Alarmism Versns Moderation in Responding to the Rehnquist Court†

MARK TUSHNET*

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INTRODUCTION

There is good news and bad news for those interested in responding to the Supreme Court's recent course of action in ways that would bring public policy back to where it sat before the Court's decisions.[1] The good news is that the Court's decisions leave open a significant number of routes to those public policy goals: The Court has said, in

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* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

1. I refer to public policy, not constitutional law, because the only way to return constitutional law back to some earlier point is to overrule the decisions that departed from the prior ones, and I think it unprofitable to examine the prospects for such overrulings.

effect, that Congress cannot get there by this route, but has not said that it cannot get there at all. The bad news is that Congress will probably be unable to explore any of the alternative routes.

There is good news and moderately bad news for those interested in pushing public policy further in the direction the Court has moved. The good news is that, under the right conditions, either Congress or the Court itself might be able to do so. The moderately bad news is that there is no guarantee that those conditions will exist, and some reason to think that they will not.

I ground the foregoing assertions on an analysis of the *political* institutions of our current constitutional order, and on an understanding of the opportunities afforded to, and the limitations placed on, the Supreme Court by any constitutional order, and particularly by the current one.[2] I begin in Part I by offering a description of the Supreme Court's recent decisions as a less substantial repudiation of prior principles than many think them to be, and as leaving Congress with the means to achieve a quite substantial proportion of the policy goals it pursued in the statutes the Court invalidated. Part II explains why Congress is unlikely to do so, in light of our apparent commitment to divided government, and parties that are organized around distinctive ideologies because of divided government. Part III turns to the prospect for continued policy transformation, identifying the conditions under which either the political branches or the Supreme Court could pursue that transformation, and suggesting that those conditions are not highly likely to be realized. Part IV is a brief conclusion, examining the implications of my argument for advocacy and scholarship.

I. THE SUPREME COURT, MODESTLY INTERPRETED

There is by now a large literature, some of it represented by and cited in other articles in this Symposium, taking an alarmist view of the Supreme Court's recent decisions.[3] These decisions, the argument goes, foreshadow a repudiation of the national commitment to national action to advance material well-being that occurred during the New Deal and was extended thereafter, and the national commitment to national action in support of racial and other forms of equality that occurred during the Great Society and was extended thereafter.

I think it is helpful to distinguish two ways of interpreting the Court's decisions. Taking the decisions as settled precedent, we can ask, "How *narrowly* could a Court faithful to the precedents interpret them?" Alternatively, we can ask, "How *broadly* might such a Court interpret them?" I have deliberately used different verb forms in these questions. The alarmist interpretation tends to be predictive, as the word "might"

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2. My analysis draws on arguments developed in more detail in MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (forthcoming 2003). A few paragraphs in what follows are drawn almost directly from that book.

3. Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole: *Why the Court Should Abandon Its Spending Doctrine and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1 (2003); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003); Christopher H. Schroeder, *Environmental Law, Congress, and the Court's New Federalism Doctrine*, 78 IND. L.J. 413 (2003).

suggests,[4] while the interpretation I offer in this Part simply identifies a possibility, without committing the interpreter to the separate judgment that the possibility will probably be realized.

I assume that readers are familiar with the Court's decisions, and therefore, instead of describing the decisions in detail, I simply outline the ways in which the decisions can fairly be given limited readings. I examine the Court's actions in several areas: the scope of national power generally, including the scope of the Commerce Clause and Congress's power under Section 5 of the Fourteenth Amendment; state sovereignty limitations on the exercise of national power when that power otherwise exists, including rules of state immunity from liability and the anticommandeering principle; and individual rights, including property rights and the right of expressive association. In all these areas, the Court's decisions *could* be given expansive interpretations, but need not be.

A. Federalism

The Court's federalism decisions fall into two broad categories: restrictions on the scope of the power granted the national government in specific enumerations of power, and state sovereign immunity limits that operate across all grants of power. In addition, there are the nondecisions, the places where a Court bent on transforming national power would have acted but has not, of which preemption and the spending power are the primary examples.

1. Limits on Enumerated Powers

The modest view of the Court's decisions on the scope of the commerce power is this: Congress may not justify regulating an activity by showing that, taken in the aggregate, the activity has substantial effects on the national economy, unless the activity itself can fairly be characterized as economic in nature.[5] The Court has not limited Congress's power to regulate activities that cross state lines (even if the activities cannot be fairly characterized as economic in nature) by "regulat[ing] the use of the channels of interstate commerce."[6] An enormous swathe of serious national policy falls within these two rules. In particular, the entire regulatory apparatus associated with the New Deal, and most of the regulations associated with the Great Society, deal with activities that are straightforwardly economic in nature. For example, some applications of the Endangered Species Act might be unconstitutional under the Court's decisions, but nearly all of the central forms of environmental regulation are unaffected by those decisions.[7]

The Court has also held that Congress cannot "enforce" constitutional rights that the

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4. For a discussion of the predictive aspect of the alarmist interpretation, see *infra* Part II.

5. United States v. Lopez, 514 U.S. 549, 559-61 (1995).

6. *Id.* at 558.

7. *See* Maya R. Moiseyev, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*: The Clean Water Act Bypasses a Commerce Clause Challenge, But Can the Endangered Species Act?*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 191 (Winter 2001) and Robert H. Bork, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 888-90 (2002).

Court itself would not recognize, although congressional enforcement mechanisms can go somewhat beyond what the Court would do if those mechanisms were congruent with and proportional to the scope of the constitutional violations.[8] This is a more serious limitation on achieving public policy goals than the Commerce Clause rule is.[9] Yet, as the Civil Rights Act of 1964 shows, a great deal of the activity that advocates of constitutional rights care about—discrimination in employment, for example—can fairly be characterized as economic in nature, and therefore within Congress's power to regulate interstate commerce, even if not within Congress's power to enforce the Fourteenth Amendment. One specific area in which national policy is vulnerable is statutory prohibition of state policies that have an unintended but disparate adverse impact on protected classes, including racial minorities, women, and the disabled, in connection with government activities that cannot be fairly characterized as economic in nature, such as the operation of polling places and courthouses. Beyond that, however, it remains possible for those who hold expansive visions of what the Constitution truly requires can accomplish much of what they seek, albeit by invoking Congress's power to regulate interstate commerce or some other congressional power instead of Congress's power to enforce the Fourteenth Amendment.

2. State Sovereignty Limitations

The modest view of the Court's state sovereign immunity decisions is this: The decisions limit the *remedies* available when a state government violates national policy, but they do not relieve state governments of their substantive obligations under national statutes, which can be enforced by other means.[10] Private individuals may not be able to sue the state government itself for damages or injunctions requiring the government to comply with national law, but the national government can.[11] Even more important, private individuals can sue the individuals charged with implementing state law in a manner said to be inconsistent with national law, seeking an injunction directing them to comply with national law.[12] The ability to enforce the law prospectively is as strong as it has ever been.[13] Limited resources for enforcement by the national government mean that the Court's decisions undoubtedly do reduce the effectiveness of formal enforcement mechanisms, by allowing state governments to forego complying with national law until they are directed to do so. Yet in many instances, state governments face substantial *political* pressure to comply with national law: With respect to employment, for example, state employees often have unions with

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8. United States v. Morrison, 529 U.S. 598, 614 (2000); and Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-81 (2000).

9. It also carries with it a certain amount of ideological freight, affirming a strong version of judicial supremacy and making it more difficult for advocates of expansive notions of civil rights to obtain national policy predicated on their articulation of civil rights, even if they can obtain the substance of their desired policies by using some other enumerated power.

10. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring).

11. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.14 (1996).

