contract to minority business enterprises.[353] In invalidating this city action, a majority of justices (Scalia, O'Connor, Rehnquist, White, and Kennedy) for the first time agreed on a standard of judicial review for affirmative action programs: strict scrutiny. Even so, O'Connor's plurality opinion left sufficient wiggle room to allow the Court to retreat to a lower level of scrutiny in the future, if a majority so desired. O'Connor suggested that strict scrutiny might not necessarily be appropriate for *all* affirmative action programs and that, even if strict scrutiny was applied in subsequent cases, governments might sometimes be able to satisfy this most rigorous judicial standard.[354] In fact, Scalia refused to join O'Connor's opinion because, from his perspective, state and local governments could never constitutionally use race-conscious affirmative action programs: strict scrutiny should still be strict in theory but fatal in fact.[355]

After *Croson*, the Court wiggled one more time, in *Metro Broadcasting, Inc., v. Federal Communications Commission*, when a five-justice majority applied an intermediate level of scrutiny to uphold a congressionally approved affirmative action program.[356] Before the Court decided its next major affirmative action case, however, four of the justices in the *Metro Broadcasting* majority had resigned; most notably, Thomas replaced Marshall. Thus, in *Adarand Constructors, Inc. v. Pena*, decided in 1995, Thomas joined the *Metro Broadcasting* dissenters (O'Connor, Kennedy, Scalia, and Rehnquist) to create a solid block of conservative justices incontrovertibly supporting the application of strict scrutiny in all cases of affirmative

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[348]*Id*. at 324-79 (Brennan, J., concurring in the judgment in part and dissenting in part).

[349]*Id*. at 361-64.

[350]*Id*. at 269-324 (Powell, J.).

[351]*Id*. at 317; *see* 316-18 (discussing Harvard plan).

[352]Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding without a majority opinion a federal affirmative action program).

[353]488 U.S. 469 (1989).

[354]*See id*. at 504 (emphasizing difference between congressional as opposed to state and local affirmative action programs); *id*. at 509-11 (suggesting that Richmond, with proper supporting evidence, could have justified its affirmative action program). O'Connor also noted that whites were in the minority in Richmond. *Id*. at 495-96.

[355]*Id*. at 520-28 (Scalia, J., concurring in the judgment).

[356]497 U.S. 547, 564-65 (1990).

action.[357] Despite articulating this unequivocal position, O'Connor, writing the majority opinion, again asserted that strict scrutiny was not fatal in fact. She reasoned that the government, in the right circumstances, might be able to adopt an affirmative action program that would pass constitutional muster: specifically, the redress of past invidious discrimination could possibly amount to a purpose compelling enough to satisfy the strict scrutiny test.[358] As in all previous cases, though, O'Connor ultimately concluded that, based on the facts, the government had not satisfied strict scrutiny. Scalia, once again, disagreed with O'Connor's qualification of strict scrutiny, even if, in application, it was purely theoretical rather than practical. "In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction," Scalia explained in a brief opinion concurring in part.[359] "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race."[360] Thomas, too, wrote an opinion concurring in part, but while Scalia worried about the niceties of the strict scrutiny test, Thomas perfectly encapsulated neoconservative arguments opposing affirmative action, especially quota-driven programs.[361] Echoing Nathan Glazer's argument that had emphasized the unforeseen consequences of affirmative action, including the promotion of victimhood and the provocation of white backlash, Thomas argued for a colorblind Constitution.

> [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences. … In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.[362]

In 2003, the Court decided a pair of cases involving affirmative action in higher education, specifically at the University of Michigan. *Grutter v. Bollinger*, challenged the law school's affirmative action admission program,[363] while *Gratz v. Bollinger* challenged the university's undergraduate affirmative action program.[364] Under the law school program, applicants who belonged to underrepresented racial minorities, including African Americans, would receive an unspecified advantage or "plus."[365] Thus, the law school program resembled the Harvard College plan that a majority of justices approved in *Bakke*. Meanwhile, the undergraduate program awarded minority individuals a precise quantity, twenty points, in an

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[357]515 U.S. 200, 227 (1995).

[358]*Id*. at 237-38; *see* Missouri v. Jenkins, 515 U.S. 70, 112-13 (1995) (O'Connor, J., concurring) (emphasizing that strict scrutiny is not strict in theory but fatal in fact).

[359]515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

[360]*Id*.

[361]Glazer, *supra* note 1.

[362]515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment).

[363]539 U.S. 306 (2003).

[364]539 U.S. 244 (2003).

[365]*Grutter*, 539 U.S. at 334.

admissions system that numerically ranked the applicants.[366] Given the Court's history in applying strict scrutiny in equal protection cases, *Gratz* predictably held the undergraduate program unconstitutional, but a majority of justices in *Grutter* surprisingly upheld the law school program, with O'Connor flipping sides, providing a crucial fifth vote, and writing the Court's opinion.[367]

O'Connor, in a sense, proved that she had sincerely declared in earlier cases that, at least for her, strict scrutiny was not strict in theory but fatal in fact. While she reached the typical result in *Gratz*, she refused to do so in *Grutter*. Indeed, the *Grutter* result was so anomalous that one might wonder whether the majority truly applied strict scrutiny. After all, despite O'Connor's declarations, the Court for sixty years always had reached the same result in equal-protection strict scrutiny cases: the governmental program was unconstitutional. Thus, one might fairly characterize O'Connor's *Grutter* approach to be "strict scrutiny lite" rather than traditional (strict-in-theory-but-fatal-in-fact) strict scrutiny. In traditional strict scrutiny cases, the Court had never deferred to the government's articulation of a compelling purpose, yet in *Grutter*, O'Connor wrote: "The Law School's educational judgment that [student-body] diversity is essential to its educational mission is one to which we defer."[368] Thomas and Rehnquist, each dissenting, expressed outrage at, in Thomas's words, this "[d]eference antithetical to strict scrutiny."[369] From their neoconservative vantage, the Court should not dilute the rigor of strict scrutiny to facilitate upholding any governmental policy, least of all an affirmative action program. Thomas and Scalia then questioned another aspect of O'Connor's application of strict scrutiny (lite). When O'Connor framed the strict scrutiny test in *Grutter*, she stated that the government must prove that its program was "narrowly tailored" rather than necessary to achieve its (compelling) purpose.[370] In previous equal-protection cases, the Court had used the terms, 'narrowly tailored' and 'necessity,' interchangeably,[371] but not in *Grutter*. The Court had never before deemed a governmental program 'narrowly tailored'—or 'necessary'—if the government could achieve its purpose through some alternative and less invidious means. In *Grutter*, though, when Thomas pointed out that the law school could have achieved its goal of student-body diversity by reducing the admission standards for all applicants,[372] O'Connor reasoned that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[373]

After *Grutter* and *Gratz*, the Court seemed firmly committed to adjudicating the constitutionality of affirmative action programs pursuant to strict scrutiny. In any particular case, though, would it be strict scrutiny traditional or lite? Apparently O'Connor's swing vote would resolve that crucial question, and her voting record demonstrated that, in the vast majority of cases, it would be traditional (strict-in-theory-but-fatal-in-fact) strict scrutiny. Certainly, any

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[366]*Gratz*, 539 U.S. at 276-77 (O'Connor, J., concurring).

[367]*See* Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. Pa. L. Rev. 347, 348-49 (2003) (discussing whether *Grutter* was surprising).

[368]539 U.S. at 328.

[369]*Id*. at 394 (Thomas, J., concurring and dissenting); *see id*. at 380 (Rehnquist, C.J., dissenting) (this "review is unprecedented in its deference").

