# THE NINE

*Inside the Secret World of the Supreme Court*

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## PROLOGUE

# THE STEPS

The architect Cass Gilbert had grand ambitions for his design of a new home for the Supreme Court—what he called "the greatest tribunal in the world, one of the three great elements of our national government." Gilbert knew that the approach to the Court, as much as the structure itself, would define the experience of the building, but the site presented a challenge. Other exalted Washington edifices—the Capitol, the Washington Monument, the Lincoln Memorial—inspired awe with their processional approaches. But in 1928 Congress had designated for the Court a cramped and asymmetrical plot of land, wedged tightly between the Capitol and the Library of Congress. How could Gilbert convey to visitors the magnitude and importance of the judicial process taking place within the Court's walls?

The answer, he decided, was steps. Gilbert pushed back the wings of the building, so that the public face of the building would be a portico with a massive and imposing stairway. Visitors would not have to walk a long distance to enter, but few would forget the experience of mounting those forty-four steps to the double row of eight massive columns supporting the roof. The walk up the stairs would be the central symbolic experience of the Supreme Court, a physical manifestation of the American march to justice. The stairs separated the Court from the everyday world—and especially from the earthly concerns of the politicians in the Capitol—and announced that the justices would operate, literally, on a higher plane.

That, in any event, was the theory. The truth about the Court has always been more complicated.

For more than two hundred years, the Supreme Court has confronted the same political issues as the other branches of government—with a similar mixed record of success and failure. During his long tenure as chief justice, John Marshall did as much as the framers of the Constitution themselves to shape an enduring structure for the government of the United States. In the decades that followed, however, the Court fared no better than presidents or the Congress in ameliorating the horror of slavery or avoiding civil war. Likewise, during the period of territorial and economic expansion before World War I, the Court again shrank from a position of leadership, mostly preferring to accommodate the business interests and their political allies, who also dominated the other branches of government. It was not until the 1950s and 1960s, and the tenure of Chief Justice Earl Warren, that the Court consistently asserted itself as an independent and aggressive guarantor of constitutional rights.

For the next thirty years, through the tenures of Chief Justices Warren E. Burger and William H. Rehnquist, the Court stood nearly evenly divided on the most pressing issues before it. On race, sex, religion, and the power of the federal government, the subjects that produced the enduring controversies, control of the Court generally belonged to the moderate swing justices, first Lewis F. Powell and then Sandra Day O'Connor, who steered the Court in line with their own cautious instincts—which were remarkably similar to those of the American people. The result was a paradox. Like all their predecessors, the justices belonged to a fundamentally antidemocratic institution. They were not elected; they were not accountable to the public in any meaningful way; their life tenure gave them no reason to cater to the will of the people. Yet the touchstones of the years 1992 to 2005 on the Supreme Court were decisions that reflected public opinion with great precision. The opinions were issued in the Court's customary language of legal certainty—announced as if the constitutional text and precedents alone mandated their conclusions—but the decisions in these cases probably would have been the same if they had simply been put up for a popular vote.

That, now, may be about to change. Through the tense standoff of the Burger and Rehnquist years, a powerful conservative rebellion against the Court was building. It has been, in many respects, a remarkable ideological offensive, nurtured at various times in such

locales as elite law schools, evangelical churches, and, most importantly and most recently, the White House. Its agenda has remained largely the same over the decades. Reverse *Roe v. Wade* and allow states to ban abortion. Expand executive power. End racial preferences intended to assist African Americans. Speed executions. Welcome religion into the public sphere. Because the Court has been so closely divided for so long, conservatives have made only halting progress on implementing this agenda. Now, with great suddenness (as speed is judged by the Court's usual stately pace), they are very close to total control. Within one vote, to be precise.

The Court by design keeps its operations largely secret from the outside world, but there are occasions when its rituals offer a window into its soul. One such day was September 6, 2005, when the justices gathered to say good-bye to William Rehnquist, who had died three days earlier.

Rehnquist had had 105 law clerks in his thirty-three years on the Court, and they all knew him as a stickler for form, efficiency, and promptness. So well before the appointed hour, the group gathered in one of the Court's elegant conference rooms. Seven former clerks and a former administrative assistant had been chosen to carry Rehnquist's casket into the building, and they wanted to make sure they did it right. The eight of them gathered around the representatives from the funeral home and asked questions with the kind of intensity and precision that the chief used to demand of lawyers arguing in front of him. Who would stand where? Should they pause between steps or not? Two feet on each step or just one? Only one of them had been a pallbearer before, and he had words of warning for his colleagues. "Be careful," said John G. Roberts Jr., who had clerked for then associate justice Rehnquist from 1980 to 1981. "It's harder than you think."

