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2005

# The Current Generation of Constitutional Law

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## Recommended Citation

David Fontana, *The Current Generation of Constitutional Law*, 93 *Geo. L.J.* 1061 (2005).

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# The Current Generation of Constitutional Law

REVIEW OF THE NEW CONSTITUTIONAL ORDER, BY MARK TUSHNET. PRINCETON UNIVERSITY PRESS, 2003. 265 PAGES.

DAVID FONTANA\*

## INTRODUCTION

In 1969, Kevin Phillips published a landmark book on the Republican Party, predicting an “emerging Republican majority.”<sup>1</sup> This majority has at least partly dominated the national political landscape since 1980. Since that year, Republicans have won five out of seven presidential elections, and have controlled the White House for sixteen out of twenty-four years. Republicans have nominated five of the last seven Justices to the Supreme Court, and seven of the nine Justices sitting on the Court now. Republicans have controlled both Houses of Congress for the past ten years, except for the 18-month period after Senator Jim Jeffords (Vt.) left the party, throwing control of the Senate to the Democrats.<sup>2</sup> With the election of George W. Bush to a second term in November of 2004 and the consolidation of Republican control over both Houses of Congress, this emerging majority has taken a solid grasp of the American political landscape. With this success at the ballot box, has there been a Republican legal and political revolution?

Mark Tushnet says there has not been such a revolution, but instead a freezing in place of the 1980 status quo.<sup>3</sup> Tushnet calls this new state of affairs the “chastened” constitutional order.<sup>4</sup> In this new, chastened constitutional order, political parties are increasingly internally united, creating two starkly different visions of America. With two ideologically distinct political parties, major initiatives are difficult to pass. As Tushnet describes it, the “guiding principle of the new regime is not that government cannot solve problems, but

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1. KEVIN PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969).

2. Republicans became the majority party in the Senate in 1995. After the election of 2000 left the Senate with a 50-50 split, the Democrats were the nominal majority from Jan. 3 to Jan. 20, 2001, with Vice President Gore as tiebreaker. When Vice President Cheney took office, the Republicans became the majority, until Senator Jeffords of Vermont left the party in June 2001 and caucused with the Democrats; from June 2001 to November 2003 the Democrats had a 50-49-1 advantage. The 2002 election again resulted in a Republican majority. See [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm).

3. MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

4. *Id.*, *passim*.

that it cannot solve any more problems.”<sup>5</sup> In his review of Tushnet’s book in this Issue, Steven Calabresi argues that Tushnet, following Bruce Ackerman, is wrong to focus on a finite number of constitutional orders.<sup>6</sup> Calabresi argues that if one had to focus on the current political and legal landscape, it could more accurately be described as “libertarian-lite.” Given Tushnet’s background as one of America’s leading constitutional theorists,<sup>7</sup> and a scholar who has written on a variety of topics, from comparative constitutional law<sup>8</sup> to critical legal studies<sup>9</sup> to the NAACP,<sup>10</sup> his arguments are profoundly important. His book is probably the single best comprehensive examination of the Rehnquist

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5. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 63 n.156 (1999) (thanking Mark Graber for this verbal formulation of the new regime). This article was the primary foundation for the book, which is a heavily revised and edited compilation of a series of earlier articles by Tushnet. See Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841 (2001); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000); Mark Tushnet, *Mr. Jones and the Supreme Court*, 4 GREEN BAG 2d 173 (2001); Mark Tushnet, *The Redundant Free Exercise Clause*, 33 LOY. U. CHI. L.J. 71 (2001); Mark Tushnet, *What is the Supreme Court’s New Federalism*, 25 OKLA. CITY. U. L. REV. 927 (2000). See also TUSHNET, *supra* note 3, at x (citing these articles as the basis for his book).