12. *Id.*

13. *Cf.* Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 122 S.Ct. 1753, 1760-61 (2002) (applying without questioning *Ex parte* Young, 209 U.S. 123 (1908)).

substantial political power, and in other contexts such as nondiscrimination in providing access to public facilities, locally organized interest groups can place pressure on state governments to comply with the national laws that the national counterparts of the local groups have helped enact.

To assess the overall impact of the modern Court's decisions, consider a state government that simply does not want to pay federally prescribed wages, or that does not want to accommodate its disabled employees. It can pretty much guarantee itself a free ride for a while, although it may face adverse political consequences from mobilized unions or interest groups. The United States might sue on the employees' behalf and recover the lost wages, but the national government devotes relatively few resources to this type of enforcement action. Eventually, though, the state is going to have to comply with national law, because eventually an employee is going to get an injunction against the state's unlawful conduct.[14] The Court's sovereign immunity decisions undoubtedly reduce the incentives states have to comply with national law, and the decisions eliminate some remedies that Congress thought important in securing state compliance. Even so, the reduction in incentives does not ultimately undermine the national government's ability to enforce its law, even in the federal courts, against recalcitrant states.

The second state sovereignty limitation the Court has imposed is the anticommandeering principle. That principle applies to a practice that, as the Court accurately said, was quite recent and limited in scope. The principle's contours are unclear precisely because there are so few cases invoking it. There are indications that the principle does not apply when the state is regulated along with private actors.[15] If so, it would be limited to regulations that affect the states solely in their sovereign capacities. And, although the Court clearly does not accept the view that the political process is sufficient in itself to protect states from such regulations, nonetheless it remains true that the political process places substantial limits on the ability of Congress to commandeer state authorities in the sense the Court has given the anticommandeering principle.

3. The Court's Failures to Act: Preemption and the Spending Power

As I have argued elsewhere, the anticommandeering principle could be invoked to place substantial limits on Congress's power to preempt state law.[16] At least, one might think that the federalism concerns animating the Court's decisions on the scope of national power and on state sovereignty might induce the Court to find preemption only rarely. Yet, this seems not to be the case. Nearly every preemption case the Court

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14. The Court might hold that the remedies provided by the general wage-and-hour law were intended to preclude reliance on *Ex parte Young* suits to enforce that law. *Cf.* Luder v. Endicott, 253 F.3d 1020 (7th Cir. 2001) (asserting, in a suit "under the Fair Labor Standards Act," that employees did not fit within the *Ex parte Young* doctrine). Such a holding would not bar Congress from making it clear that the *Ex parte Young* technique was in fact available for enforcement of the wage-and-hour laws.

15. Reno v. Condon, 528 U.S. 141, 151 (2000) (noting that the challenged statute was "generally applicable").

16. Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841 (2001).

has decided recently nods in the direction of an asserted presumption against preemption, but finds preemption anyway.[17] The cynic would observe that the cases typically involve efforts by litigants to invoke state law to impose greater obligations on corporations than federal law imposes, and that the Court's decisions show that when push comes to shove, the Court prefers corporations to states. A Court seriously committed to a revolution in federalism would have done more in the area of preemption than the present Court has.

Perhaps more important, the Court has not yet imposed limits on Congress's power to impose conditions on federal funds.[18] Indeed, in the first anticommandeering case, the Court specifically observed that Congress could induce state compliance with federal regulation by offering the states money on condition that they do what Congress wanted, even to the extent of getting the states to do what Congress tried to commandeer them to do.[19] Using the spending power to induce compliance requires that Congress expend money, of course, but sometimes—perhaps often—Congress would appropriate the money anyway. The Court has not yet begun to examine limits on the conditional spending power, and one can imagine that the Court would find some extreme invocations of that power unconstitutional. But, as with the commerce power, the modest view outlined in this Part would suggest that core applications of the conditional spending power would remain untouched by whatever doctrine the Court does develop.

4. Conclusion

Professor Edward Rubin has termed the modern Court's vision "puppy federalism": "[L]ike puppy love, it looks somewhat authentic but does not reflect the intense desires that give the real thing its inherent meaning."[20] That may be a bit overstated, but Professor Rubin's observation is consistent with, and is supported by, the modest interpretation of the Court's decisions. The Justices in the Court's majority know what an unconstitutional statute is when they see one, but they have not offered a larger theory to explain why one statute is constitutional and another is not. Justice Kennedy came as close as anyone in his opinion concurring in the Court's term limits decision.[21] The Constitution's framers, Justice Kennedy said, "split the atom of sovereignty," assigning some tasks to sovereign states and some to the sovereign nation.[22] But, a metaphor is not a theory.

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17. *See e.g.*, Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141 (2001).

18. *Pierce County v. Guillen*, 123 S.Ct. 720 (2003), avoided deciding whether a federal statute was outside Congress's power under the Spending Clause, by finding the statute constitutional as an exercise of the power to regulate interstate commerce. *Id.* at 732 n. 9.

19. New York v. United States, 505 U.S. 144, 167 (1992) (discussing Congress's conditional spending power).

20. Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS 37, 38 (2001).

21. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (Kennedy, J., concurring).

22. *Id.* at 838.

B. Individual Rights

Professor James Fleming has offered the best summary of the Court's individual rights agenda in his comment on the Court's refusal to find that people suffering intense pain and nearing death did not have a constitutional right to obtain assistance in committing suicide.[23] The Court's precedents provided substantial support for finding that the Constitution did guarantee such a right, but the Court refused to push its precedents to that conclusion.[24] Professor Fleming observes that the Court said, in essence, "this far and no further."[25] His conclusion suggests that the Court has nearly reached the limit of its understanding of individual rights. The Court seems to have an aggressive individual rights agenda in two areas: property rights and free expression. In both areas, the modest view would have it, the Court has moved in the direction of a mild libertarianism that does not threaten to transform the modern regulatory state.

1. Property Rights

The modest view of the Court's regulatory takings decisions is this: First, the Court has required that state and local governments show a "nexus" between a condition it places on a request for permission to develop some land and the effects of the development itself.[26] As with the decisions on Congress's power to regulate interstate commerce, these decisions undoubtedly will curb some excessively enthusiastic regulatory efforts. Demonstrating that the requisite nexus exists will increase the costs of devising the regulations, but careful design already attends most of the most important environmental regulations. Most "smart growth" initiatives, wetlands preservation, and historic preservation programs can satisfy the nexus requirement without difficulty.

Second, land use regulations will be unconstitutional if they "go[] too far."[27] They go too far either when they permanently deprive the landowner of all economically beneficial use of the property, or when on balance the regulation's public benefits are not substantial enough to justify the property's loss of value.[28] Whether the property loses all value depends on how we identify the property—referred to in the literature as the "denominator" problem, referring to the fact that we measure loss of economic value by comparing the postregulation value (the numerator) to the preregulation value (the denominator).[29] The Court has been notably careful in refusing to adopt an expansive definition of the denominator, and the cases suggest that the Constitution does not require a denominator rule seriously adverse to state and local governments.[30]

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23. Washington v. Glucksberg, 521 U.S. 702 (1997).

24. *Id.* at 719-20.

25. James E. Fleming, *Fidelity, Basic Liberties, and the Specter of* Lochner, 41 WM. & MARY L. REV. 147, 152 (1999).

26. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

27. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

28. Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001).

29. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). The larger the denominator, the smaller the loss and the less likely it is that the government's action deprives the owner of all economic value.

30. *See, e.g.*, *Palazzolo*, 533 U.S. 606 at 630-33.

The Court's application of the balancing test when a regulation impairs property value, but does not eliminate it entirely, has been reasonably favorable to regulators as well.