At precisely ten the pallbearers and the hearse met on First Street, in front of Cass Gilbert's processional steps. The casket was like Rehnquist himself—plain and unadorned. The seven men and one woman grabbed the handles on the pine casket and turned to bring the chief inside the building for a final time. The soft sun of a perfect late-summer morning lit the steps, but the glare off the marble was harsh, nearly oppressive.

As the pallbearers shuffled toward the Court, an honor guard of the

other law clerks stood in silence to the left. On the right were the justices themselves. It had been eleven years since there was a new justice, the longest period that the same nine individuals had served together in the history of the Supreme Court. (It had been five decades, since the death of Robert H. Jackson, in 1954, that a sitting justice had died.) The justices lined up according to the Court's iron law of seniority, with the junior member toward the bottom of the stairs and the senior survivor at the top.

The casket first passed Stephen G. Breyer, appointed in 1994 by President Bill Clinton. Such ceremonial duty ill suited Breyer, who still had the gregarious good nature of a Capitol Hill insider rather than the grim circumspection of a stereotypical judge. He had just turned sixty-seven but looked a decade younger, with his bald head nicely tanned from long bike rides and bird-watching expeditions. Few justices had ever taken to the job with more enthusiasm or enjoyed it more.

Breyer's twitchy exuberance posed a contrast to the demeanor of his fellow Clinton nominee, from 1993, Ruth Bader Ginsburg, standing three steps above him. At seventy-two, she was tiny and frail—she clasped Breyer's arm on the way down. Elegantly and expensively turned out as usual, on this day in widow's weeds, she was genuinely bereft to see Rehnquist go. Their backgrounds and politics could scarcely have differed more—the Lutheran conservative from the Milwaukee suburbs and the Jewish liberal from Brooklyn—but they shared a love of legal procedure. Always a shy outsider, Ginsburg knew that the chief's death would send her even farther from the Court's mainstream.

The casket next passed what was once the most recognizable face among the justices—that of Clarence Thomas. His unforgettable confirmation hearings in 1991 had seared his visage into the national consciousness, but the justice on the steps scarcely resembled the strapping young person who had transfixed the nation. Although only fifty-seven, Thomas had turned into an old man. His hair, jet black and full during the hearings, was now white and wispy. Injuries had taken him off the basketball court for good, and a sedentary life had added as much as a hundred pounds to his frame. The shutter of a photographer or the gaze of a video camera drew a scornful glare. Thomas openly, even fervently, despised the press.

David H. Souter should have been next on the stairs. When Rehnquist died, Souter had been at his home in Weare, New Hampshire, but he

hadn't received word until it was too late to get to the morning's procession. It was hard to reach him when he was in New Hampshire, because Souter had a telephone and a fountain pen but no answering machine, fax, cell phone, or e-mail. (He was once given a television but never plugged it in.) He was sixty-five years old, but he belonged to a different age altogether, more like the eighteenth century. Souter detested Washington, enjoyed the job less than any of his colleagues, and cared little what others thought of him. He would be back for the funeral the following day.

Anthony M. Kennedy was absent as well, and for equally revealing reasons. He had been in China when Rehnquist died, and he, too, couldn't make it back until the funeral on Wednesday. Nominated by Ronald Reagan in 1987, Kennedy had initially seemed the most conventional, even boring, of men, the Sacramento burgher who still lived in the house where he grew up. But it turned out the prototypical country club Republican possessed a powerful wanderlust, a passion for international travel and law that ultimately wound up transforming his tenure as a justice.

Three steps higher was Antonin Scalia, his famously pugnacious mien softened by grief. He had taken the position on the Court that Rehnquist left in 1986, when Reagan made him chief, and the two men had been judicial soul mates for a generation. An opera lover, Scalia was not afraid of powerful emotions, and he wept openly at the loss of his friend. Scalia had always been the rhetorical force of their counterrevolutionary guard, but Rehnquist had been the leader. At sixty-nine, Scalia too looked lost and lonely.