6. Steven Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023 (2005) (“Tushnet agrees with the position . . . that not all constitutional moments happen quickly”). Calabresi argues that Ackerman argues that there have been only three key constitutional moments. *Id.* (noting “Bruce Ackerman’s claim that there has not been a constitutional moment since 1937”); *id.* at 1026 (“I . . . challenge the whole concept of enduring constitutional orders that last for eighty years, in the case of the Founding Republic, seventy years in the case of the Middle Republic, and sixty-five years in the case of the New Deal Era”); *id.* at 1028 (stating that Ackerman argues that major constitutional changes “occur[] every sixty to eighty years when the voters pay a lot more attention to constitutional issues and when they make major settlements, in extra-legal ways, of major, outstanding constitutional issues”). Of course, one of the appeals of Tushnet’s book is its portrait of a gradually emerging series of constitutional changes, TUSHNET, *supra* note 3, at 2 (“Constitutional orders are gradually constructed and transformed”), and although Ackerman focuses on three major constitutional periods, that does not mean he believes there are not major, quasi-constitutional moments that occur in between the major transformations. See, e.g., BRUCE ACKERMAN, *AMERICA ON THE BRINK* (forthcoming 2005); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551 (2004). One does not need a constitutional moment, according to Ackerman’s theory, for there to be major constitutional changes.

7. Tushnet is ranked seventh (tied with Bruce Ackerman) on Brian Leiter’s list of the most cited legal scholars. [http://www.utexas.edu/law/faculty/bleiter/rankings02/most\\_cited.html](http://www.utexas.edu/law/faculty/bleiter/rankings02/most_cited.html) (last visited Mar. 30, 2005).

8. See, e.g., VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. LEGIS. 453 (2003); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435 (2002).

9. See, e.g., MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

10. MARK TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994); MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991* (1997); MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

Court, as Calabresi agrees.<sup>11</sup>

This Review discusses Tushnet's assessment of the constitutional order that he argues has prevailed since 1980. Tushnet aspires to describe the full and complete constitutional *order*—"a reasonably stable set of *institutions* through which a nation's fundamental decisions are made over a sustained period."<sup>12</sup> Given this stated aspiration, Tushnet's book would have been even more compelling if it included a closer examination of the actual activities of the other branches of government.

A closer examination of the politics and policies of the last generation demonstrates an important central dynamic—the increasingly conservative nature of American political discourse and American political parties. Tushnet argues that the Democratic Party has moved sharply to the left, and the Republican Party has moved sharply to the right. Therefore, according to Tushnet, these parties meet in the middle, and meet infrequently there because they are so separated ideologically. I disagree. A review of some of the available evidence about the legislation of the past generation and the political attitudes of citizens and parties indicates that political discourse has moved sharply to the right, so no matter where the parties meet, they are meeting at a point far to the right of where they did in the "old" constitutional order. There are exceptions to this general trend, and there are competing versions of conservatism, but the overall shift is real, and complicates both Tushnet's picture of a chastened constitutional order and Calabresi's picture of a libertarian-lite constitutional order.

Part I of this Review will discuss Tushnet's comprehensive description of the structural characteristics of the new constitutional order, as well as the substantive components of this regime. Part II discusses what Tushnet's efforts might have gained from closer examination of the activities of other branches of government, and Part III considers how such an examination might result in a partial reformulation of some of the institutional and substantive components of the regime of the past generation.

## I. THE NEW CONSTITUTIONAL ORDER ACCORDING TO TUSHNET

Seemingly every discipline in the social sciences has its own sub-field specializing in sweeping characterizations of particular generations or moments. In sociology, Daniel Bell's landmark *The End of Ideology*,<sup>13</sup> written before the tumultuous years of the 1960s, described the general social tenor of the 1950s. Political scientists debate realigning elections, elections that result in a general

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11. Steven G. Calabresi, *supra* note 6, at 1025 ("Mark Tushnet's *The New Constitutional Order* is one of the best books about constitutional theory I have read in a long time.")