Finally, it is worth noting that the Court has occasionally invoked other property-rights-protecting doctrines to invalidate legislation, but in what the Justices in the majority clearly thought were extreme cases.[31] The exception is the Court's decision finding that interest on client funds in special state programs to finance legal services for the poor was property of the client, and that the programs therefore had to be analyzed under the Takings Clause.[32] Notably, though, the Court has shied away from addressing the constitutionality of rent control statutes, which would seem a prime candidate for attention by a Court with an aggressive property rights agenda.

2. Free Expression

The present Court is a First Amendment enthusiast. The dissolution of the distinction between commercial speech, subject to substantial regulation, and political speech, which could not readily be regulated, has made the First Amendment a darling of corporate interests. In addition, large media enterprises have taken advantage of the protection historically afforded small publishers. The modest view of the Court's free speech decisions is this: Most of what the Court has done is consistent with the general deregulatory thrust of modern legislation; the Court has either mopped up after legislatures, or has paid attention to small regulatory programs that escaped the deregulators' attention. In either case, the Court's role in altering public policy has been small.[33]

Probably the most interesting recent development is the invocation of a right of expressive association to protect the Boy Scouts from having to comply with a state law barring discrimination against gays and lesbians in places of public accommodation.[34] The Court's doctrinal articulation of the right of expressive association was quite broad: Courts had to defer to an organization's statement of the views its members held and defer as well to the organization's assertion that requiring it to refrain from discrimination would interfere with its ability to disseminate those

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31. The modern Court's initial decisions dealing with the Obligation of Contracts Clause had few progeny. For other cases invalidating statutes on property rights grounds, see *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), *Babbitt v. Youpee*, 519 U.S. 234 (1997), and *Hodel v. Irving*, 481 U.S. 704 (1987).

32. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998). *But see* Wash. Legal Found. v. Legal Found. of Wash., 122 S.Ct. 2355 (2002) (granting review of a decision holding that lawyers' clients had no right to an injunction against the operation of a plan using the interest earned on their accounts to support a legal services program).

33. The Court's position on campaign finance regulation might be another matter—if we could be confident about what that position was. Its 1976 decision in *Buckley v. Valeo*, 425 U.S. 946 (1976), plays a large role in debates over campaign finance reform. Yet, no one is really confident that the present Court would follow *Buckley*, although whether it will reject *Buckley* to make it easier to regulate campaign finance, or reject *Buckley* to make it more difficult to do so, remains quite uncertain. *Compare* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (holding that the First Amendment prohibits applying campaign finance regulation to political party expenditures), *with* Nixon v. Shrink Mo. Gov't Pol. Action Comm., 528 U.S. 377 (2000) (upholding limitations on contributions in state campaigns).

34. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

views.[35] Further, a group need not be organized solely for the purpose of expression to be protected by the right of expressive association.[36] In addition, the organization can conduct some substantial commercial activities, as does the Boy Scouts.

A Court truly aggressive about a right of expressive association could use the doctrine as articulated in the Boy Scouts case to make large inroads on the application of well-established antidiscrimination laws to many businesses, for, as Professor Richard Epstein observes, "every organization engages in expressive activity when it projects itself to its own members and to the rest of the world."[37] Yet, the threat the doctrine poses to settled law—antidiscrimination law in its core applications—indicates that the Boy Scouts case could be read narrowly. The most obvious limiting rule would be that only nonprofit organizations can assert a right of expressive association; one can imagine as well courts being less receptive to claims of a right of expressive association when asserted in defense of racial and perhaps gender discrimination, instead of discrimination on the basis of sexual orientation.

3. Conclusion

The right of expressive association is new, and the Takings Clause is newly invigorated. Neither, however, has been made so robust as to preclude the modest readings offered here.

C. Conclusion

Taken in the aggregate, the Court's decisions need place only slight limits on the achievement of public policy goals. First, as to federalism: Nothing in the Court's decisions threatens the core of the expansion of national power that occurred in the New Deal and afterwards, which confirmed that the national government had the power to intervene extensively in the *private* sector to accomplish national economic goals. The national government's ability to regulate state government actors directly, when state governments engage in economic activity, has been weakened slightly, as the Court has reduced the effectiveness of the remedial mechanisms for enforcing national economic policy. Congress's power to define violations of constitutional rights that go beyond what the Court is willing to recognize has been sharply limited, but many such rights violations can also be characterized as implicating economic activity, and therefore remain within Congress's power to regulate. Further, the Court has as yet expressed no willingness to limit Congress's power to impose conditions on state receipt of federal funds, even when the substance of those conditions could not be imposed directly as a regulation on the states.

As to individual rights: The Court's most dramatic initiatives have been in the area of property rights, but the decisions actually do not significantly impair state power to regulate the uses of private property. The doctrinal articulation of the right of expressive association was quite expansive, and could be taken to threaten many antidiscrimination laws, but it seems to me quite unlikely that the Court will invoke the

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35. *Id.* at 653.

36. *Id.* at 655.

37. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 140 (2000).

right of expressive association with respect to commercial enterprises. The present Court might be described as mildly libertarian, but its very mildness indicates that its individual rights agenda need not portend a return to the kind of expansive laissez-faire view of government power contemporary scholars associate with the *Lochner* era.[38]

II. THE IMPLICATIONS OF DIVIDED GOVERNMENT

Undoubtedly some statutes presently on the books are vulnerable under the Court's new constitutional jurisprudence; in that sense the Court's "revolution" has not yet ended. Yet, as former Solicitor General Seth Waxman has observed: "[M]odern federalism doctrine is being developed at the expense of a series of enactments that Congress passed at a time when another paradigm–a paradigm of greater national power–prevailed."[39] The modest reading of the Court's decisions offered in Part I suggests that Congress could tinker around the edges of the statutes the Court has invalidated and reenact them in a form that would survive constitutional challenge.[40] Waxman's observation suggests a different point, though. The paradigm of national power he referred to has been displaced not only in the Supreme Court, but in Congress as well. While Congress *could* reenact the statutes the Court has invalidated, and enact new ones consistent with older views about the scope of national power, it will not.

The reason lies in the structure of the political branches of the national government. The details of that structure are complex, but its outlines are clear.[41] The current political system involves divided government, with each major party controlling only one branch essential to the enactment of legislation. In addition, elected officials confront each other across a divide that is not only partisan, but also rather ideological. The consequences for public policy are that major initiatives can be enacted only if they have substantial bipartisan support, and that existing statutes cannot readily be repealed. No major legislative revolution is in prospect. Divided government also means that the Supreme Court has substantial freedom to do what a majority wishes, because in circumstances of divided government, whatever the Court does will "stick." Yet, the Supreme Court is also part of the government as a whole, and it rarely gets out of line with what is occurring in the political branches. With no legislative revolution likely, neither is a judicially led constitutional revolution.

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38. The association is almost certainly erroneous as a matter of historical fact, but "the *Lochner* era" today refers less to a particular historical period than to an approach to constitutional law.

39. Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1120 (2001).

40. Congress has already reenacted the Gun Free School Zones Act, invalidated in *United States v. Lopez*, 514 U.S. 549 (1995), inserting a requirement that the gun possessed near a school have once traveled in interstate commerce. 18 U.S.C. § 922 (q) (2002). As far as I know, prosecutors have not pursued cases under the revised statute.