[370]*Id*. at 326.

[371]*E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases").

[372]*Grutter*, 539 U.S. at 350 (Thomas, J., concurring and dissenting).

[373]*Id*. at 339.

affirmative action program smacking of a quota system would be held unconstitutional—O'Connor could not accept in *Gratz* the numerical precision of the undergraduate admission program that awarded an additional twenty points to minority applicants.[374]

By 2007, when the Court decided its next major affirmative action case, *Parents Involved in Community Schools v. Seattle School District No. 1*, Roberts had replaced Rehnquist as Chief Justice, and most important, Alito had replaced O'Connor, thus solidifying the Court's neoconservative base.[375] Under the *Parents Involved* programs (in Seattle and Louisville), school officials maintained racially integrated public schools by considering race when assigning students to elementary and high schools. Roberts, writing for a five-justice majority (joined by Scalia, Thomas, Alito, and Kennedy), applied traditional strict scrutiny and invalidated the programs,[376] while Breyer (joined by Stevens, Souter, and Ginsburg) wrote a dissent applying strict scrutiny lite.[377] Forewarning of future decisions, Roberts stressed that *Grutter* should be interpreted narrowly. *Grutter* was unique, according to Roberts, in three ways: the Michigan law school affirmative action program did not impose any type of racial quota; it allowed each applicant to be evaluated individually rather than categorized solely as a member of a racial group; and it applied only to higher education.[378] Because the affirmative action programs challenged in *Parents Involved* differed from the Michigan law school program in all these respects, *Grutter* was inapposite.[379] Finally, in a plurality section of his opinion (which Kennedy did not join), Roberts concluded that equal protection required the government to be colorblind: the Constitution recognizes no difference between affirmative action programs and Jim Crow laws. The principle of equality embodied in *Brown*, Roberts reasoned, mandated the invalidation of the *Parents Involved* affirmative action programs.[380] "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[381]

Indeed, this neoconservative stress on constitutional colorblindness became a flash point of dispute among the justices. Stevens and Breyer each wrote dissents that emphatically denounced Roberts's equating of *Brown* and *Parents Involved*.[382] In Stevens's words:

> There is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court's most important decisions.[383]

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[374]539 U.S. at 276-77 (O'Connor, J., concurring).

[375]551 U.S. 701, 127 S.Ct. 2738 (2007).

[376]127 S.Ct. at 2751-52.

[377]*Id*. at 2811-20 (Breyer, J., dissenting); *see id*. at 2817-18 (Breyer, J., dissenting) (arguing that because context matters when applying strict scrutiny, it is not strict in theory but fatal in fact).

[378]*Id*. at 2753-54.

[379]*Id*.

[380]*Id*. at 2767-68 (Roberts, C.J., plurality opinion).

[381]*Id*. at 2768.

[382]*Id*. at 2817-20, 2836-37 (Breyer, J., dissenting).

[383]*Id*. at 2797-98 (Stevens, J., dissenting).

Meanwhile, Thomas concurred in *Parents Involved* to emphasize the importance of colorblindness. "Disfavoring a color-blind interpretation of the Constitution," Thomas wrote,[384] Justice Breyer's "dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown*.… This approach is just as wrong today as it was a half-century ago."[385] Finally, Kennedy wrote a concurrence that explained his refusal to join the section of Roberts's *Parents Involved* opinion emphasizing colorblindness. Kennedy insisted that the government, at least in some contexts, should be allowed to take race "into account;"[386] therefore, colorblindness "cannot be a universal constitutional principle."[387] Thus, significantly, although Kennedy joined Roberts's opinion where it stressed the narrowness of the *Grutter* holding,[388] Kennedy's concurrence nonetheless suggested that *Grutter* might retain some precedential value.[389] In fact, Kennedy acknowledged that, following from *Grutter*, racial diversity might in some circumstances constitute a compelling purpose for a public school district (rather than only for higher-education).[390]

In sum, even after *Parents Involved*, the neoconservative agenda for affirmative action remained only partially fulfilled. Uncertainties lingered in this key realm of equal-protection law largely because of Kennedy's moderate conservatism. As in the cases dealing with congressional power, Kennedy's country-club Republicanism—moderate on many social issues and generally accepting of the status quo—dampened his enthusiasm for his neoconservative colleagues' aggressive righteousness. Still, as a general matter, Kennedy strongly favors the application of traditional (strict-in-theory-but-fatal-in-fact) strict scrutiny to affirmative action issues, despite his irresoluteness in *Parents Involved*. Inevitably, Kennedy reaches the same conclusion as the more unequivocal neoconservative justices reach in every case: the government's affirmative action program violates equal protection (consequently, Kennedy dissented in *Grutter*). Thus, in his *Parents Involved* concurrence, Kennedy rigorously applied the 'narrow tailoring' prong of strict scrutiny and concluded that the Louisville and Seattle school districts failed to satisfy the standard.[391] Moreover, Kennedy was not sated by reaching this conclusion: he also explicitly criticized Breyer's endorsement and application of strict scrutiny lite.[392] Kennedy warned that strict scrutiny lite would "have no principled limit and would result in the broad acceptance of governmental racial classifications," a possibility that Kennedy could not abide.[393] Kennedy might not be an unmitigated neoconservative, but he is unquestionably conservative and consistently votes with the neocon (not the liberal) justices.

3. Establishment Clause Cases

The congressional power and affirmative action cases shared a specific neoconservative orientation: a distrust of government's ability to get things right. Regardless of intentions, national, state, and local governmental programs were likely to produce unintended and detrimental consequences. While this view has been central to numerous neoconservative policy prescriptions, neocon commentators often also emphasized another concern: a need for moral

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[384] *Id*. at 2768 (Thomas, J., concurring).
[385] *Id*..
[386] *Id*. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).
[387] *Id*. at 2792.
[388] *Id*. at 2751-54.
[389] *Id*. at 2791, 2793.
[390] *Id*. at 2789.
[391] *Id*. at 2789-91.
[392] *Id*. at 2793.
[393] *Id*.

clarity. Neocons encouraged governmental and non-governmental institutions to promote the articulation and teaching of traditional and often religious values. This neoconservative concern has strongly influenced the Supreme Court in establishment-clause cases.

The Court's doctrinal approach to establishment-clause issues has been unsettled for many years. The Court first incorporated or applied the establishment clause against state and local governments only after its 1937 turn, in *Everson v. Board of Education*, decided in 1947.[394] In *Everson*, the Court not only adopted Thomas Jefferson's metaphorical "wall of separation between Church and State"[395] but also stated that the wall "must be kept high and impregnable."[396] Yet, apparently the wall was not insurmountable, as *Everson* upheld the public reimbursement of transportation costs for children attending religious (or public) schools. Even so, conservatives, such as Bork, have long criticized the wall metaphor as being too hostile toward religion. Instead, they often advocate for non-preferentialism: the government cannot prefer one religion over another, but it can favor religion over irreligion.[397] And of course, some conservatives, especially traditionalists, go even further, arguing that the government ought to be able to promote Christianity as the traditional religion of the United States.[398]

Regardless, the post-World War II Court continually invoked and applied the wall metaphor. For instance, in *Engel v. Vitale*, decided in 1962, the Court invalidated the recitation of a supposedly non-denominational prayer in the public schools.[399] Any such prayer favored religion over irreligion, impermissible under the establishment clause, which rests "on the belief that a union of government and religion tends to destroy government and to degrade religion."[400] By 1971, in *Lemon v. Kurtzman*, the Court had synthesized its prior establishment-clause decisions into a three-pronged standard embodying the wall metaphor: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[401] In subsequent cases, however, the Court applied the *Lemon* test unevenly. For example, in one case, *Stone v. Graham*, the Court invalidated a statute that required the posting of the Ten Commandments on public classroom walls,[402] but in another case, *Lynch v. Donnelly*, the Court upheld a governmental display of a crèche.[403]

Despite the obvious flexibility of the *Lemon* test, which facilitated outcomes like that of *Lynch*, decided in 1984, the conservative justices became increasingly disgruntled with *Lemon* and its instantiation of the wall metaphor.[404] Burger's majority opinion in *Lynch* emphasized that, *Lemon* notwithstanding, the Court had been unwilling "to be confined to any single test or

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[394]330 U.S. 1 (1947).