Sandra Day O'Connor wept as well. O'Connor and Rehnquist had enjoyed one of the more extraordinary friendships in the history of the Court, a relationship that traversed more than fifty years, since she watched the handsome young law student heft trays in the cafeteria at Stanford Law School. (She would later join his class there and graduate in just two years, finishing just behind him, the valedictorian.) They both settled in Phoenix and shared backyard barbecues, even family vacations, until Rehnquist moved to Washington in 1969, joining the Court in 1972.

Nine years later, Ronald Reagan made O'Connor the first woman justice. Her long history with Rehnquist might have suggested that she would turn into his loyal deputy, but that never happened. Indeed, more than anyone else on the Court, it was O'Connor who frustrated Rehnquist's hopes of an ideological transformation in the law and who came, even more than the chief, to dominate the Court.

And though her grief for Rehnquist was real, she may have been weeping for herself, too. She was seventy-five and her blond bob had turned white, but she loved being on the Supreme Court even more than Breyer did, and she was leaving as well. She had announced her resignation two months earlier, to care for her husband, who was slipping further into the grip of Alzheimer's disease. Losses enveloped O'Connor—a dear old friend, her treasured seat on the Court, and, worst of all, her beloved husband's health.

And there was something else that drew O'Connor's wrath, if not her tears: the presidency of George W. Bush, whom she found arrogant, lawless, incompetent, and extreme. O'Connor herself had been a Republican politician—the only former elected official on the Court—and she had watched in horror as Bush led her party, and the nation, in directions that she abhorred. Five years earlier, she had cast the decisive vote to put Bush into the White House, and now, to her dismay, she was handing over her precious seat on the Court for him to fill.

Finally, at the top of the stairs, was John Paul Stevens, then as ever slightly removed from his colleagues. Gerald R. Ford's only appointee to the Court looked much as he did when he was named in 1975, with his thick glasses, white hair, and ever-present bow tie. Now eighty-five, he had charted an independent course from the beginning, moving left as the Court moved right but mostly moving according to his own distinctive view of the Constitution. Respected by his colleagues, if not really known to them, Stevens always stood apart.

The strain from the march up the forty-four steps showed on all the pallbearers except one. The day before carrying Rehnquist into the Supreme Court for a final time, John Roberts had been nominated by President Bush to succeed Rehnquist as chief justice. He was only fifty years old, with an unlined face and unworried countenance. Even with his new burdens, Roberts looked more secure with each step, especially compared with his future colleagues.

The ceremony on the steps represented a transition from an old Court to a new one.

Any change would have been momentous after such a long period of stability in membership, but Rehnquist's and O'Connor's nearly si-

multaneous departures suggested a particularly dramatic one—generational, ideological, and personal. Conservative frustration with the Court had been mounting for years, even though the Court had long been solidly, even overwhelmingly, Republican. Since 1991, it had consisted of either seven or eight nominees of Republican presidents and just one or two Democratic nominees. But as the core of the Republican Party moved to the right, the Court, in time, went the other way. Conservatives could elect presidents, but they could not change the Court.

Three justices in particular doomed the counterrevolution. Souter, drawing inspiration from icons of judicial moderation like John Marshall Harlan II and Learned Hand, almost immediately turned into a lost cause for the conservatives. Like travelers throughout history, Kennedy was himself transformed by his journeys; his internationalism translated into a more liberal approach to legal issues. Above all, though, it was O'Connor who shaped the Court's jurisprudence and, with it, the nation.

Few associate justices in history dominated a time so thoroughly or cast as many deciding votes as O'Connor—on important issues ranging from abortion to affirmative action, from executive war powers to the election of a president. Some might believe Cass Gilbert's marble steps really did protect the justices from the gritty world of the Capitol. But the Rehnquist Court—the Court of *Bush v. Gore*—dwelled in the center of American political life.

In these years, the Court preserved the right to abortion but allowed restrictions on the practice; the justices permitted the use of affirmative action in higher education, but only in limited circumstances; they sanctioned the continued application of the death penalty but also applied new restrictions on executions. Through one series of cases, the justices allowed for greater expression of public piety in American life, but in a handful of others, they gave a cautious embrace to the cause of gay rights.