41. I develop the reasons in more detail in TUSHNET, *supra* note 2.

A. Divided Government

Political scientists agree that divided government characterizes the present period.[42] The reasons for divided government remain unclear, though. The easiest explanation is that, although most voters prefer unified government, enough voters want divided government to produce that result. In one formulation, voters "balanc[e] the policies or ideologies of the opposing parties by placing them in control of different institutions."[43] This account confronts the difficulty that coordinating the preferences for divided government in a single election is quite difficult. A preference-based account might explain why voters chose Bill Clinton as President in 1992 and then installed a Republican Congress in 1994, but providing such an account for the 1996 elections, for example, is quite difficult: Some people might want a divided government that has a Democratic President and a Republican Congress, while others might want a divided government with a Republican President and a Democratic Congress, but unless things work out extremely well, they all might end up with the same party controlling both branches.[44]

For whatever reason, divided government does seem a persistent feature of the present political structure.[45] As we now know, of course, the division need not be complete; it is enough that one party controls the presidency and the other controls one house of Congress. Indeed, with respect to the Senate, *control* need not mean that a party holds a majority of the seats. The past decade has seen a substantial increase in the number of filibusters and quasi filibusters, which have produced a situation in which *effective* control requires sixty votes—enough to stop or forestall a filibuster—rather than merely fifty-one.[46]

B. Ideologically Polarized Government

Divided government itself might not have significant policy effects, if coalitions could form and re-form across party lines on different issues. Divided government does matter, though, when representatives are ideologically opposed as well. And, ideological division characterizes the present political system.

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42. The standard general account is MORRIS FIORINA, DIVIDED GOVERNMENT (1996).

43. *Id.* at 72.

44. An alternative to preference-based accounts relies on structures alone, but the structure-based accounts are quite complex and do not have the intuitive appeal that the preference-based ones do.

45. Subject to a qualification discussed, *infra*, Part III.A. Mitchell Berman, commenting on a draft of this Article, suggests that under some conditions persistent divided government, with occasional periods of unified government, can result from essentially random processes. The conditions are that the parties enjoy close to equal popular support and (less importantly) that party discipline is weak so that a congressional candidate may hold views substantially different from those hold by the party's presidential candidate. The question then would be what accounts for changes in the differential support of the parties, with more equal division recently than in the past, and in the strength of party discipline. For a discussion of the latter issue, see TUSHNET, *supra* note 2.

46. In contrast, the internal rules of the House of Representatives give a party with even a slim majority the ability to force a vote on proposals structured by the majority caucus.

1. Candidate selection

Years ago party leaders chose candidates for the House of Representatives and the Senate. Their choices were determined by a range of factors, including but not limited to ideology. Today candidates are chosen differently. In the first stage, a number of people simply offer themselves as candidates. They need not have undergone any screening by party leaders or anyone else.[47] In the second stage, voters chose among the self-nominated candidates in party primary elections. Here, ideology plays a large role, because those who vote in party primaries tend to be the more ideologically committed of a party's membership. As a result, Republican candidates tend to be more conservative than their districts as a whole, and Democratic candidates more liberal.[48] The composition of Congress then begins to polarize.

2. Districting

Polarization is promoted by the increasing ability of politicians to create safe districts by the use of computer programs that allow small blocs of uncongenial voters to be shifted out of a district while adhering to the Supreme Court's "one person, one vote" rulings.[49] According to one recent account, computer technology and partisan apportionment explain why the number of competitive races for the House of Representatives in 2002 is one-quarter of the number in 1992, and the number of seats that switch parties has been cut in half over the past fifty years.[50] In 1998, 94 incumbents ran unopposed, and 114 had only nominal opposition, primarily because the districts were solidly in the hands of one party.[51] Within relatively homogeneous

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47. Self-nomination may produce a pool of potential candidates thicker with ideologically committed people than does one created by nomination by leaders, because ideologues may offer themselves as candidates more readily than people with other motivations for public service.

48. This fact provides the basis for one of the more persuasive structural accounts of divided government. Assume a district whose median voters are moderately conservative. They might find the rather conservative Republican candidate preferable to the extremely liberal one; yet they prefer the moderately conservative Democratic presidential nominee to the more conservative Republican one. For this model, see Bernard Grofman et al., *A New Look at Split-Ticket Outcomes for House and President: The Comparative Midpoints Model*, 62 J. POL. 34 (2000).

49. Reynolds v. Sims, 377 U.S. 633 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

50. John Harwood, *House Incumbents Tap Census, Software to Get a Lock on Seats*, WALL ST. J., June 19, 2002, at A1.

51. Jonathan D. Salant, *Number of Congressional Candidates, Funds Spent Down in '98*, BULLETIN'S FRONTRUNNER, Apr. 29, 1999, LEXIS, Nexis Library, FRNTRN File. This was a near record. *See* PAUL S. HERRNSON, CONGRESSIONAL ELECTIONS: CAMPAIGNING AT HOME AND IN WASHINGTON 31 (3d ed. 2000) (noting that the 1998 figure was "one fewer than the record set in 1950"). For updated interim figures for 2002, see Allison Stevens, *Number of Uncontested Races Extremely High*, THE HILL, Apr. 24, 2002, *available at* http://www.hillnews.com/042402/c2k2_uncontests.shtm (last visited Jun. 24, 2002) (reporting forty-six uncontested races as of April 24, which projects to approximately fifty-five to sixty uncontested races for the November elections).

districts, representatives have to worry mostly about challenges from within the party, and therefore about challenges to them on ideological grounds.[52]

The case of the Senate is more complex and less well-understood. The facts are reasonably clear. The number of states having one Senator from each party has decreased substantially, from a peak of twenty-seven in 1976 to fourteen in 2002. One suggestive argument rests on the economics of migration.[53] Taken in the aggregate, people who move from one state to another tend to be wealthier than those who remain in a single state, and people who tend to be wealthier tend to be Republicans. Migration then leads the states receiving people to become more Republican and states losing people to become more Democratic.[54]

3. Congressional Rules

Self-nominated candidates owe nothing to the organized parties. Once they arrive in Washington, they tend to pursue their own agendas, refusing to accept discipline from party leaders. Even so, the parties in Congress tend to polarize. In part, that occurs because self-nominated candidates tend to share ideologies with others in their party: They need not be organized by some external force like party leadership, because they already agree with each other. Internal congressional rules play an important part in making the congressional parties act in even more polarized ways.[55] Members who have run independently of each other face a collective action problem in getting anything done, but they need to accomplish something if they are to present themselves to voters at the next election as successful legislators. Authorizing party leaders in the House and Senate to exercise substantial power solves the coordination problem.[56] Common platforms like the Contract with America have the same effect, but perhaps more important is the leadership's ability to compose legislative packages that members vote for as a whole, and prescribe the rules authorizing—or, more important, restricting—votes on amendments to proposals. These internal rules reduce the power of the small remaining contingents of liberal Republicans and conservative Democrats when the Republican or Democratic caucus organizes the House or the Senate.

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52. *But see* HERRNSON, *supra* note 51, at 30-32 (describing *increasing* competition in House races during the 1990s).

53. James G. Gimpel & Jason E. Schuknecht, *Interstate Migration and Electoral Politics*, 63 J. POL. 207 (2001).

54. In 2002, the Democratic Party of Virginia declined to nominate an official candidate to oppose the reelection of Senator John Warner, the Democratic Party of Kansas did the same with respect to the reelection of Senator Pat Roberts, and Senator John Kerry ran unopposed for reelection in Massachusetts, indicating that some of the patterns visible in House races can now be found in Senate ones as well. According to one compilation, since 1982 Senators have run unopposed in 1984 (one Senator), 1990 (five Senators), and 1992 (one Senator). HERRNSON, *supra* note 51, at 33.

55. Here I follow the argument of BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE (1989) [hereinafter SINCLAIR, TRANSFORMATION] and BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA (1995).

56. As Sinclair observes, these new rules invoke the "standard response" to collective action problems of "plac[ing] in the hands of leaders selective incentives that can be used to induce institution-regarding behavior." SINCLAIR, TRANSFORMATION, *supra* note 55, at 210.