[395]*Id*. at 16.

[396]*Id*. at 18.

[397]*E.g.*, McCreary County v. ACLU, 545 U.S. 844, 889-90 (2005) (Scalia, J., dissenting) (criticizing *Lemon* test and advocating for non-preferentialism); Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting) (criticizing wall metaphor and advocating for non-preferentialism); *see* Abington School District v. Schempp, 374 U.S. 203, 216 (1963) (rejecting non-preferentialism).

[398]*See* Winnifred Fallers Sullivan, Paying the Words Extra 77-78 (1994) (contrasting non-preferentialism with other establishment-clause views).

[399]370 U.S. 421, 425 (1962).

[400]*Id*. at 430.

[401]403 U.S. 602, 612-13 (1971) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

[402]449 U.S. 39 (1980).

[403]465 U.S. 668 (1984).

[404]*E.g.*, McCreary County v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

criterion in this sensitive area."[405] Meanwhile, O'Connor wrote a concurrence in *Lynch* that proposed an alternative to *Lemon*. O'Connor's endorsement test contained two prongs: first, does the state action create excessive governmental entanglement with religion, and second, does the state action amount to governmental endorsement or disapproval of religion?[406] Before long, another moderate conservative, Kennedy, introduced one more alternative test. Kennedy's coercion test also consisted of two parts: first, the "government may not coerce anyone to support or participate in any religion or its exercise,"[407] and second, the government "may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[408]

The coercion test became the favorite of neoconservatives because, compared to the *Lemon* and endorsement tests, it allowed the government the widest latitude in promoting religious values and displaying religious symbols.[409] Indeed, depending on the definition of coercion, Kennedy's test seemed to prohibit little governmental conduct beyond that already proscribed by the free-exercise clause (which prohibited the government from forcing individuals either to follow or not to follow any particular religion).[410] Moreover, Kennedy appeared to design the coercion test to harmonize with non-preferentialism. When he first articulated the test, he criticized judicial attempts to enforce "an absolute 'wall of separation,'"[411] and then wrote: "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."[412] Thus, the coercion test would seem to allow the government to favor religion over irreligion so long as, in doing so, the government did not coerce support for or participation in religion. Indeed, the second prong seemed to underscore the possibility of giving benefits to religion so long as those benefits fell short of establishing a specific governmental religion or faith.[413]

Through the 1990s and after, the justices sometimes applied the endorsement and coercion tests, but they also continued to apply the *Lemon* test. When applying *Lemon*, however, the justices whittled away at its rigor, to the point that the reconstituted *Lemon* test no longer embodied the wall metaphor. Start with the third prong: entanglements. *Lemon* specified two types of impermissible governmental entanglements with religion. First, administrative entanglement might arise when the government monitors religious institutions to insure that they do not use any supplied public funds for religious activities.[414] Second, if governmental action, such as a public funding program, politically divides the people in accord with their religious

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[405]465 U.S. at 679; *see* Mueller v. Allen, 463 U.S. 388, 394 (1983) (describing *Lemon* as a "helpful signpost").

[406]465 U.S. at 687-88 (O'Connor, J., concurring).

[407]County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring and dissenting).

[408]*Id*. (Kennedy, J., concurring and dissenting) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

[409]Lee v. Weisman, 505 U.S. 577, 587 (1992) (explaining that the coercion test provides the minimal amount of protection). In *County of Allegheny*, Rehnquist, Scalia, and White joined Kennedy's opinion first articulating the coercion test. *Id*. at 655 (Kennedy, J., concurring and dissenting); *see* Good News Club v. Milford Central School, 533 U.S. 98, 115-17 (2001) (Thomas's majority opinion emphasizing that children in public school were not coerced to follow religion).

[410]*E.g.*, Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (holding that city ordinance targeting practices of Santeria religion violated free-exercise clause); *see* Elk Grove Unified School District v. Newdow, 542 U.S. 1, 53 n.4, 54 n.5 (2004) (Thomas, J., concurring in the judgment) (equating the coercion test under the establishment clause with free-exercise proscriptions).

[411]County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring and dissenting).

[412]*Id*. at 657.

[413]*Id*. at 659.

[414]*Lemon*, 403 U.S. at 614-22.

differences, then the governmental action and the concomitant political divisiveness might constitute excessive (and therefore unconstitutional) entanglement.[415]

The entanglements prong, though, has not fared well over the years, as the transition from *Aguilar v. Felton*[416] *to Agostini v. Felton*[417] demonstrates. Pursuant to statute, the federal government funded New York City teachers who provided remedial instruction for religious school students at the (religious) school premises. In 1985, *Aguilar v. Felton* held this program unconstitutional because of excessive entanglements.[418] The moderate conservative Powell joined the four liberals then on the Court—Brennan, Marshall, Blackmun, and Stevens—to constitute a five-justice majority, with Brennan writing the opinion. The Court emphasized administrative entanglement because city personnel needed to "visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in [the remedial] classes."[419] Powell's concurring opinion, meanwhile, stressed political divisiveness. Whenever the government provides any type of funding for religious schools, Powell explained, then different religious groups will be motivated to lobby the legislature to provide additional funding most useful for their respective religions.[420]

By 1997, when the Court reconsidered the same funding program, the Court had moved rightward with predictable results. *Agostini v. Felton* overruled *Aguilar* by a five-to-four vote, with O'Connor writing a majority opinion joined by Rehnquist, Scalia, Thomas, and Kennedy.[421] O'Connor, for the most part, eliminated the entanglements prong from the *Lemon* test. She reasoned that, because of overlaps between the second and third prongs, "it is simplest to … treat [entanglement] as an aspect of the inquiry into a statute's effect."[422] When O'Connor therefore analyzed whether entanglement concerns might now lead the Court to conclude that the funding program violated the effects prong, she obviated consideration of political divisiveness, which she deemed "insufficient" by itself to render the program unconstitutional.[423] Equally important, O'Connor diminished the relevance of administrative entanglements. The Court would no longer require the government to monitor the use of public funds in religious schools, and when monitoring did take place, the Court would allow governmental officials and school personnel to work cooperatively.[424] Thus, regardless of the *Aguilar* Court's worries about entanglements, the *Agostini* Court held the funding program to be consonant with the establishment clause.