12. TUSHNET, *supra* note 3, at 1 (emphasis added).

13. DANIEL BELL, *THE END OF IDEOLOGY* (1965).

political dynamic that rules American politics for a period of thirty-six years.<sup>14</sup> Tushnet's definition of a constitutional order does for constitutional law what these other approaches to scholarship have done for their respective fields. A constitutional order is the order of a particular age or period of time, the defining constitutional ethos or *zeitgeist* of that age. Tushnet defines a constitutional order as:

[A] reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions. These institutions and principles provide the structure within which ordinary political convention occurs, which is why I call them *constitutional* rather than merely political.<sup>15</sup>

Constitutional scholars have long tried to define particular eras of constitutional law, but usually by focusing on the reign of particular Chief Justices. The best scholarship, however, focuses on integrating the activities of the Court with the larger political dynamic of the time.<sup>16</sup> Tushnet succeeds in doing what few have done: integrating the most recent generation of constitutional law with broader political developments.<sup>17</sup> The result is simple, according to Tushnet: Polarized parties increasingly do battle, and with little ground for compromise, little is accomplished.

#### A. THE INSTITUTIONS OF THE NEW CONSTITUTIONAL ORDER

According to Tushnet, the chastened constitutional order is defined by two key institutional characteristics: the persistence of divided government<sup>18</sup> and the emergence of increasingly "ideologically distinct and unified parties."<sup>19</sup> Because of these two central institutional dimensions, the possibility for dramatic change is minimized. There are two parties with radically different views of America, but neither party is able to translate its own extreme views into policy because it must deal with the other, equally extreme party in a system of divided government.

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14. For an excellent recent overview of this scholarship, see DAVID MAYHEW, *ELECTORAL REALIGNMENTS: THE CRITIQUE OF A GENRE* (2003). See generally WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970); JAMES SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENTS AND REALIGNMENTS OF POLITICAL PARTIES IN THE UNITED STATES* (1983); V.O. Key, *A Theory of Critical Elections*, 17 J. POL. 3, 4 (1955).

15. TUSHNET, *supra* note 3, at 1.

16. For good examples of New Deal Court scholarship, see, for example, BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* (1998); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); JEFFREY D. HOCKETT, *NEW DEAL JUSTICE* (1996); RICHARD A. MAIDMENT, *THE JUDICIAL RESPONSE TO THE NEW DEAL: THE U.S. SUPREME COURT AND ECONOMIC REGULATION, 1934-1936* (1992). On the Warren Court, see, for example, LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

17. TUSHNET, *supra* note 3, at 4 ("My approach to regime principles is less Court focused than Ackerman's or Balkin and Levinson's.").

18. TUSHNET, *supra* note 3, at 5, 7, 13, 15-16, 22-23, 26, 32, 100-01.

19. *Id.* at 8.

The general population itself tends to be more ideologically divided than it was in the previous constitutional order, according to Tushnet. “Republican voters are more uniformly conservative and Democratic ones more uniformly liberal than in the past.”<sup>20</sup> Parties have a greater ability to draw favorable congressional districts, so these voters can be better grouped together to place ideological allies together, with “[t]he result . . . that partisan homogeneity in Congress has increased substantially over the past several decades.”<sup>21</sup> Tushnet argues that this is at least partly attributable to the reapportionment decisions of the Supreme Court, which have given greater latitude to state legislatures and allowed them more aggressively to pursue partisan interests, without fearing limiting constitutional principles.<sup>22</sup>

This dramatic ideological divergence—and the greater ability to use the divergence to political advantage—means that we live in an era of divided government. From the election of Ronald Reagan in 1980 until the election of George W. Bush, only twenty-nine out of 279 months have featured one party controlling both the legislature and the executive.<sup>23</sup> The result is that bipartisanship, a rare characteristic of the chastened constitutional age, is necessary to pass major legislation:

Only initiatives that have broad bipartisan support are likely to be enacted, and polarization makes it difficult to assemble a bipartisan majority for major policy initiatives. Both points are important. Bipartisan support can be assembled under the right conditions, and divided government in itself may lead either to “stalemate” or to a “bidding up” phenomenon, depending on the political and policy calculations made by policymakers.<sup>24</sup>

While narrow majorities may have been sufficient to pass broad legislation in the past, the increasing use of the filibuster has prevented such majorities from making broad changes in the chastened constitutional order.<sup>25</sup> In 1995 alone, according to one notable calculation that Tushnet mentions,<sup>26</sup> forty-four percent of the significant pieces of legislation discussed in the Senate had to overcome major procedural problems caused by a minority determined to prevent the legislation’s passage.<sup>27</sup>

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20. *Id.* at 14.