4. Conclusion

The explanation for ideologically polarized government is largely structural, unlike the preference-based explanation for divided government. The use of primaries to select candidates and the incentives on state legislators to respond to partisan concerns in districting are likely to be permanent features of our political order, stable even if voters change their preferences slightly.

C. Policy Outcomes in Ideologically Divided Government

One might think that ideologically divided government was a prescription for legislative stalemate. That is not quite accurate, though. Some new laws can be enacted, and the ones as to which there is stalemate have distinctive characteristics.

1. Laws with High Bipartisan Support

Obviously a proposal that has substantial support within both parties has a good chance of enactment. Such proposals must be compatible with both conservative and liberal ideologies. Sometimes important proposals that are largely technical satisfy this requirement.[57] More interesting are important proposals that capitalize on the aspects of individualism that are common to conservative and liberal ideology.[58] Here, the primary example must be education: To oversimplify, conservatives favor education programs over other forms of government action because they see education as giving individuals the internal resources with which they can decide how they choose to live their lives, and liberals favor education programs because they see education as a means of self-realization. Similarly, regulations that give businesses incentives to comply with national policy without requiring them to do so are compatible with both ideologies, although sometimes liberals will seek more directive regulation. Of course, conservatives and liberals will divide over the details of programs that invoke their overlapping values, but the overlapping commitment to individualism opens the way to agreement on *some* important legislation.[59]

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57. For example, the creation of a cabinet position for internal security that merely consolidates existing agencies is, in my view, largely a technical matter. Yet, even the creation of sueh a department was delayed substantially because of sharp partisan division over details.

58. It seems worth noting that the requirement of bipartisan agreement seems to preclude the adoption of statutes that respond to perceived problems with the distribution of wealth, health care, or other matters, that is, with the outcomes of market processes.

59. One subcategory of proposals with bipartisan support deserves attention. These are the "feel good" statutes, symbolized in contemporary constitutional discourse by the Gun Free School Zones Act. Such statutes really have no important implications for public policy. They are simple expressions by members of Congress that they share their constituents' concerns, not serious public programs. I simply note that one should hardly get exercised by Supreme Court decisions invalidating "feel good" statutes: Precisely because such statutes have no significant public policy implications, their invalidation has none either.

2. Small Initiatives

Divided ideological government gives partisans the power to obstruct enactment of nearly anything. But, obstructionism is a weapon that is best used with respect to major programs. It takes time and effort to obstruct the legislative process, and a representative would try to do so only when, from the representative's point-of-view, the cost is worth it. As a result, smaller initiatives might slip through the legislative process. So, for example, one scholar suggests, "President's [sic] have most control over *small pet projects* that they personally identify with and push early in their administrations."[60] The conclusion seems apt with respect to legislation more generally.[61] I have referred to this phenomenon as the chastening of ambition in our political system.[62]

3. Existing Programs

Divided ideological government means that few large new programs can be created. It also means that old ones will remain on the books. Here, *old* means, roughly, enacted before the early 1990s. The important point to note here is that the persistence of old statutes gives the Supreme Court the opportunity to play an important role in the present system. As Waxman's observation suggests,[63] it can do so by cleaning up the statute books, invalidating statutes that could not be enacted today, and that will not be reenacted in modified form after invalidation. In addition, the Court has substantial freedom in interpreting older statutes, as its recent activity in connection with the Americans with Disabilities Act suggests. What the Justices say a statute means will be what the statute means, even if the Court misinterprets the old statute, either from the point of view of those who supported its enactment initially, or from the point of view of what might be a contemporary legislative majority.

Finally, to introduce a subject I discuss in more detail in Part III, the role of the Court in interpreting old statutes is one reason why judicial appointments are likely to receive particularly close scrutiny. Some legislators remain fond of older statutes, even though they cannot enact any new programs, and will fear what a new Justice could do to the statutes. Other legislators dislike those statutes, and will hope that a new Justice will scale the statutes back or even strike them down. Further, the possibility that threatening a filibuster could block a nomination means that a party with more than forty Senators—that is, both parties—can exercise an effective veto over nominations.[64]

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60. James P. Pfiffner, *Presidential Constraints and Transitions*, *in* PRESIDENTIAL POLICYMAKING: AN END-OF-CENTURY ASSESSMENT 19, 32 (Steven A. Shull ed., 1999) (emphasis added).

61. For a journalist's comment on the scope of policy proposals, see Richard L. Berke, *Following Baby-Size Issues Into Voters' Hearts*, N.Y. TIMES, Mar. 21, 1999, at E1.

62. Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Ambition*, 113 HARV. L. REV. 29 (1999).

63. *See supra* text accompanying note 39.

64. It is important to note that the veto can be exercised behind the scenes. The filibuster threat may induce the President to submit a nomination that will not be filibustered, and we would not observe a filibuster occurring even though those who threatened to filibuster would

D. The Supreme Court's Position in Ideologically Divided Government

In a world of divided government, the Supreme Court could do essentially anything its majority wanted. Positive political theory makes clear what intuition suggests: In a divided government, courts that are significantly more conservative than the more conservative branch, or more liberal than the more liberal branch, can follow the judges' preferences without fearing that the legislature will retaliate against the judges or overturn their decisions. The reason is that the courts' opponents, who might form a majority in one branch, cannot muster enough support in the other to act against the courts.

This observation poses a puzzle for liberals upset by the Supreme Court's recent decisions, who fear that what they have seen is no more than a pale foreshadowing of more drastic moves to come. As I have indicated, the doctrinal materials for far more substantial actions are indeed in place. The Boy Scouts case[65] and the Court's Commerce Clause doctrine would authorize judges fairly applying the precedents to invalidate core applications of civil rights laws, for example.[66] The puzzle is: why has the Court not done so? Why have the Justices not wrought a truly major revolution in constitutional doctrine, rather than taking small steps that might someday culminate in a revolution?

Bruce Ackerman offers a strategic explanation for the Court's caution: The Justices have picked their targets carefully, refraining from invalidating "a major statute in a way that would catalyze a massive political reaction."[67] But, in a divided government, no "massive political reaction" is likely against anything the Court does, because *one* branch will support the Court's action.[68] The freedom afforded the Court in divided government allows the Justices to pursue the agenda they actually have, and it seems a stretch to assume that the Justices have some hidden agenda. A different understanding of the Court's conduct emerges from a classic in the political science literature on the Supreme Court, Robert A. Dahl's article on the Supreme Court as a decision maker in a democracy.[69] Dahl concluded that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[70] From Dahl's perspective, there is nothing surprising about a Court

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have effectively vetoed some other nominee.

65. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

66. For an argument that the Court has a larger agenda than expressed in its opinions so far, see Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

67. Bruce Ackerman, *Off Balance*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 192, 198 (Bruce Ackerman ed., 2002).

68. *Id.* Ackerman's position is consistent with his distinctive normative-descriptive theory of constitutional change, which is different from the positive political theory on which I rely in posing the question here. Ackerman's general approaeh, though not positive political theory, justifies his argument that, from the point of view of even quite conservative Justices, pursuing a constitutional revolution now would be too soon.

69. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957), *reprinted in* 50 EMORY L.J. 563 (2001).

70. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 50 EMORY L.J. 563, 570 (2001) (originally published in 1957). Dahl offered the more-or-less regular but intermittent process of appointing new Justiees as the mechanism by which the Court was aligned with lawmaking majorities.

behaving modestly during a period of divided government. The median Justice is likely to be reasonably close to the median between the ideologically divided branchcs.[71] Or, put another way, within a government whose abilities are constrained by the balance of political forces, the Supreme Court is likely to be less than revolutionary as well.[72]

E. Conclusion

The good news for people distressed at the direetion they see the Court taking is that what you see is what you get. Unless the Court's ideological makeup changes, the Court is likely to continue drifting in a somewhat conservative direction. But, with the same qualification, it is unlikely to take us back to pre-New Deal constitutional doctrines, or to devise new, equally transformative constitutional doctrines. The future is likely to be pretty much like the past—unless something changes. The next Part explores the possibilities for such changes, including changes in the Court's ideological composition.

III. THE POLITICAL CONDITIONS FOR TRANSFORMATION

Large ehanges in fundamental public policy might occur under one of three conditions: A briefly unified government, the appointment of new Supreme Court Justices, or a government that remains unified for a long period because of presidential leadership.

A. Briefly Unified Government

The argument that we have a government of chastened ambition rests on the proposition that we have committed ourselves to divided government. But, as I indicated, exactly why that is so remains unclear. In particular, coordinating choices to assure that we continue to have divided government is difficult. Sometimes, almost by accident, we might end up with a unified government. This is especially so when, as is today true, the Nation and Congress are split almost evenly, because small, perhaps random events might have quite large consequences. As in the case of Senator James Jeffords, a single member's shift of party allegiance (in that case, from the Republican party to independent status) can change control of one chamber. That is an example of a small change *preserving* divided government, but equally small changes in a closely divided Congress could create unified government, as the elections of 2002 may have showed.

Of course if the American people truly want divided government, we can reestablish it at the next election. In the interim, however, a briefly unified government can enact dramatic changes in public policy. The party controlling the government will use the

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71. Under some circumstances, the median Justice might become significantly closer to one of the ideological poles. For a discussion, *see infra* text accompanying note 72.

72. I emphasize that the version of Dahl's argument I present here holds that the Court's modesty results from the actual preferences of its median Justice, not from fear by the Justices that they face reprisal if they go too far. For a version of the latter argument (predicated, I note, on an assumption that the Court's membership will change), see Ackerman, *supra* note 67, at 207-09.

opportunity to enact as much of its ideological program as it can, which is likely to be quite a bit. If divided government returns after the following election, the newly enacted statutes will remain on the books, because they cannot be repealed under conditions of divided government.[73] The political system operates as a one-way ratchet: What is done under unified government cannot be undone under divided government.

Briefly unified government can change public policy dramatically, working a revolution in public policy supported only by a narrow, and perhaps temporary, majority. This could provoke a crisis of stability, as those who lost hold of the government find themselves back in control (or at least in control of one branch), and yet unable to advance their own programs or even repeal their opponents' programs. The frustration occasioned by such a situation might generate unusual modes of political action, of the sort associated with crises.[74]

A second source of crisis might be the Supreme Court. The party controlling the government during a period of briefly unified government might be able to "pack" the Supreme Court with its adherents. Then, when the other party retakes control, the Supreme Court might be in a position to constitutionalize the programs enacted earlier, insulating them from repeal even through ordinary political action. I believe this course of events unlikely to materialize, though.[75] Two conditions have to be satisfied: The first unified government must have the opportunity to appoint enough Supreme Court Justices to give the Court an ideological cast for the long term, and the first unified government must be replaced by a second one. Supreme Court nominations are themselves almost random events, although a government's ideological allies on the Court can sometimes time their retirements strategically. And, unified governments come into being only through a conjunction of almost random events. The odds are low that everything will fall into place in a way that would produce a constitutional crisis by this route.

B. New Justices

Scholars who focus on the Supreme Court, which is to say, almost all law professors who discuss constitutional law, see the Court itself as a possible source of a constitutional revolution. As I have argued, the Court as presently composed seems not to be interested in revolutionary transformation. But, of course, new Justices could change the Court's preferences by fair readings of the precedents the modern Court has already put in place that go far beyond the modest interpretations I have offered. Those modest interpretations, it might be said, hang by a thread—or by the votes of one or

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73. It is possible, of course, that a unified Republican government might replace a unified Democratic one (or vice versa). Even then, however, repealing recent statutes might be unlikely because of the effective veto substantial minorities in the Senate can exercise. *See supra* text accompanying note 46 (discussing the effective veto held by forty Senators).

74. The impeachment of President William Clinton might be understood as this sort of unusual form of political action, taken by Republicans frustrated at their inability to enact the programs for which they believed they had been elected.

75. *But see* Ackerman, *supra* note 67 (suggesting this possibility and arguing—in the terms used in this Article—that Supreme Court vacancies should be held open until the persistence of unified government is confirmed).

two Justices who could be replaced by more ideologically committed Justices when today's Justices retire, resign, or die.

Whether that possibility will be realized depends on the politics of the modern processes of judicial nomination and confirmation. Divided government strongly affects both processes.[76]

The Warren Court era made the politics of judicial appointments an important part of politics generally because political leaders learned how courts can contribute to the extension and consolidation of their political programs. Interest groups have added judicial nominations to their areas of concern, and some interest groups now take those nominations as a primary area of interest for both lobbying and fund raising purposes. Ideological polarization in divided government means that it becomes more likely than before that a nominee's views about what the Constitution means will differ substantially from the views on the same question held by substantial numbers of Senators.[77]

What sorts of judges are likely to be appointed to the federal courts in the new constitutional order of divided government and highly partisan and polarized Congresses? The run of Supreme Court nominations from Robert Bork through Stephen Breyer suggests the answer. A high profile nomination is likely to be quite costly politically, at least when different parties control the presidency and the Senate. The opposition party in the Senate may be able to convert a nomination into a political issue that can damage the President and his party, even if the Senate and the President are from the same party.

We can see something of a learning curve in recent appointments. The nomination of Robert Bork, a highly qualified, strongly ideological figure with well-known positions on many issues, failed and taught liberal interest groups how they could use judicial nominations as a means of more general political organizing. The nomination of Clarence Thomas, known to be ideological but with some special demographic appeal, succeeded, but the success imposed a fairly high political cost on the President who nominated him.[78] The nomination of David Souter, whose positions were unknown when he was nominated, succeeded, but Souter's performance as a Justice taught conservatives that they could not rely on reassurances that a nominee without a

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76. The argument that follows draws heavily on LAUREN COHEN BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION (2002); MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS (1994); and DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999).

77. A nominee's opponents have sometimes searched out what they presented as personal failings to justify their opposition, and sometimes presented what the nominee's supporters regarded as distorted characterizations of the nominee's views. I believe that this so-called politics of personal destruction has begun to change into one in which Senators explicitly and unabashedly take a nominee's ideology into account. (An e-mail exchange with Keith Gardner Whittington, Professor of Politics at Princeton University, helped me clarify this point.) For a normative analysis of these developments, see Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003).

78. It is generally said, for example, that President George H.W. Bush had to sign a civil rights bill that he had previously vetoed, to reduce the impression caused by the Thomas nomination that Bush was opposed to civil rights.

substantial public record would be a conservative after appointment.

A reasonably risk-averse President and Senators will strongly prefer bland nominees: "The constellation of political and legal forces at work in the nation virtually guarantees a potentially powerful *opposition* in response to any nomination, and thus the modern president is compelled to seek out nominees who present characteristics certain to forestall, or at least minimize, this opposition."[79] The so-called "stealth nominee," who lacks a substantial record that opponents can attack, should be the characteristic nominee in the present political system. And yet, the case of Justice Souter indicates that although stealth nominees may escape substantial challenge from the President's opponents, they may not be sufficiently reliable, at least openly so, to satisfy the President's supporters. Even worse, consider the reaction of the opposition party to a stealth nominee: The very fact that the President's supporters are willing to tolerate the nominee after the Souter experience will demonstrate to the opposition that the President's supporters must have enough information to reassure them in the face of a thin public record.[80]

Presidents may sometimes calculate that the benefits of making a controversial nomination, for example in satisfying an important constituency,[81] exceed the costs of attracting opposition, but those costs are likely to lead Presidents to make such a nomination only rarely. Under the right circumstances, a Republican President supported by a Republican Senate, and perhaps even one facing a Democratic Senate, might be able to push through some strikingly conservative nominees to the federal courts, and even to the Supreme Court.