Well, what about the effects prong, given that the Court, in Thomas's words, has "modified" *Lemon* by recasting entanglements "as simply one criterion relevant to determining a statute's effect," and an inconsequential criterion, at that?[425] Has the Court imbued the effects prong with greater prominence, despite the results in *Agostini*? No. If anything, while the Court has all but eliminated the entanglements prong, it has simultaneously rendered the effects prong toothless. *Zelman v. Simmons-Harris*, decided in 2002, upheld a school voucher program that

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[415]*Id*. at 622-24.
[416]473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).
[417]521 U.S. 203 (1997).
[418]473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).
[419]*Id*. at 413; *see id*. at 412-13 (elaborating entanglement).
[420]*Id*. at 416-18 (Powell, J., concurring).
[421]521 U.S. 203 (1997).
[422]*Id*. at 233.
[423]*Id*.
[424]*Id*. at 233-34.
[425]Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (Thomas, J., plurality opinion); *see* Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2002) (dismissing political divisiveness as irrelevant); *id*. at 668 (O'Connor, J., concurring) (explaining that *Agostini* "folded the entanglement inquiry" into the effects prong).

allowed parents to use public money to pay for religious-school education.[426] Rehnquist's majority opinion, joined by O'Connor, Scalia, Thomas, and Kennedy, ostensibly focused on the effects prong. Of apparent significance, then, while the voucher program appeared neutral on its face, statistical evidence showed that ninety-six percent of the beneficiaries sent their children to religious schools.[427] But the Court dismissed such evidence as irrelevant to determining effects, even though statistics would seem to be an ideal means for demonstrating the actual societal effects or consequences of a facially neutral governmental program—at least if the effects prong is to have any bite.[428] Nevertheless, Rehnquist explained that "the number of program beneficiaries attending religious schools"[429] was beside the point: "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[430]

In practice, it seems, the Court has reduced the *Lemon* test to a single prong: the purpose prong.[431] So long as the government constructs a program that appears to have a secular purpose—and just about any facially neutral law will do so—the government will not violate the establishment clause. As thus transformed, the *Lemon* test now corresponds more closely with the non-preferentialist position than with the wall metaphor. Assuming that the government does not specify that funds should flow to particular religions—and such a program would not be facially neutral—then the government remains free to channel benefits to religious institutions, as was the case in *Zelman*. Moreover, in reality, any such facially neutral governmental program, channeling benefits to religious institutions, will likely funnel most of those benefits to mainstream (Christian) religions. After all, the overwhelming majority of Americans belong to those religions. In the end, the religious mainstream can direct benefits to itself under the guise of governmental neutrality without impinging on establishment-clause proscriptions.

The influence of the neoconservative justices on establishment-clause doctrine is unmistakable. In the early 1970s, the Court articulated and applied the *Lemon* test as a manifestation of the wall metaphor. But as neocons advocated for greater moral clarity in a number of social realms, the justices themselves began to assail *Lemon*. Before long, the justices could draw on a mish-mash of doctrinal approaches to establishment-clause issues. They could apply a coercion test, an endorsement test, a reconstituted *Lemon* test, or no test at all, as the Court has done in some cases, simply declaring that the government ought to be able to follow American traditions.[432] And whatever test or tests the justices applied, the result was often the same: the Court sustained the promotion of traditional American (and Christian) values. In these cases, the government itself might be promoting the values—for instance, by providing funding to private religious groups—or the government, forced by the Court, might be granting religious groups access to a public realm where they could spread their religious messages.[433]

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[426]536 U.S. 639 (2002).

[427]*Id*. at 2470-71.

[428]*Id*. at 2470; *see id*. at 2470-71 (also disputing the accuracy of the statistical evidence).

[429]*Id*. at 2467.

[430]Zelman v. Simmons-Harris, 122 S.Ct. 2460, 2470 (2002).

[431]*E.g.*, McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (focusing on governmental purposes). The purpose prong, too, has come under attack. *E.g.*, *id*. at 902 (Scalia, J., dissenting).

[432]*E.g.*, Van Orden v. Perry, 545 U.S. 677, 686-90 (2005) (Rehnquist, C.J., plurality) (upholding public display of Ten Commandments).

[433]*See, e.g.*, Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995) (holding the first amendment required the university to fund a Christian newspaper published by students).

Either way, the justices shifted the case outcomes toward the neoconservative and non-preferentialist positions.

Elk Grove Unified School District v. Newdow, decided in 2004, illustrates the vast potential ramifications of neoconservatism for establishment-clause cases.[434] In *Newdow*, a student's father challenged the public school recitation of the phrase, "under God," in the Pledge of Allegiance. The four progressive justices, joined by Kennedy, skirted the establishment-clause issue by holding that the father, Newdow, lacked standing to bring the suit. Rehnquist, concurring in the judgment and joined by Thomas and O'Connor, reasoned that Newdow had standing but that the school had not violated the establishment clause. Rather than articulating and applying a specific establishment-clause test, Rehnquist emphasized a deep national tradition "of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history."[435] The Court, Rehnquist explained, should hesitate before interfering with the attempts of other governmental institutions to promote and sustain such traditional values.[436] "Here, Congress prescribed a Pledge of Allegiance, the State of California required patriotic observances in its schools, and the School District chose to comply by requiring teacher-led recital of the Pledge of Allegiance by willing students."[437] The first amendment required no more than that schools permit students "to abstain from the ceremony if they chose to do so."[438]

But it was Thomas who pushed the neoconservative envelope to its limits in *Newdow*. He agreed with Rehnquist that Newdow had standing to bring his first-amendment challenge, but unlike Rehnquist, Thomas then launched into an originalist analysis of the establishment clause. Referring to the text, contemporaneous interpretations from the time of the framing, and "prevailing" nineteenth-century views of the clause, Thomas concluded that the establishment clause should not apply against state and local governments.[439] "The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."[440] What does Thomas mean when he calls the establishment clause a federalism provision? The clause, from this perspective, draws a jurisdictional boundary between national and state sovereignty: the clause "made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause."[441] As Thomas phrased it, "States and only States were the direct beneficiaries" of the establishment clause.[442] "Thus," Thomas concluded, "unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause."[443] In other words, if Thomas had his way, with the Court following his originalist analysis, state and local governments not only would be able to promote traditional values but would also be able to establish religions overtly and explicitly without violating the first amendment. Given this conclusion, incorporation of the establishment clause would create a "peculiar" conundrum: "It

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[434]542 U.S. 1 (2004).
[435]*Id*. at 26 (Rehnquist, C.J., concurring in the judgment).
[436]*Id*. at 32-33.
[437]*Id*.
[438]*Id*. at 33.
[439]*Id*. at 50 (Thomas, J., concurring in the judgment).
[440]*Id*. at 49.
[441]*Id*. at 50.
[442]*Id*. at 51.
[443]*Id*. at 49.

would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion."[444]

Thomas realized that the other justices (and other Americans, for that matter) might resist undoing more than sixty years of jurisprudence based on the incorporation and application of the establishment clause against state and local governments. Therefore, Thomas asked: if one were to stretch to interpret the establishment clause as originally protecting an individual right against the national government—an individual right that could at least feasibly be incorporated to apply against state and local governments—what would be the content of that individual right? The "best argument," according to Thomas, "would be that, by disabling Congress from establishing a national religion, the [establishment] Clause protected an individual right, enforceable against the Federal Government, to be free from *coercive* federal establishments."[445] Translating Thomas's argument into the language of the competing establishment-clause doctrines—the *Lemon* test, the endorsement test, and the coercion test—if any individual right is to incorporated, its contours should be determined pursuant to the coercion test. Moreover, Thomas conceptualized coercion in its narrowest sense: only legal compulsion would amount to coercion. While some other justices had reasoned that coercion could arise indirectly from psychological pressure (to conform to certain religious practices),[446] Thomas agreed with Scalia: to be constitutionally cognizable, coercion must be "by force of law and threat of penalty."[447] When conceptualized in this manner, Thomas added, the coercion test corresponds with non-preferentialism.[448] True, government cannot *prefer* "particular religious faiths," but constitutionally cognizable governmental preference does not exist unless the government coerces citizens (by force of law and threat of penalty) to follow or support (financially) a specific religion or religions.[449] Finally, and perhaps needless to say, given this minimalist interpretation of the establishment clause, Thomas concluded that the first amendment does not preclude schools from leading students in the recitation of the phrase "under God" in the Pledge of Allegiance.[450]

B. The Supreme Court in the Future: Neocons in Exile

Neoconservativism has strongly influenced Supreme Court decision making: many case outcomes correspond with neoconservative views, and many opinions reveal neoconservative influences. Yet, the neoconservative agenda has not been completely fulfilled in any constitutional realm. Establishment-clause jurisprudence is typical. Over the last twenty-five years, the Court's decisions have consistently bolstered governmental and private efforts to promote traditional American (and Christian) values. While the Court has not explicitly repudiated the wall metaphor—the idea that a high wall separates church and state—case outcomes have corresponded increasingly with non-preferentialism—the position that the government can support religion so long as it does not prefer one religion over another. Even so, the Court has never expressly adopted non-preferentialism. Similarly, the justices will discuss

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[444]*Id*. at 51.