These decisions—the legacy of the Rehnquist Court—came about largely because for O'Connor there was little difference between a judicial and a political philosophy. She had an uncanny ear for American public opinion, and she kept her rulings closely tethered to what most people wanted or at least would accept. No one ever pursued centrism and moderation, those passionless creeds, with greater passion than O'Connor. No justice ever succeeded more in putting her stamp on

the law of a generation. But the unchanging facade of Cass Gilbert's palace offers only the illusion of permanence. O'Connor's legacy is vast but tenuous, due mostly to her role in 5–4 decisions, which are the most vulnerable to revision or even reversal with each new case.

That process—the counterrevolution that had been stymied for twenty years—has now begun.

# 1

# THE FEDERALIST WAR OF IDEAS

For a long time, during the middle of the twentieth century, it wasn't even clear what it meant to be a judicial conservative. Then, with great suddenness, during the presidency of Ronald Reagan, judges and lawyers on the right found a voice and an agenda. Their goals reflected and reinforced the political goals of the conservative wing of the Republican Party.

Earl Warren, who served as chief justice of the United States from 1953 to 1969, exerted a powerful and lasting influence over American law. The former California governor, who was appointed by Dwight D. Eisenhower, put the fight against state-sponsored racism at the heart of his agenda. Starting in 1954, with *Brown v. Board of Education*, which outlawed segregation in public education, the justices began more than a dozen years of sustained, and usually unanimous, pressure against the forces of official segregation. Within the legal profession in particular, Warren's record on civil rights gave him tremendous moral authority. Warren and his colleagues, especially William J. Brennan Jr., his close friend and strategist, used that capital to push the law in more liberal directions in countless other areas as well. On freedom of speech, on the rights of criminal suspects, on the emerging field of privacy, the Warren Court transformed American law.

To be sure, Warren faced opposition, but many of his Court's decisions quickly worked their way into the permanent substructure of American law. *New York Times Co. v. Sullivan*, which protected newspapers that published controversial speech; *Miranda v. Arizona*, which established new rules for interrogating criminal suspects; even *Griswold v. Connecticut*, which announced a right of married people to

buy birth control, under the broader heading of privacy—all these cases, along with the Warren Court's many pronouncements on race, became unassailable precedents.

Richard M. Nixon won the presidency in part by promising to rein in the liberalism of the Court, but even though he had the good fortune to name four justices in three years, the law itself wound up little changed. Under Warren E. Burger, whom Nixon named to succeed Warren, the Court in some respects became more liberal than ever. It was under Burger that the court approved the use of school busing, expanded free speech well beyond *Sullivan*, forced Nixon himself to turn over the Watergate tapes, and even, for a time, ended all executions in the United States. *Roe v. Wade*, the abortion rights decision that still defines judicial liberalism, passed by a 7–2 vote in 1973, with three of the four Nixon nominees (Burger, Lewis F. Powell, and Harry A. Blackmun) in the majority. Only Rehnquist, joined by Byron R. White, appointed by John F. Kennedy, dissented.

Through all these years—from the 1950s through the 1970s—the conservatives on the Court like White and Potter Stewart did not differ greatly from their liberal colleagues. The conservatives were less willing to second-guess the work of police officers and to reverse criminal convictions; they were more willing to limit remedies for past racial discrimination; they deferred somewhat more to elected officials about how to organize and run the government. But on the big legal questions, the war was over, and the liberals had won. And their victories went beyond the judgments of the Supreme Court. The Warren Court transformed virtually the entire legal culture, especially law schools.

It was not surprising, then, that on the day after Ronald Reagan defeated Jimmy Carter in 1980, Yale Law School went into mourning. On that day, Steven Calabresi's torts professor canceled class to talk about what was happening in the country. The mood in the room was one of bewilderment and hurt. At the end, the teacher asked for a show of hands among the ninety first-year students before him. How many had voted for Carter and how many for Reagan? Only Calabresi and one other student had supported the Republican.

The informal poll revealed a larger truth about law schools at the time. Most professors at these institutions were liberal, a fact that re-

flected changes that had taken place in the profession as a whole. The left-leaning decisions of the Warren and Burger Courts had become a reigning orthodoxy, and support among faculty for such causes as affirmative action and abortion rights was overwhelming.