We can see the difficulties, and possibilities, by examining the suggestion that President George W. Bush could nominate a reasonably conservative Hispanic judge or former judge to the Supreme Court. Liberal interest groups learned from the Thomas nomination that they have to be quite careful about a nominee with specifie demographic appeal, but they might be unable to muster enough opposition to block the nomination.[82] Even a Hispanic nominee with a publicly perceptible position in favor of restricting abortion rights would face substantial opposition from Democratic-leaning women's groups. And yet, the President's conservative supporters themselves

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79. SILVERSTEIN, *supra* note 76, at 100.

80. What is the best pool from which to choose a nominee? Sitting judges who, as political scientist David Yalof puts it, "chart a course of moderation" in which any controversial decisions can be explained away by saying that the judge had to follow the Supreme Court's dictates. YALOF, *supra* note 76, at 171. A sitting judge nominated for the Supreme Court, and even more so the Prcsident, can suggest without quite saying so that the nominee's own views might be different from the Supreme Court decisions that forced the nominee to decide the case in a controversial way. Politicians and law professors, in contrast, achieve prominence by confronting highly controversial issues, which is precisely why Presidents shy away from such nominations.

81. Silverstein argues, for example, that President George Bush "reward[ed] . . . the right wing of the party . . . [with] judicial appointments." SILVERSTEIN, *supra* note 76, at 124.

82. Shortly after Bush took office, liberal interest groups focused on the Court began to build the case against confirming any Bush nominee: They argued that the conservative Justices who, in their eyes, put Bush in office should not be able effectively to select their own successors. That strategy probably would not succeed, but it indicates that Democratic interest groups are not likely to treat Supreme Court nominations as political deals in which one constituency can be "bought off" by simple identity politics.

are not comfortable with a stealth nominee, having taken as a slogan, "No more Souters." The President must choose someone with no visible position on abortion, and then assure his conservative supporters that the nominee is not another David Souter, while simultaneously avoiding stirring up serious opposition precisely because, on the abortion issue, the nominee is indeed not another David Souter. This is a delicate political task, and even minor stumbles are likely to make the choice quite costly in political terms. Those political costs are likely to be high, but they may be worth bearing, particularly if the nomination occurs well before the President seeks reelection.[83]

The hypothetical nomination I have described deals with the political circumstances of a particular President, but its outlines arise from the general characteristics of the present political system.[84] Interest group attention to the Supreme Court coupled with divided government makes it unlikely—not impossible, but unlikely—that new Justices will be interested in revolutionizing constitutional doctrine rather than chastening it.

C. Presidential Leadership

The events of September 11, 2001, and their aftermath made clear a third route to constitutional transformation. Presidential leadership in times of crisis has always been important, and perhaps has been the central element, in transforming our political system.[85] Presidents who guide the nation to a new constitutional system succeed in the short run on three levels, and succeed in the long run on a fourth. Rhetorically, they articulate for the nation a new constitutional vision around which the nation can come together. Politically, they obtain from Congress laws that implement that vision. Programmatically, the statutes they put in place are seen to solve or at least substantially mitigate the problems to which they were addressed. For the longer term, successful political leaders begin to construct a new institutional structure within which day-to-day political contention occurs.

The combination of rhetorical with programmatic success matters most. The cases of President Ronald Reagan and Representative Newt Gingrich show that leaders who do indeed clearly articulate visions that many in the public find attractive may nonetheless fail to transform the political order as they hope. The reason for the incomplete transformation during the Reagan presidency is that rhetoric must be accompanied by political and programmatic success. Even more dramatically than President Reagan, Representative Gingrich was unable to accommodate a

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83. This may be particularly true when the Court is closely divided and a single appointment might be thought likely to have substantial long-term effects. Under those conditions, of course, the opposition to the nomination is likely to be particularly intense as well.

84. A similar analysis is available, I believe, of a hypothesized nomination of a sitting Senator. The decay of norms of senatorial deference coupled with the rise of interest group attention to judicial nominations makes it less likely than in the past that the President can assume that such a nomination, particularly of a Senator with a clear ideological position (which is to say, virtually any Senator), would sail through to confirmation. Confirmation is possible, but is likely to come with substantial political costs.

85. The classic work is now STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH (1993), which has deeply influenced my analysis, even though I do not cite it for specific points in what follows.

transformative program to the existing reality of governing structures in a way that allowed him to push the program forward. Even political success joined with rhetorical leadership may not be enough. The policies a President persuades Congress to adopt must be seen to work, that is, to advance the nation in the direction the President's vision has identified.

These observations have obvious implications for the possibilities opened up by the terrorist attacks of September 11, 2001. President George W. Bush occupies the office in a period of crisis under several disadvantages. There is a crisis, but it is not the one—of economic stagnation—that produced the initial successes of the Reagan revolution, and it is not something that was the focus of public attention during the 2000 presidential campaign. Partisan Democrats have misgivings about the manner in which President Bush came to occupy the office. Perhaps most problematic, he became the Republican candidate for the presidency precisely because he did *not* articulate a strong ideological vision, but rather because he was seen as the Republican candidate most likely to blur ideological differences with the Democrats.

Even so, President Bush might be able to implement the Reagan-Gingrich revolution more effectively than its initiators. His task is to use the opportunity provided by the present crisis to tie the Reagan-Gingrich principles to the crisis, thereby rearticulating them for a public that did not accept them in their first incarnation. Relying on President Bush's first State of the Union address, E.J. Dionne, Jr., a liberal columnist, suggested the direction in which President Bush might transform policy.[86] According to Dionne, Bush combined conservatives' defense of the free market with a traditionalist's interest in securing the conditions of moral development through the use of public power to nurture the institutions of civil society that help people understand their personal responsibility for personal and economic success. Tax cuts and reductions in the scope of existing regulation represent the first element, while faith-based public programs, improvements in education that include, but are not limited to, vouchers for use in private schools, and government programs that support volunteer activities, represent the second. The speech did not, however, closely tie these principles to the war on terrorism, and it remains unclear to me whether President Bush is interested in doing so. Yet, connecting these programs to the rhetoric made available by the events of September 11, 2001 seems to me quite important if President Bush is to succeed in transforming the political system.

The glimmerings of new institutional arrangements can be seen. Picking up on themes stated during the Reagan presidency, the Bush administration has asserted its interest in establishing the constitutional independence of a strong presidency. It limited disclosure of presidential records and resisted disclosure of vice-presidential contacts with officials of energy-related companies. Its initial version of a proposal for military tribunals for noncitizens held for terrorist activities would have kept the ordinary courts out of the process entirely. In at least this respect, we can see the Bush administration's interest in developing a new institutional arrangement for a new constitutional order.[87]

The crisis provides the opportunity for this rearticulation and shift in conservative

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86. E.J. Dionne, Jr., *Conservatism Recast*, WASH. POST, Jan. 27, 2002, at B1.

87. The President's effective selection of the present Senate Majority Leader is another hint at a new institutional arrangement.

principles and institutions, cast once again in the rhetoric of war and given structure by the process of crafting public appeals through political technology. At this writing, it is of course too early to know whether President Bush's rhetoric will succeed, whether he will accommodate enough in politics to achieve his political goals, whether the policies that are enacted will be seen to succeed, and what the distinctive institutional characteristics of a newer constitutional order would be.