[445]*Id*. at 50-51.

[446]Santa Fe Independent School District v. Doe, 530 U.S. 290, 311-12 (2000); Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

[447]Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (quoted in *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment)). Thomas, Rehnquist, and White joined Scalia's dissent in *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).

[448]*Newdow*, 542 U.S. at 53-54 (Thomas, J., concurring in the judgment).

[449]*Id*. at 53.

[450]*Id*. at 54.

originalist interpretations of the establishment clause, as advocated by neocons, but a Court majority has never committed to following the original meaning and nothing else. Ultimately, those judicial opinions where the most enthusiastic neoconservative justices proffer their strongest neoconservative arguments usually turn out to be concurring or dissenting rather than majority.

But what about the future? Recent political developments have set the stage for a long-running play ridden with tension between the Court and the other federal branches. The Democrats captured the presidency and Congress in the 2008 elections, yet the Court is more strongly neoconservative than ever before, given the recent additions of Roberts and Alito—especially with Alito replacing the more moderate O'Connor. Thus, it bears repeating, despite the appointment of Sotomayor and the possibility that President Obama might eventually appoint two more justices, the Court will likely retain its current alignment, with five conservatives and four liberals (or progressives). Most Court observers identify Kennedy as the swing voter on the Roberts Court, and he scored a solidly conservative .365 on the Segal-Cover political ideology rankings.[451] How, then, will the neocons, now exiled to the Supreme Court, shape constitutional adjudication over the next few years?

Neocons are renowned for their confident and aggressive assertions of power. Given this, might the neoconservative justices shun prudence and push hard to the right? Probably not. Surrounding circumstances will demand a degree of moderation, whether the neoconservative justices embrace it happily or not. For years now, neocons in general and neoconservative constitutional theorists in particular have advocated for the resurrection of republican democracy, but the successful fulfillment of this overarching neoconservative goal has always been problematic if not impossible. Even while the neocons castigated pluralist democracy, they necessarily operated within the parameters of the pluralist democratic regime. They acted as if they were an interest group trapped in a political battle for power against other interest groups. And they had little choice but to do so if they wished to aggrandize their power rather than to fade into insignificance.[452] Thus, they self-consciously followed political entrepreneurs who cultivated patrons, formed organizations, and then strategically acted to maximize their political sway.[453] Neocons spread their ideas in journals like *The Public Interest* and *Commentary*; they networked in organizations like the AEI and the Federalist Society; and they worked at public interest law firms that successfully advocated for the judicial adoption of neoconservative policies.[454] Like any aggressive interest group, they lambasted their opponents while proclaiming their own righteousness. Consequently, they denounced liberals for practicing a "politics of victimhood,"[455] then turned around and declared that they, too, were victims. Irwin Stelzer complained, for instance, that neocons had been unfairly characterized as a "cabal" and as "ideologues,"[456] while David Brooks remonstrated: "If you ever read a sentence that starts

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[451]Scores, *supra* note 265; Lane, *supra* note 269.

[452]Steven M. Teles, The Rise of the Conservative Legal Movement 6 (2008).

[453]*Id*. at 9, 58-264.

[454]Under Attorney General Edwin Meese, the Department of Justice issued two reports encouraging conservative approaches to constitutional interpretation and adjudication. Office of Legal Policy, *The Constitution in the Year 2000* (Oct. 11, 1988); *Guidelines on Constitutional Litigation* (Feb. 19, 1988); *see* Jean Stefancic & Richard Delgado, No Mercy (1996) (arguing that conservatives strategically advocated to change social policies).

[455]Nash, *supra* note 1, at 570.

[456]Stelzer, *supra* note 102, at 3.

with 'Neocons believe', there is a 99.44 per cent chance everything else in that sentence will be untrue."[457]

In short, neoconservatives never transcended pluralist democracy in their own practices, much less transforming the entire democratic system. Why? The primary obstacle blocking the neoconservative resurrection of republican democracy always remained the entrenched pluralist democratic regime itself. Republican democracy may have suited a nineteenth-century society that was largely agrarian, rural, and ethnically and religiously homogeneous, but it could no longer be sustained in the America of the early 1930s or after. Thus, when the neocons began writing essays and books arguing that republican democracy was preferable to pluralist democracy—that a democracy based on virtue and the common good was, from the neoconservative perspective, better than a democracy bereft of foundational values and dedicated to the unmitigated pursuit of self-interest—the neocons still could not return the nation to a social, economic, and cultural environment conducive to republican democracy. Neoconservative arguments for republican democracy could only ding the outer body without reconstructing the inner motor of the pluralist democratic regime. A persuasive neoconservative tract might convince some people to change their political views and might lead to a few policy reforms—for instance, a change in the welfare laws. Yet, without some momentous changes in the underlying social structures and predominant cultural forces, such an argument would be unlikely to lead to a revolutionary change in democratic regimes (from pluralist to republican democracy). And such momentous social and cultural changes were not forthcoming. The nation had become irretrievably heterogeneous; it had become urban, suburban, and exurban; and it had become post-industrial and informational. In short, in the late-twentieth and early-twenty-first centuries, regardless of neoconservative contentions, republican democracy no longer fit the American society and culture.[458]

Given this situation—this insurmountable obstacle to the achievement of the overarching neoconservative goals—one should certainly not expect the neoconservative Roberts Court justices to usher in a new republican democratic regime. So long as American society remains committed to a pluralist democratic form of government—likely to be true for the foreseeable future—one should expect the Court to incorporate only bits and pieces of republican democracy into the larger pluralist democratic framework. That is, our neoconservative Court is likely to cut and paste: cutting elements of pluralist democracy and pasting in swatches of republican democratic judicial review, when possible, but recognizing that the system remains pluralist democratic. To be sure, the neoconservative justices might contemplate pushing further, disregarding the main parameters of our pluralist democratic system. They might, after all, think they have nothing to lose[459]—enjoying, of course, lifetime appointments—yet more likely, they would fear that pushing too hard against a Democratic Congress and President could generate a constitutional crisis.[460]

In fact, 'cutting and pasting' usefully describes much of the Court's jurisprudence over the past two decades, during the Rehnquist Court and early-Roberts Court years. In the realm of Congress's commerce power, for instance, the *Lopez* Court injected certain formalist elements characteristic of republican democratic judicial review into its review of the GFSZA, which

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[457]David Brooks, *The Neocon Cabal and Other Fantasies* (2004), *reprinted in* Reader, *supra* note 1, at 39, 42.

[458]*See* Crossroads, *supra* note 1, at 30-31 (emphasizing that a regime always remains integrally connected to the underlying culture).