But even law schools were not totally immune from the trends that were pushing the nation's politics to the right, and a small group of students like Calabresi decided to turn these inchoate tendencies into something more enduring. Along with Lee Liberman and David McIntosh, two friends from Yale College who had gone on to law school at the University of Chicago, Calabresi decided to start an organization that would serve as a platform to discuss and advocate conservative ideas in legal thought. They considered several names that would showcase their erudition—"The Ludwig von Mises Society," and "The Alexander Bickel Society"—but they settled on a more elegant choice. They called themselves the Federalist Society, after the early American patriots who fought for the ratification of the Constitution in 1787. Calabresi's guide on the Yale Law School faculty was Professor Robert Bork. Liberman and McIntosh started a Federalist branch at Chicago and recruited as their first faculty adviser a professor named Antonin Scalia.

The idea for a conservative legal organization was perfectly timed, and not just because of the Republican ascendancy in electoral politics. In this period, liberalism may have been supreme at law schools, but it was hardly an intellectually dynamic force. In the 1960s, liberal scholars at Yale and elsewhere were writing the law review articles that gave intellectual heft to the decisions of the Warren Court, but by the eighties, the failures of the Carter administration turned many traditional Democrats away from the practical realities of law to a more exotic passion—advocating (or decrying) a movement known as Critical Legal Studies. Drawing heavily on the work of thinkers like the Italian Marxist Antonio Gramsci and the French poststructuralist Jacques Derrida, CLS devotees attacked the idea that law could be a system of neutral principles, or even one that could create a fairer and more just society. Rather, they viewed law mainly as a tool of oppression that the powerful used against the weak. Whatever its ultimate merits, CLS was singularly inconsequential outside the confines of law schools, its nihilism and extremism rendering it largely irrelevant to the work of judges and lawmakers. At law schools, then, the field was largely open for a vigorous conservative insurgency.

So the Federalist Society both reflected and propelled the growth of

the conservative movement. It held its first national conference in 1982, and by the following year there were chapters in more than a dozen law schools. Recognizing the intellectual potential of the society, conservative organizations like the John M. Olin and Scaife foundations made important early grants that allowed the Federalists to establish a full-time office in Washington. The Reagan administration began hiring Federalist members as staffers and, of course, appointing them as judicial nominees, with Bork and Scalia as the most famous examples. (Bork and Scalia both went on the D.C. Circuit in 1982. Calabresi himself went on to be a professor of law at Northwestern.)

The young Federalists who started organizing in the early eighties did not merely strive to recapitulate the tactics of their conservative elders. The prior generation, those who waged their decorous battle against the extremes of the Warren Court, preferred "judicial restraint" to "judicial activism." For conservatives like Justices Stewart or John Marshall Harlan II, who were two frequent dissenters from Warren Court decisions, the core idea was that judges should defer to the democratic branches of government and thus resist the temptation to overturn statutes or veto the actions of government officials. But the new generation of conservatives had more audacious goals. Indeed, they did not believe in judicial restraint, and they represented a new kind of judicial activism themselves. They believed that constitutional law had taken some profoundly wrong turns, and they were not shy about demanding that the courts take the lead in restoring the rightful order.

With the election of Ronald Reagan, conservative ideas suddenly had important new sponsors in Washington. Reagan was elected on promises of shrinking the federal government, which he proposed to do by cutting the budgets for social programs. Many in the Federalist Society sought a legal route to the same goal. Back in 1905, the Supreme Court had said in *Lochner v. New York* that a law that set a maximum number of hours for bakers was unconstitutional because it violated the bakers' freedom of contract under the Fourteenth Amendment's protection of "liberty" and "property." By the 1940s, the Roosevelt appointees to the Supreme Court had repudiated the "*Lochner* era," and for decades no one had seriously suggested that there might be constitutional limits on the scope of the federal gov-

ernment's power. Then, suddenly, in the Reagan years, some conservatives started questioning that wisdom and asserting that much of what the federal government did was unconstitutional. (The second event ever sponsored by the Federalist Society was a speech at Yale in 1982 by Professor Richard Epstein of the University of Chicago Law School in favor of *Lochner v. New York*.) While Reagan was arguing that Congress *should not* pass regulations, the Federalists were saying that, under the Constitution, Congress *could not*.