21. *Id.* at 15.

22. *Id.* at 14 (“It can all be traced back to the *Baker v. Carr* decision . . . . Because the districts in Congress are more and more one-party dominated, the American Congress is more extreme. What you have in Congress after 30 years of this redistricting and more polarization by party.”) (quoting a former member of Congress).

23. *Id.* at 15–16.

24. *Id.* at 22.

25. *Id.* at 23.

26. TUSHNET, *supra* note 3, at 23.

27. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 49 (2000); TUSHNET, *supra* note 3, at 2, 8–9.

## B. THE SUBSTANCE OF THE CHASTENED CONSTITUTIONAL ORDER

Jeffrey Segal and Harold Spaeth have used social science methodologies to predict Supreme Court decisions based on the political affiliations of the Justices.<sup>28</sup> William Eskridge<sup>29</sup> and others<sup>30</sup> have focused on the Court as a strategic actor. Some have examined the practical impact of Supreme Court decisions.<sup>31</sup> Tushnet creatively combines these sorts of social science methodologies with doctrinal analysis in order to define a constitutional era. Tushnet also differs from most substantive characterizations of the last generation of constitutional law, which many have described as revolutionary.<sup>32</sup>

According to Tushnet, the previous constitutional regime was defined by the State of the Union message given by President Franklin D. Roosevelt in 1944.<sup>33</sup> Tushnet calls this the “New Deal-Great Society constitutional order.”<sup>34</sup> The New Deal-Great Society constitutional order featured a “Second Bill of Rights,” including “the right to earn enough to provide adequate food and clothing and recreation,”<sup>35</sup> and rights to satisfactory medical care,<sup>36</sup> to a quality education,<sup>37</sup> and to protection from the burdens of growing older and other sources of

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28. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE ATTITUDINAL MODEL* (1993).

29. See especially William N. Eskridge, Jr. & Phillip R. Frickey, *The Supreme Court, 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28 (1994) (examining how “each branch,” including the Court, acts strategically); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) (“[T]his Article . . . develops a model of the Court as a political actor in statutory interpretation. The model is based upon a game played by the Court, Congress, and the President in statutory implementation.”).

30. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

31. Jack Balkin and Sanford Levinson have examined how presidential elections can lead to broad powers to make judicial appointments, and then how these judicial appointments can lead to radical changes. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 2045 (2001). Balkin and Levinson, though, discuss the processes by which constitutional change happens, and do not extensively use social science research. *Id. passim*. Bruce Ackerman examines constitutional change, but he looks at how legal and political events combine to make specific amendments to the Constitution. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* (1998).

32. See, e.g., Balkin & Levinson, *supra* note 31; Seth Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1075–76 (2001) (“[C]onstitutional adjudication has undergone a thoroughgoing paradigm shift”); Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14; Linda Greenhouse, *Ideas & Trends: Divided They Stand, The High Court and The Triumph of Discord*, N.Y. TIMES, July 15, 2001, § 4 (Week in Review), at 1 (“There is a revolution in progress at the court, with Chief Justice William H. Rehnquist and Justices Antonin Scalia, Sandra Day O’Connor, Anthony M. Kennedy and Clarence Thomas challenging long-settled doctrines governing state-federal relations, the separation of powers, property rights and religion.”); Larry D. Kramer, *No Surprise, It’s an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33 (arguing that “conservative judicial activism is the order of the day”); Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (“We are now in the midst of a remarkable period of right-wing judicial activism.”).