Still, if President Bush succeeds programmatically, in developing and implementing policies that are seen to respond well to the perceived crisis, and rhetorically, in articulating a grander ideological vision that explains why new regime principles are suited to the new situation, the U.S. political system could be transformed into one committed in principle to a sharply reduced role for government in supporting economic growth and achieving economic and social Justice.

How might that occur? Consider a scenario with two parts. A President who succeeds programmatically and rhetorically would be in a position to go to the country in the 2004 elections as the leader of a unified ideological party, and might help his party gain solid control of Congress. A full-scale repudiation of New Deal/Great Society principles might then occur, symbolized by a substantial privatization of the U.S. system of pensions for the elderly. The second part of the scenario involves the Supreme Court. I have argued that, under the conditions that prevailed before September 11, President Bush would face a difficult political choice when given the opportunity to nominate a Supreme Court Justice. Under the circumstances immediately after September 11, his choice would be easy: Select the uncontroversial, bland stealth nominee. Under the circumstances that might prevail if he becomes a transformational leader, his choice would also be easy, but precisely the opposite: Select the committed ideologue. The Supreme Court then could assist the new unified government by cleansing the statute books of legislation left over from the prior system.[88]

D. Conclusion

Liberals are right to see in the present Supreme Court's decisions the possibility of constitutional transformation. And, of course, the American people might decide that such a transformation is a good thing. This Part has identified the conditions for

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88. Indeed the doctrinal materials are available for the Court to push in new directions. The Court has held that some education voucher systems may include vouchers for use at religiously affiliated schools. Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002). I can imagine a court taking the next step and holding that such systems *must* include those schools, because excluding them would be discrimination of the basis on the content of the instruction they offer, a violation of free speech principles. And, I can imagine a third, more dramatic step, a holding that states must *establish* voucher systems. A sketch of the argument is that parents have a constitutional right to send their children to private schools, whether religiously affiliated or not, and that voucher systems are necessary to ensure that this option is truly available to parents. Another possibility is that the Court might hold it unconstitutional to have a Social Security system that does not provide individuals with some opportunity to determine how their retirement savings will be invested—that is, a partial privatization of Social Security as a constitutional requirement. Here the argument would develop from some of the modern Court's takings doctrine.

constitutional transformation, and has argued that the possibility that those conditions will be satisfied, while not nonexistent, is smaller than liberal alarmists think.[89]

The scenarios described in Part III.C are realistic ones, and more realistic than they were a year or two ago. Still, they remain less realistic than the modest interpretation of the present political system that I have offered. Consider the keystone legislation of the New Deal/Great Society constitutional order: Social Security, the Civil Rights Act of 1964, the environmental legislation of the 1970s. I think it wholly unrealistic to imagine that even a unified conservative Congress would repudiate the national commitments those statutes represent. Of course there would be tinkering at the edges, and substantially less enforcement by the national government, including the courts, than the most ardent environmentalists and civil rights advocates would like. And, of course there would be serious contention over what precisely the normative commitments made by those statutes were: How clean must clean water be? Is affirmative action consistent with or contrary to principles of equal opportunity? But, the normative commitments—to a livable environment and to equal opportunity—will, I believe, remain unquestioned.

The possibilities for judicially led transformation exist as well, but it would certainly take time for the lines of precedent to develop to the point where the Court could comprehensively implement a new constitutional vision. Indeed, in some ways it is easier to imagine a Court overruling the decisions that validated the New Deal/Great Society constitutional order than it is to imagine it moving in an entirely new direction. But, as I have argued, as a political matter it seems unlikely that even a newer constitutional order would repudiate the keystones of the earlier one. In short, we have, and are likely to continue to have, a political system with chastened ambitions.

IV. CONCLUSION: IMPLICATIONS FOR ADVOCACY AND SCHOLARSHIP

What are the implications of the foregoing description of the present political system?[90] I doubt that the present system leaves much room for creative advocacy directed at the courts by the liberal side. Ingenious arguments are unlikely to change the minds of today's Justices. The Court's liberals do not need to be told that some new way of thinking about the Constitution will lead to liberal conclusions; for them, the old ways of thinking do so anyway. And, the Court's conservatives will not suddenly see the light when presented with a new way of thinking that, it is said, leads to liberal conclusions.[91] What advocates should do is pretty much slog along with the

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89. Liberal alarmism might be a useful strategy for mobilizing supporters, precisely to ensure that the conditions for constitutional transformation will not in fact be satisfied. For example, it clearly helps in mobilizing opposition to a Supreme Court nomination to urge forcefully that the Court is only a single vote away from being able to work a constitutional revolution.

90. The following paragraphs are strongly influenced by Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314 (2002).

91. My favorite example (so far) of misplaced scholarly efforts, if it be understood as an effort at advocacy directed at the courts, is Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison, 110 YALE L.J. 441 (2000). As Professor Graber puts it, "Rather than trying to convince Justice Scalia to think more like Professor Ronald Dworkin, progressives should spend more energy doing the political organizing necessary for ensuring that when Justice Scalia retires he will be replaced by a

standard tools of doctrinal argument, liberals pressing the courts to adopt modest interpretations of the Supreme Court's recent decisions and conservatives urging the courts to push those decisions more vigorously in a conservative direction.[92]

Legislative advocacy is both similar and different. Advocates of new statutes can urge Congress to do almost anything, which is why legislative advocacy is different, and explain to legislators, who might think that the Supreme Court stands in their way, that the decisions, properly interpreted, in fact do not stand in the way, which is why legislative advocacy is similar. Of course advocates of substantial innovative legislation should not expect much to come of their efforts until the political system changes. But, advocating large changes can lead to small ones with which the advocates might be pleased.

The implications for scholars are, I think, more interesting. Working within the outlines of existing law is likely to be extremely boring, because the lines of argument are well-known.[93] What might be valuable are works pushing the envelope. One model here might be conservative scholarship of the 1970s and 1980s. As Professor Jack Balkin has said in a slightly different context, the sensible reaction to that scholarship when written was that it was, well, crazy.[94] Or, to use a less pejorative term, it was utopian, having only the most remote connection to what seemed possible within the political and legal system as then contoured.

Conservative scholars now have the luxury of being realistic. Liberal scholars should be utopian.[95] They should propose new statutes that have no prospect of adoption in the foreseeable future and articulate constitutional doctrines that would both defend the constitutionality of such statutes and provide support for the proposition that enacting such statutes is mandated by the Constitution.[96]

Justice who thinks more like Professor Dworkin." Graber, *supra* note 90, at 322.

92. As Professor Graber notes, "The seminal article in this tradition [written from the liberal side] is Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989)." Graber, *supra* note 90, at 325 n.47.

93. Would anyone with an ambitious young scholar's best interests at heart advise the scholar today to write an article on the proper interpretation of the Eleventh Amendment?

94. Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1446 (2001).

95. *See* Graber, *supra* note 90, at 334 (describing a strategy of constructing a "constitution-in-exile").

96. For myself, a good place to begin would be with arguments about the constitutional imperative of social welfare rights. Showing that utopianism need not be a pursuit solely for the young, see CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED (1997) (arguing for a constitutionally mandated set of social welfare rights). Graber, *supra* note 90, at 349, argues that progressives' constitution-in-exile should be "judged by their capacity to be vehicles for bringing down the incumbent center-right regime," and that this judgment will depend on an assessment of whether that regime is relatively durable, as I have argued it is, or whether it might be displaced by a progressive movement energized by, for example, "a more charismatic candidate." If my assessment is right, utopian proposals may do well even under Graber's standard.