Edwin Meese III, Reagan's attorney general in his second term, provided a framework for the emerging conservative critique of the Warren and Burger era when he called for a "jurisprudence of original intention." The words of the Constitution, he said, meant only what the authors of the document thought they meant. Or, as the leading "originalist," Robert Bork, put it, "The framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed." According to Bork, the meaning of the words did not evolve over time. This was an unprecedented view of the Constitution in modern times. Even before the Warren Court, most justices thought that the words of the Constitution were to be interpreted in light of a variety of factors, beyond just the intentions of the framers. As the originalists' greatest adversary, William Brennan, observed in 1985, "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

In large measure, the debate over original intent amounted to a proxy for the legal struggle over legalized abortion. No one argued that the authors of the Constitution intended for their words to prohibit states from regulating a woman's reproductive choices; to Bork and Scalia, that ended the debate over whether the Supreme Court should protect a woman's right to choose. If the framers did not believe that the Constitution protected a woman's right to an abortion, then the Supreme Court should never recognize any such right either. In the *Roe* decision itself, Harry Blackmun had acknowledged that the words of the Constitution did not compel his decision. "The Constitution does not explicitly mention any right of privacy," Blackmun had written, but the Court had over time "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." The interpretive leap of *Roe* was Blackmun's conclusion for the Court that "this right of pri-

vacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." And it was this conclusion above all that the new generation of conservatives in Washington during the Reagan years began trying to persuade the Court to reverse.

One of those young lawyers was Samuel A. Alito Jr., who was just six years out of law school when he joined the staff of the Justice Department shortly after Reagan was inaugurated in 1981. Four years later, he was presented with a classic dilemma for a committed legal conservative: how best to persuade the Court to overturn *Roe v. Wade*—all at once or a little bit at a time?

In 1982, Pennsylvania had tightened its restrictions on abortion, including requiring that women be prevented from undergoing the procedure without first hearing a detailed series of announcements about its risks. The Court of Appeals for the Third Circuit had declared most of the new rules unconstitutional—as violations of the right to privacy and the rule of *Roe v. Wade*. Alito had joined the staff of the solicitor general, the president's chief advocate before the Supreme Court, and he was assigned the job of suggesting how best to attack the Third Circuit's decision and persuade the Supreme Court to preserve the Pennsylvania law. Around that time, over the Reagan administration's objection, a majority of the justices had reaffirmed their support of *Roe*. The question for Alito was what to do in light of the justices' intransigence. In a memo to his boss on May 30, 1985, Alito wrote, "No one seriously believes that the Court is about to overrule *Roe*. But the Court's decision to review [the Pennsylvania case] may be a positive sign." He continued, "By taking these cases, the Court may be signaling an inclination to cut back. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?" Alito wound up recommending an aggressive line of attack against *Roe*. "We should make clear that we disagree with *Roe v. Wade* and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled," he wrote; at the same time, the Justice Department should defend the Pennsylvania law as consistent with *Roe* and the Court's other abortion decisions.

The solicitor general filed a brief much in line with what Alito rec-

ommended, but the case, *Thornburgh v. American College of Obstetricians and Gynecologists*, turned out to be a clear defeat for the Reagan administration. In a stinging, almost contemptuous opinion, written by Blackmun, the Court rejected the Pennsylvania law, declaring, "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." In a plain message to the conservative activists now in charge at the Justice Department, he wrote, "The constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." Raising the rhetorical stakes, Blackmun went on to quote Earl Warren's words for the Court in *Brown v. Board of Education*: "It should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." To Blackmun, the war on *Roe* was morally little different from the "massive resistance" that met the Court's desegregation decisions a generation earlier.

But while *Roe* commanded a majority of seven justices in 1973, the decision in *Thornburgh* was supported by only a bare majority of five in 1986. So within the Reagan administration, the lesson of the case was obvious—and one that conservatives took to heart. They didn't need better arguments; they just needed new justices.

Reagan himself had little interest in the legal theories spun by his Justice Department. He had long been on record as opposed to legalized abortion, but the president was manifestly uncomfortable with the subject as well as with the most zealous advocates in the prolife cause. So when, early in his first term, he received the unexpected resignation of Potter Stewart, the president's first reaction was less ideological than political. He wanted above all to fulfill his campaign promise to appoint the first woman to the Court, with her precise stands on the issues a distinctly secondary concern. After searching the small pool of Republican women judges, Reagan selected the thoroughly obscure Sandra Day O'Connor in 1981. O'Connor's ambiguous record on abortion meant that the evangelical wing of the Republican Party regarded her with hostility; Jerry Falwell, then the leader of the Moral Majority and a key figure in Reagan's election, said "good Christians" should be concerned about O'Connor. But at

this point, Falwell and his colleagues did not yet control the Republican Party, much less the presidency, so Reagan ignored their complaints. And true to form, O'Connor in her first abortion cases, like *Thornburgh*, tread cautiously, voting to uphold restrictions but never committing to an outright reversal of *Roe*.