33. TUSHNET, *supra* note 3, at 1; see generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

34. TUSHNET, *supra* note 3, at 1.

35. *Id.* at 2.

36. *Id.*

37. *Id.*

economic difficulty.<sup>38</sup> Later, President Johnson expanded much of the New Deal order with his support of the Civil Rights Act of 1964,<sup>39</sup> the Voting Rights Act of 1965,<sup>40</sup> and the creation of Medicare.<sup>41</sup>

This Second Bill of Rights became a stable part of our constitutional system, as it came to be accepted even by Republican Presidents. Twelve years after Roosevelt's speech, President Dwight D. Eisenhower signed the Interstate Highway Act,<sup>42</sup> a piece of legislation that would never have been signed by a Republican president—indeed by any president—in an earlier constitutional order. Republican President Richard M. Nixon was the first national leader to aggressively support affirmative action programs.<sup>43</sup> He also expanded existing food stamp programs<sup>44</sup> and even supported an income floor for some groups.<sup>45</sup>

By contrast, according to Tushnet, these aspirations have been “chastened in the new order.”<sup>46</sup> Rather than affirmative governmental action to secure the rights mentioned in the Second Bill of Rights, government instead “provides the structure for individuals to advance their own visions of justice.”<sup>47</sup> This new constitutional order “remains committed to preserving a baseline of New Deal-Great Society protections for some quality-of-life programs . . . [t]he guiding principle of the new regime is not that government cannot solve problems, but that it cannot solve any more problems.”<sup>48</sup> As Tushnet describes it:

The chastened aspirations of the new constitutional order derive from a somewhat different view of the prerequisites of liberty and flourishing. . . . [S]mall-scale programs with modest aims characterize the new constitutional order: any deficiencies in the provision of health care or in income security after retirement are to be dealt with by market-based adjustments rather than ambitious redistributive initiatives. Similarly, poverty is to be alleviated by ensuring that the poor obtain education and training to allow them to partici-

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38. *Id.*

39. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §2000e (2000)).

40. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

41. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. (codified as amended in scattered sections of 42 U.S.C. (2000)).

42. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (codified as amended in scattered sections of 23 U.S.C.).

43. DEAN J. KOTLOWSKI, NIXON'S CIVIL RIGHTS 9 (2001); Paul Marcus, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 UCLA L. REV. 817, 817-24 (1970).

44. DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* 121-22 (1973)

45. JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY 1900-1994*, at 197 (1994). President Nixon increased Social Security spending by twenty percent, and in 1974 social spending was in general fifty-eight percent higher than it was in President Johnson's Great Society proposals. CHARLES P. BLAHOUS, *REFORMING SOCIAL SECURITY* 70 (2000).

46. TUSHNET, *supra* note 3, at 2.

47. *Id.*

48. *Id.* at 32.



pate actively in the labor market, rather than by providing generous public assistance payments.<sup>49</sup>

This chastened constitutional order “began to take shape with Ronald Reagan’s election in 1980, was given greater definition in the 1994 elections, and was consolidated during the final years of the Clinton presidency.<sup>50</sup> In that process, following the success of the Republican Party in the 1994 mid-term elections, Democratic President Bill Clinton cooperated in pursuing the policies of the new constitutional order.<sup>51</sup> In his first several years in office, Clinton made deficit reduction<sup>52</sup> and the adoption of the North American Free Trade Agreement (NAFTA) central parts of his policy platform.<sup>53</sup>

In the courts, this chastened constitutional order found its home in the “judicially minimalist” Rehnquist Court,<sup>54</sup> a Court that Tushnet argues has not radically redefined the powers of government.<sup>55</sup> Tushnet argues that the major doctrinal innovation of the Rehnquist Court—outlining a more aggressive version of federalism—tends to be more symbolic than substantive, and the

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49. *Id.*

50. *Id.*

51. *Id.* at 1, 10, 11, 13, 26, 105, 167–68.