[459]I thank Mark Tushnet for emphasizing this point.

[460]*See* William E. Leuchtenburg, The Supreme Court Reborn (1995) (discussing court-packing plan).

proscribed the possession of firearms at school. Yet, the *Lopez* Court claimed only to reformulate the rational basis test—Congress would still be empowered to regulate activities substantially affecting interstate commerce—even though such a doctrinal approach resonated with pluralist democracy. In the establishment-clause realm, the neoconservative justices have severely weakened the *Lemon* test and its implementation of the wall metaphor, yet the neocons have been unable to persuade a majority unequivocally to adopt non-preferentialism. This 'cutting and pasting' leads the justices, in effect, to joust with other governmental officials and institutions in a type of dialogue: the justices will attempt to influence or force others to accept or incorporate elements of republican democracy into our governmental system, while other governmental actors and institutions compel the justices to acquiesce in the operation of pluralist democracy. When the *Lopez* Court invalidated the GFSZA, the Court questioned Congress's failure to make sufficiently detailed findings in support of the statute. So, when Congress enacted VAWA, Congress deliberated extensively and reported detailed findings connecting interstate commerce with violence against women. The *Morrison* Court nonetheless dismissed these findings as inadequate and held part of VAWA unconstitutional, but Congress continued, of course, to implement its commerce power, twice reauthorizing other parts of VAWA.[461] The Court and the Congress—the Congress and the Court—each will continue to speak and to react to the other as they proclaim their respective positions.

Where, then, will the neoconservative justices seek to paste in pieces of republican democracy in the future? One might expect the Court to continue stressing the limits of congressional power pursuant to the *Lopez* reformulated rational basis test for the commerce clause and the *Boerne* doctrine for the fourteenth amendment, section five.[462] The specific statutes targeted by the Court likely will depend on the new legislation enacted by the Democratic Congress. Certainly, though, some extant statutes are candidates for judicial assault: a prominent example is the Endangered Species Act (ESA).[463] The Court could easily conclude that, under the *Lopez* rational basis test, Congress exceeded its power in passing the Act because its environmental goals are not substantially related to interstate commerce—at least from the perspective of the neoconservative justices.[464] Federal anti-discrimination statutes might also be at risk. The justices could apply the *Lopez* and *Boerne* doctrines to hold that Congress exceeded its commerce and section five powers in passing statutes that protect the elderly, the disabled, and others.[465] In a similar fashion, the justices are likely to push forward their neoconservative precedents in the affirmative-action field. Expect the justices to continue emphasizing traditional (strict-in-theory-but-fatal-in-fact) strict scrutiny rather than strict scrutiny lite while narrowing the precedential value of *Grutter*, which upheld Michigan Law School's affirmative action admissions program. The key to such cases, of course, would be Kennedy. While he shies away from joining the most aggressive neoconservative opinions, he nonetheless has joined the majorities in *Lopez*, on the commerce power, and *Adarand* and *Parents Involved*, on affirmative action. Would the neoconservative justices be able to convince Kennedy to take an extra step—for instance, in affirmative action cases—by holding that the Constitution demands the

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[461]Pub. L. No. 109-162, 119 Stat. 2960 (2005); Pub. L. No. 106-386, 114 Stat. 1464 (2000).

[462]*See* Cass R. Sunstein, Radicals in Robes 18-19 (2005) (suggesting congressional power might be an area where the Court could continue to move rightward).

[463]Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884.

[464]Ackerman, *supra* note 260.

[465]Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990); Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967); *see* Sunstein, *supra* note 462, at 18 (arguing that conservative justices might "limit democratic efforts to protect [against] various forms of discrimination").

government to be colorblind? *Parents Involved*, in which Kennedy refused to join that part of Roberts's opinion emphasizing colorblindness, suggests otherwise. Kennedy, in effect, might dampen any neoconservative impulses to turn hard to the right, thus avoiding a tense confrontation between the Court and the Democrats.

Yet, exactly because of Kennedy, neoconservative inroads are most likely to be made in the establishment-clause context, where Kennedy, quite simply, looks most like a neoconservative. He was, in 1988, the first justice to articulate the coercion test, and he has continued to champion its advantages over the competing *(Lemon* and endorsement) tests.[466] Kennedy tailored the coercion test to harmonize with the neocons' favored non-preferentialism and to provide "a minimum" of constitutional protection against government-religion connections.[467] Now that Alito has replaced O'Connor—who always continued to press for her endorsement test—Alito is likely to join Kennedy, Thomas, Scalia, and Roberts in explicitly repudiating *Lemon* and adopting the coercion test instead.[468] Even so, Kennedy has diverged from the neocons over the definition of coercion. Whereas the neoconservative justices have insisted on a narrow concept of coercion—coercion must be "by force of law and threat of penalty"[469]—Kennedy has joined the liberal justices in defining coercion to include, in some contexts, psychological or social pressure, such as that imposed on teenagers by their peers.[470] Moreover, Kennedy has refused to join a Scalia dissent that advocated going beyond the non-preferentialist position to allow government, in some situations, to favor certain religions over others (rather than favoring religion in general over irreligion).[471]

In conclusion, the neoconservative outlook is most likely to be pressed forward in constitutional realms where it has already gained a foothold, such as in congressional power cases. The neocons are unlikely to achieve major breakthroughs in other areas, with the possible exception of the establishment clause. Of course, neocons might dream: for instance, they might fantasize about promoting moral values by eliminating the right of privacy, which encompasses a woman's right to choose abortion.[472] But such dreams will almost certainly remain chimerical because Kennedy would have to supply a fifth vote, an improbable scenario, given that he co-authored the joint opinion in *Planned Parenthood v. Casey*,[473] which expressly reaffirmed *Roe v. Wade* and a woman's right to choose.[474] Of course, if Sotomayor or another Obama appointee were to surprise by siding with the conservatives on the abortion issue, neoconservative dreams could become reality.

IV. Conclusion: What's a Progressive to Do?

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[466]County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring and dissenting); *see, e.g.*, Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (criticizing endorsement and *Lemon* tests).

[467]Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoted in Santa Fe Independent School District v. Doe, 530 U.S. 290, 302 (2000)).

[468]*See, e.g.*, Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 33-39 (2004) (O'Connor, J., concurring in the judgment) (applying endorsement test).

[469]Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (quoted in *Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)).

[470]Santa Fe Independent School District v. Doe, 530 U.S. 290, 311-12 (2000); Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

[471]Van Orden v. Perry, 545 U.S. 677, 893-900 (2005) (Scalia, J., dissenting).

[472]*See* Sunstein, *supra* note 462, at 18 (noting that conservatives would like the Court to eliminate the right of privacy).

[473]505 U.S. 833 (1992).

[474]410 U.S. 113 (1973).

How should political progressives (or liberals) confront the challenge of a neoconservative Supreme Court?[475] They can respond at different levels of generality. For instance, progressives can argue at the most general level that the overarching neoconservative goal of resurrecting republican democracy is wrongheaded as well as futile. Progressives can make the case that, as a theory, pluralist democracy is preferable to republican democracy because, for instance, a pluralist democratic system encourages more widespread political participation. Of course, neocons are neocons partly because they have already decided that republican democracy holds significant appeal, so broad theoretical arguments might be unavailing from the outset. Progressives could therefore emphasize a more practical though still general argument: because of the current state of American culture and society and the entrenchment of pluralist democracy, a resurrection of republican democracy is impossible. While this obstacle appears insurmountable, it has not yet prevented the neoconservative justices from attempting to cut and paste elements of republican democracy into the pluralist democratic system.