Reagan's reelection emboldened the hard-core conservatives in his administration, especially when it came to selecting judges. This was largely because William French Smith, the bland corporate lawyer who was attorney general in Reagan's first term, was replaced by Meese, who put transformation of the Supreme Court at the top of his agenda. Soon, Meese had his chance. In 1986, just days after the decision in *Thornburgh*, Burger resigned as chief justice. Reagan's first move was an obvious one. During his fourteen years on the Court, William Rehnquist had grown from being an often solitary voice of dissent to the leader of the Court's ascendant conservative wing. Just sixty-one years old, and popular with his colleagues, he was the clear choice to replace Burger as chief. But who, then, to put in Rehnquist's seat?

Meese considered only two possibilities—Scalia or Bork, both waiting impatiently for the call in their nearby chambers at the D.C. Circuit. Both were real conservatives, not "squishes," as young Federalist Society lawyers referred to Harlan, Stewart, and the other moderate conservatives. Bork had virtually invented originalism as an intellectual force, and he had been a vocal spokesman against almost every Supreme Court landmark of the past two decades—especially, of course, *Roe v. Wade*. Nine years younger, Scalia had a nearly identical ideological profile, if not quite as distinguished an intellectual pedigree. For his part, Reagan was taken by Scalia's gruff charm and liked the fact that Scalia would be the first Italian American on the Court. The Democrats, who were a minority in the Senate, decided to concentrate on stopping Rehnquist from becoming chief justice and so gave Scalia a pass. He was confirmed unanimously, while Rehnquist won anyway by a 65–33 vote. At the same time, Bork was all but promised the next seat to come open.

Less than a year later, on June 26, 1987, Lewis Powell resigned, and Reagan promptly named Bork as his replacement. A great deal had changed, however, including the Senate itself, which was now led by a Democratic majority. Reagan's popularity had slipped, thanks largely to the Iran-Contra affair, which had become public at the end of 1986. There was no Rehnquist nomination to distract from a fight

over a new justice. And the seat at stake was not that of Burger, who had become a reliable conservative vote, but that of Powell, who was the swing justice of his day and the fifth vote for the majority in *Thornburgh* and other abortion rights cases. Bork himself was an ornery intellectual, with a scraggly beard and without any natural ethnic or religious political base. For Democrats, in short, he was an inviting target.

More than anything, the fight over Bork's nomination illustrated that Meese and his allies had done a better job of persuading themselves of the new conservative agenda than they had of convincing the country at large. In truth, many of the Warren Court precedents—the ones Bork had attacked for so long—remained popular with the public and, consequently, in the Senate. By 1987, the *Miranda* warnings were deeply ingrained in the culture, not least because of their endless repetition on television police dramas; the word *privacy* may not have appeared in the Constitution but Bork's criticism of that right—and his defense of Connecticut's right to ban the sale of birth control—sounded extreme to modern ears.

Most of all, though, racial equality (if not affirmative action) had become a bedrock American principle, and Bork had simply backed the wrong side during the civil rights era. In 1963, he had written a notorious article for the *New Republic* in which he had assailed the pending Civil Rights Act. Forcing white barbers to accept black customers, Bork wrote, reflected "a principle of unsurpassed ugliness." More than his views about privacy and abortion, it was Bork's history on race that doomed his nomination. The key block of voters in the Senate were moderate Democrats from the South like Howell Heflin of Alabama, who were actually sympathetic to Bork's cultural conservatism. But these senators were all elected with overwhelming black support—and they would not abide views that, fairly or not, sounded racist. Bork ultimately lost by a vote of 58–42.

Enraged by the attacks on Bork, Reagan had said he would nominate a replacement for Bork that the senators would "object to as much as the last one." So Meese and his allies tried to foist a potentially even more conservative, and a much younger, nominee on the Senate, Douglas H. Ginsburg, a recent Reagan appointee to the D.C. Circuit. But Ginsburg's nomination collapsed over a few tragicomic days, following revelations that the law-and-order judge had smoked marijuana as a professor at Harvard Law School.

