



# TO THE BAG

## SUPER MAJORITIES

To the *Bag*:

In Erwin Chemerinsky’s summary of the Supreme Court’s October 2015 term, *Everything Changed*, 19 Green Bag 2d 343 (2016), he states: “From 1971 . . . until February 13[, 2016], there were at least five justices and at times as many as seven justices who had been appointed by a Republican President.”

In fact, for three terms (October Term 1991 through October Term 1993) there were eight justices who had been appointed by Republican presidents. During the October 1991 and October 1992 terms, occurring after the retirement of the last Lyndon Johnson appointee, Thurgood Marshall, Byron White (appointed by President John F. Kennedy) was the only justice who had been appointed by a Democrat. The other eight (William Rehnquist, Harry Blackmun, John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas) were all appointed by Republicans. When White retired in 1993, he was replaced by Clinton appointee Ruth Bader Ginsburg. It was not until the Nixon-appointed Blackmun was replaced by the Clinton-appointed Stephen Breyer that the Court returned to having only seven Republican-appointed justices.

By this time, Blackmun and Stevens had firmly joined the liberal camp, with O’Connor and Kennedy, once considered solidly conservative, and the newly-appointed Souter emerging as key swing votes.

Ironically, the period in the Court’s history when it had eight Republican-

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appointed justices was one its most contentious. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where a plurality of the Court reaffirmed the “central holding” of *Roe v. Wade*, 410 U.S. 113 (1973), was a bitter disappointment to conservatives and produced a biting dissent from Scalia. Blackmun’s decision to begin dissenting from every death penalty case (“From this day forward, I no longer shall tinker with the machinery of death.”) drew a stinging rebuke from Scalia (*Callins v. Collins*, 510 U.S. 1141 (1994)). These terms also produced notable conservative disappointments (and angry Scalia dissents) in *Lee v. Weisman*, 505 U.S. 577 (1992), and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), both giving a broad reading to the First Amendment’s Establishment Clause.

In this regard, the Supreme Court between 1991 and 1994 provides an interesting parallel to the Stone and Vinson courts. After Harlan Fiske Stone’s ascension as Chief Justice in 1940, the Supreme Court included eight Democrat-appointed justices (counting Stone, who was appointed Associate Justice by Republican President Calvin Coolidge but appointed Chief Justice by Democratic President Franklin Roosevelt). And between Justice Owen Roberts’s resignation on July 31, 1945 and Chief Justice Fred Vinson’s death on September 8, 1953, all nine justices were Democrat appointees. These years too saw some of the most bitter infighting in the Court’s history. See Melvin Urofosky, *Division and Discord: The Supreme Court under Stone and Vinson* (1997).

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