Progressives might next consider attacking more specific neoconservative methods and arguments. Neoconservatives claim that many of their constitutional views arise from a commitment to originalism, which supposedly renders constitutional interpretation apolitical. Thus, progressives can criticize originalism in at least three ways. First, they can argue that other interpretive approaches are preferable to originalism. Justice Breyer, for one, has written a book sketching an "active liberty" interpretive approach that emphasizes citizen participation in government.[476] Second, they can emphasize that the choice to follow originalism is just that: a choice, and a political one, at that. Numerous interpretive methods exist, with originalism merely being one of them. Indeed, conservatives themselves have demonstrated that the very definition of originalism can be controversial, as they have shifted from a definition focused on framers' intentions to one focused more on original public meaning.[477] Third, progressives can argue that even if all the justices were to follow an originalist approach, it would not produce uncontroversial and apolitical case outcomes.[478] In numerous cases, the majority and dissenting justices largely explore the same historical sources yet reach different conclusions, disagreeing about the original meaning of the Constitution.[479]

Indeed, conservative originalists often seem to skew their historical conclusions to fit their political goals.[480] Libertarians such as Richard Epstein and Randy Barnett argue that the

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[475]*See generally* The Constitution in 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009) (presenting various progressive approaches to constitutional adjudication).

[476]Stephen Breyer, Active Liberty (2006).

[477]*Compare* Neutral, *supra* note 213, at 8, 17 (focusing on text and framers' intentions) *with* Tempting, *supra* note 213, at 5-6, 143-44 (focusing on original meaning).

[478]*See* Robert Post & Reva Siegel, *Originalism as a Political Practice*, 75 Fordham L. Rev. 545 (2006) (arguing that originalism should be understood as a conservative political practice); Transformative, *supra* note 221, at 75-78 (arguing that Meese's Department of Justice purposefully sought to advocate for originalism as a means of advancing a political agenda).

[479]*E.g.*, Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995); New York v. United States, 505 U.S. 144 (1992).

[480]Ackerman, *supra* note 272 (arguing that neoconservative jurists follow originalism to results that "magically coincide with their own vision of the future"); Erwin Chemerinsky, *When it Matters Most, It Is Still the Kennedy Court*, 11 Green Bag 2d 427, 429-31 (2008) (arguing that Scalia ignored the constitutional text and its original meaning to find individual right to possess guns in second amendment); Post & Siegel, *supra* note 478, at 562-65 (arguing that Justices Thomas and Scalia apply originalism to correspond with their political preferences).

Court took a wrong turn in 1937 and that it should therefore return to a form of republican democratic judicial review. The problem is that they then interpret the history of the republican democratic regime as supporting a *return* to libertarianism: supposedly based on the original meaning of the Constitution, courts should presume that governmental actions are illegitimate whenever they infringe on individual liberty.[481] But from the nation's inception through, at least, most of the nineteenth century, republican democracy did not equate with libertarianism. The government could and did regulate (and restrict individual liberty) whenever such regulation would promote the common good. True, *Congress* did not extensively regulate the economy until the early-twentieth century, but that fact reflected economic structures rather than governmental philosophy. During the nineteenth century, economic activity was limited mostly to local markets—no substantial national marketplace existed until after the post-Civil War growth of the railroads—so state and local governments, rather than Congress, imposed regulations. And there was no shortage of regulations: state and local governments regularly used the so-called police power to impose restrictions that were deemed for the common good.[482] If such a restriction were challenged, a court would determine its legality by discerning whether the disputed governmental action was either for the common good (and therefore permissible) or for private or partial interests (and therefore impermissible). Some regulations were upheld and some were not, but if anything, through much of the nineteenth century, courts were more apt to uphold than invalidate governmental actions.[483] As Chancellor James Kent of New York emphasized: "private interest must be made subservient to the general interest of the community."[484]

While progressives can present such historical arguments countering neoconservative positions, progressives might instead offer their own more affirmative outlooks. For instance, some progressives have articulated a theory of "judicial minimalism."[485] Cass Sunstein explains: minimalist judges "seek to avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes."[486] That is, minimalist decisions (and opinions) are narrow and shallow, as illustrated in the case of *Romer v. Evans*, decided in 1996.[487] Several Colorado municipalities had enacted ordinances prohibiting sexual-orientation discrimination in housing, employment, education, and other public services and accommodations. These ordinances prompted a statewide referendum that resulted in the adoption of a state constitutional amendment (Amendment 2).[488] Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government designed to

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Somebody like Randy Barnett, who argued that the Court correctly decided *Lochner* (pro-conservatism) and *Roe v. Wade* (pro-liberalism), was the exception. Restoring, *supra* note 248, at 274-334.

[481]Restoring, *supra* note 248, at 53-86; Liberty, *supra* note 248, at 1-28; Takings, *supra* note 248, at 35-329.

[482]William J. Novak, The People's Welfare (1996) (detailing the many extensive nineteenth-century state and local regulations).

[483]*See* Feldman, *supra* note 3, at 26-32 (describing judicial review under republican democracy).

[484]James Kent, 2 Commentaries on American Law 276 (1827; Legal Classics Library Reprint); *e.g.*, Commonwealth v. Rice, 9 Metcalf 253, 50 Mass. 253, 256, 259 (1845) (upholding regulation of economic marketplace); *see* Commonwealth v. Alger, 61 Mass. 53, 7 Cush. 53, 84-86 (1851) (Lemuel Shaw explaining extensive scope of police power); Vanderbilt v. Adams, 7 Cow. 349, 351-52 (N.Y. 1827) (John Woodworth explaining sovereign power over individual liberties).

[485]Cass R. Sunstein, One Case at a Time (1999); *see, e.g.*, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 Colum. L. Rev. 1454 (2000) (arguing for minimalism).

[486]Sunstein, *supra* note 485, at 9.

[487]517 U.S. 620 (1996).

[488]*Id*. at 623-24.

protect … homosexual persons or gays and lesbians."[489] Thus, Amendment 2 repealed the previously enacted municipal ordinances to the extent that they prohibited discrimination on the basis of "'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'"[490] The Court held that Amendment 2 violated the equal protection clause of the fourteenth amendment.[491]

As interpreted by Sunstein, the *Romer* Court's majority opinion, written by Kennedy (joined by Stevens, O'Connor, Souter, Ginsburg, and Breyer) left much undecided.[492] The opinion was narrow because it invalidated Amendment 2 without holding that all or indeed any other laws discriminating on the basis of sexual orientation are unconstitutional.[493] Subsequent cases could arise in which the Court might uphold such discrimination. Likewise, the opinion was shallow because the Court did not base its decision on any deeply theorized principles of equality. Indeed, the case presented the Court with a perfect opportunity to decide whether gays and lesbians should be deemed either a suspect or quasi-suspect class, which would trigger heightened judicial scrutiny (such as strict scrutiny) under the Court's equal protection methodology.[494] The Court, though, refused to decide this fundamental question regarding the nature of equality under the fourteenth amendment. Instead, the Court concluded that Amendment 2 failed the rational basis test, the lowest level of judicial scrutiny under equal protection, and thus was unconstitutional.[495] Since Amendment 2 could not satisfy even rational basis review, the Court did not need to contemplate applying any level of heightened scrutiny and therefore left undecided whether gays and lesbians constituted a suspect or quasi-suspect class.[496]

According to Sunstein, minimalist judges and justices leave things undecided, as in *Romer*, because they accept "humility in the face of limited judicial capacities and competence."[497] Regardless of whether this account of minimalism is precisely accurate, the strategic appeal of minimalism from a progressive political perspective is obvious, given the current makeup of the Supreme Court. When progressives argue for a minimalist decision, they attempt to persuade the justices to temper their political and legal goals, to leave more and deeper decisions to other institutions. If progressives cannot trust the Court to reach acceptable (progressive) outcomes, then leave more decisions to other governmental institutions, especially when Democrats control those other institutions. Mark Tushnet pushed this position to the extreme by arguing to strip the power of judicial review from the federal judiciary; he literally wants to take the Constitution away from the courts.[498] In truth, progressives here are engaged in damage control: the neocons control the Court, so the progressives hope to mitigate potential

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[489]*Id*. at 625.