Howard Baker now stepped into the process. A former senator who

had been brought in as chief of staff to steady the White House after the Iran-Contra revelations, Baker had little interest in the ideological groundbreaking that Meese was leading at the Justice Department. Baker was an old-fashioned conservative who wanted a justice in his own mold, a believer in judicial restraint. With the White House reeling from multiple fiascos, Baker just wanted to pick someone who would be confirmed—a conservative, to be sure, but not necessarily someone who would please Meese and the other true believers. The call went out to Anthony M. Kennedy, a thoughtful and earnest judge on the Ninth Circuit from Sacramento. He was confirmed quickly and without incident.

George H. W. Bush served as a transitional figure between the old Republican Party and the new. He was born to the country club GOP of his father, the cautious and corporate senator from Connecticut, but the forty-first president was elected in 1988 courtesy of the evangelical and other hard-core conservatives who were increasingly dominating the party. In the Reagan years, figures like Jerry Falwell, Pat Robertson, and, later, James C. Dobson were content to be heard by the White House; but in the first Bush presidency, they wanted more. And the issues that meant the most to them—abortion, above all—were decided by the Supreme Court. They wanted their own justices.

On the Court, and in much else, Bush tried to finesse the demands of the far right. To win their support in the first place, Bush had sworn fealty to the new conservative orthodoxies, including opposition to *Roe v. Wade*, but it was clear that his heart was never in the cause. For this reason, then, Brennan's resignation in July 1990 was for Bush more an annoyance than an opportunity. He was preoccupied with the sudden fall of Communism and had no stomach for a fight in the Democratic Senate over a Supreme Court nominee—especially about issues that meant little to him personally. A Yankee aristocrat, Bush surrounded himself with men in the same mold, like his White House counsel, C. Boyden Gray, and attorney general, Richard Thornburgh (who as governor of Pennsylvania was the defendant in the 1986 abortion case).

As his first choice for the Supreme Court, Bush chose yet another man with a background and temperament similar to his own—David H. Souter. The appointee had spent virtually his entire career in New

Hampshire state government, where he had a nearly invisible public profile. (Thurgood Marshall, in his final cranky years on the Court, still spoke for many when he greeted the news with "Never heard of him.") John Sununu, the White House chief of staff, promised conservatives that the appointment would be "a home run" for them, but Souter's moderate testimony at his confirmation hearing suggested otherwise. Democrats, grateful that Bush had avoided a confrontational choice, raised few objections, and Souter was confirmed by a vote of 90–9.

Even before Souter's record refuted Sununu's prediction (as it surely did), conservatives registered their outrage at his appointment—and their demands for Bush's next choice. Sununu promised that the president would fill the next vacancy with a nominee so conservative that there would be "a knock-down, drag-out, bloody-knuckles, grassroots fight." Thus, a year later, Clarence Thomas.

Marshall resigned on June 27, 1991, almost a year to the day after Brennan, and this time conservatives insisted that Bush appoint one of their own. By this point, with Brennan also gone, Marshall was the last full-throated liberal on the Court. His seat was especially precious to his political opponents, since only two members of the *Thornburgh* majority from 1986—Blackmun and Stevens—remained; the replacements for the other three would all be selected by presidents who publicly opposed *Roe v. Wade*. The decision appeared as good as overruled.

Thomas's confirmation hearings, of course, turned into a malign carnival of accusation and counterclaim between the nominee and his one-time aide Anita Hill. But that sideshow obscured the larger significance of Thomas's appointment. Even though the nominee was unusually reticent in answering the senators' questions, it was easy to infer that the forty-three-year-old judge believed in what might be called the full Federalist Society agenda: that the justices should interpret the Constitution according to the original intent of the framers, that Congress had repeatedly passed laws that infringed on executive power and violated the Constitution, and that the crown jewels of liberal jurisprudence—from *Miranda* to *Roe*—should be overruled.

The scope and speed of the conservative success was remarkable. In just about a decade, conservatives had taken ideas from the fringes of intellectual respectability to an apparent majority on the Supreme Court. Thomas's confirmation, on October 15, 1991, by a vote of

52–48, meant that Republican presidents had appointed eight of the nine justices—and Byron White, the lone Democrat, was more conservative, and a stronger opponent of *Roe*, than most of his colleagues. With Rehnquist, O'Connor, Scalia, Kennedy, Souter, and Thomas completing the roster, how could the conservative cause lose?