[490]*Id*. at 624 (quoting Colo. Const., Art. II, § 30b).

[491]*Id*. at 635-36.

[492]Sunstein, *supra* note 485, at 137-57; Peters, *supra* note 485, at 1486-91.

[493]517 U.S. at 631-36.

[494]*See, e.g.*, Washington v. Seattle School Dist., 458 U.S. 457 (1982) (applying strict scrutiny to racial discrimination); Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate level scrutiny to gender discrimination).

[495]The Court wrote that, under the rational basis test, "we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." 517 U.S. at 631.

[496]*Id*. at 631-36 (resolving case under rational basis review). *Romer* can be added to a short list of cases where the Court has applied rational basis "with bite." Gerald Gunther, Constitutional Law 604 (11th ed. 1985); *e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[497]Sunstein, *supra* note 485, at 54.

[498]Tushnet, *supra* note 276, at 129-53.

political and legal harms. Conservatives, like Robert Bork, championed judicial restraint in the 1960s and 1970s in response to Warren and early-Burger Court decisions, and now progressives in effect advocate for restraint because of the Rehnquist and Roberts Courts.[499]

Whatever progressives argue to the Court—whether it's for minimalism, or against originalism, or for a particular originalist or historical understanding of the Constitution, or otherwise—they will inevitably confront a titanic obstacle: the neoconservative presence. The neoconservative justices are not likely to find progressive arguments persuasive. For example, if progressives advocate for judicial minimalism, nobody is going to be fooled. Regardless of the theoretical arguments for minimalism, the neoconservative justices will not find the progressive political strategy to be too opaque to discern. Even if progressives sincerely believe in the merits of minimalism as a judicial methodology—and most likely, many of them are sincere—the political implications of leaving more decisions to Democratic-controlled governmental institutions will be obvious. Given this fact, progressives might be reduced to three tacks. First, avoid the Court whenever possible. Litigate, for example, in state courts and invoke state constitutional provisions (thus sidestepping the Court's conservative interpretations of the federal Constitution).[500] Second, use an interest-convergence strategy if it fits. In rare instances, the political interests of progressives and neocons might overlap or coincide, and if so, progressives might as well emphasize this happenstance, regardless of the forum, whether they are in state court, federal court, or elsewhere. In this way, progressives might be able to forge a temporary alliance with neocons and advance their agenda.[501] Third, when forced to advocate before the Court, progressives would be wise to narrow their arguments, in most cases, to one target: Justice Kennedy.[502]

In most politically charged cases—those that are most salient in separating conservatives and progressives—progressives will win only if they can convince Kennedy to vote with the four progressive-liberals rather than with the four neoconservatives. Since Kennedy is a moderate conservative, progressives will always face a difficult task; Kennedy's legal and political inclinations will be to follow the neocons in most cases. Progressives would probably fare best, then, if they accentuate those points that separate Kennedy from the neocons. For instance, whereas the neoconservative justices—like neocons in general—tend to assert their views confidently and aggressively, Kennedy tends to be more prudential, more cautious.[503] Thus, in *Newdow*, Kennedy joined the four progressive justices in sidestepping the merits of the establishment-clause challenge to the 'under God' provision in the Pledge of Allegiance.[504] Tellingly, while Kennedy and the progressives relied on Newdow's lack of standing to resolve the case, all of the other conservative justices argued that the Court should have reached the merits and should have held that the 'under God' provision did not violate the establishment clause.[505] In a case such as *Newdow*, one senses that Kennedy abandoned the neocons more than he accepted the progressive view. Yet, in some instances, Kennedy might go further and actually accept the progressive position on the merits, especially in cases raising certain social issues,

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[499]*See* Friedman, *supra* note 340, at 161-64 (explaining how conservatives and progressives have shifted their views of judicial review because of changing political contexts).

[500]I thank Richard Delgado for emphasizing this point.

[501]Richard Delgado, *Zero-Based Racial Politics*, 78 Geo. L.J. 1929 (1990).

[502]*See* Chemerinsky, *supra* note 272, at 427-28 (emphasizing that Kennedy's vote decides ideologically charged cases).

[503]Partly for this reason, Sunstein identifies Kennedy as a judicial minimalist. Sunstein, *supra* note 485, at 9.

[504]Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).

[505]*Id*. at 26-33 (Rehnquist, C.J., concurring in the judgment).

such as gay and lesbian rights.[506] In *Lawrence v. Texas*, Kennedy wrote the majority opinion holding that substantive due process protects a right to engage in homosexual conduct, while Scalia wrote a scathing dissent joined by Rehnquist and Thomas.[507]

Finally, progressives should realize that, in many instances, Kennedy will vote with the neocons, but he might nonetheless be influenced to temper the (conservative) majority's line of reasoning. Consider the establishment-clause context. Alito's replacement of O'Connor increases the likelihood that a (conservative) majority of justices will settle upon Kennedy's coercion test as the prevailing standard, replacing the *Lemon* test, but progressives could ameliorate the coercion test by persuading Kennedy to continue defining coercion expansively.[508] If the Court characterizes coercion as including psychological and social pressure—rather than being limited to threatened legal penalties, as the neocons desire[509]—then the establishment clause is more likely to be deemed a barrier to the public expression or adoption of mainstream religious values and views. If, instead, Kennedy merely signs onto a neoconservative opinion adopting the coercion test—let's say one written by Scalia or Thomas—then the establishment clause is likely to become little more than precatory, a plea to the predominant religions to consider minorities before displaying mainstream symbols and inculcating religious values.

Of course, just as neocons dreamed about completely fulfilling their goals before the Supreme Court, so can progressives dream. The kernel of the progressive dream lies buried in the plans, in the futures, of the conservative justices themselves. If, in the next few years, one conservative justice were to resign—however surprising and premature it would be—then President Obama could appoint a replacement who would (probably) swing the Court toward a five-to-four progressive majority. Suddenly, the politics of Supreme Court adjudication would change dramatically. Instead of arguing to Kennedy, if he still remained on the Court, progressives would assert their positions with more assurance, seeking to hold together the progressive majority. The remaining neocons, whether Thomas, Scalia, Roberts, or Alito, would end their careers dwelling in a far deeper form of exile—one that would entail a gnawing sense of frustration. Ironically, these justices could become the new Thurgood Marshall and William Brennan, lonely voices persistently dissenting against powerful political and legal opponents. For progressives, though, this romantic future remains no more than a dream—and a remote one, at that. The neoconservative justices might be in exile, but they will almost certainly continue for the foreseeable future to exercise substantial control over legal (and political) developments.

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[506] *See* Graber, *supra* note 276, at 325 (describing Kennedy's country-club Republicanism).

[507] Lawrence v. Texas, 539 U.S. 558 (2003).

[508] Santa Fe Independent School District v. Doe, 530 U.S. 290, 311-12 (2000); Lee v. Weisman, 505 U.S. 577, 593-94 (1992).

[509] *Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment); Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).