52. *See, e.g.*, John King, *Clinton Announces Record Payment on National Debt* (May 1, 2000), at <http://archives.cnn.com/2000/ALLPOLITICS/stories/05/01/clinton.debt/> (quoting Clinton as stating, “[w]e should not jeopardize the longest economic expansion in history with risky tax cuts that threaten our fiscal discipline” and citing his budget plans of 1993 and 1997 as part of this approach).

53. NAFTA was negotiated before Clinton took office, but he lobbied vigorously for its passage in Congress, *see* Judith H. Bello, *The Current Status of the North American Free Trade Agreement*, 2 U.S.-MEX. L.J. 5, 6–7 (1994), and he negotiated some amendments to it. *See Agreement on Side Deals Reached Among NAFTA Parties*, Daily Lab. Rep. (BNA) No. 156, at D3 (Aug. 16, 1993). By December 1993, Congress passed a law giving authority for NAFTA to be implemented, Pub. L. No. 103–182, 107 Stat. 1057 (1993), and President Clinton signed that law on December 8, 1993. *See, e.g.*, Betty Southard Murphy, *NAFTA’s North American Agreement on Labor Cooperation: The Present and the Future*, 10 CONN. J. INT’L L. 403, 403 n.2 (1995).

54. Tushnet agrees with the analysis of Cass Sunstein that the Rehnquist Court practices “judicial minimalism.” TUSHNET, *supra* note 3, at 130–38. Tushnet says that “[i]f [Alexander] Bickel’s jurisprudence was appropriate for the New Deal-Great Society constitutional regime, Sunstein’s is equally appropriate for the present one.” *Id.* at 130. Sunstein’s account is found in CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) [hereinafter, SUNSTEIN, *ONE CASE AT A TIME*]; Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Leaving Things Undecided*]. For an excellent critique of Sunstein’s minimalism, *see* Christopher Peters, *Assessing the New Judicial Minimalism*, 110 COLUM. L. REV. 1454 (2000).

55. TUSHNET, *supra* note 3, at 56, 65, 66, 67, and 76. Others have agreed with Tushnet’s assessment of the slight impact that the Rehnquist Court has had. *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 Sup. Ct. Rev. 71; Edward Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001); Keith E. Whittington, *William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 8, 27 (Earl M. Maltz ed., 2003) (“The Rehnquist Court has sought to play a much less prominent, if still important, role within the political system. It has sought to limit the government less by carving out particular preferred freedoms than by imposing new obstacles on the exercise of central government authority. Its focus is less on achieving its preferred society than on avoiding the perceived mistakes of its own predecessors.”).

technical powers of the federal government remain largely the same as they were before the Rehnquist Court.<sup>56</sup> Tushnet applies this argument to the different threads of Rehnquist Court federalism jurisprudence. Regarding the anti-commandeering cases such as *New York v. United States*<sup>57</sup> and *Printz v. United States*<sup>58</sup> that prevent the federal government from using states to enforce federal regulatory programs, Tushnet believes that these decisions are “[l]ess important than they might seem at first”<sup>59</sup> because they still permit the federal government to *directly* regulate activities.

Tushnet argues that the series of Eleventh Amendment cases in which the Rehnquist Court has limited the power of the federal government to authorize private lawsuits against state governments for money damages are of limited import.<sup>60</sup> The 1908 case *Ex parte Young*,<sup>61</sup> which held that a plaintiff can sue a state official to obtain an injunction coercing enforcement of national law, creates an “important limitation” on the federalism cases.<sup>62</sup> The Court has also made it clear that Congress can abrogate sovereign immunity via the Fourteenth Amendment,<sup>63</sup> a power that Tushnet argues has not been substantially limited, even if the Fourteenth Amendment has been interpreted more narrowly recently.<sup>64</sup> Thus, life on the current Court is like life in the other branches of

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56. TUSHNET, *supra* note 3, at 56.

57. 505 U.S. 144 (1992).

58. 521 U.S. 898 (1997).

59. TUSHNET, *supra* note 3, at 44.

60. TUSHNET, *supra* note 3, at 54.

61. 209 U.S. 123 (1908).

62. *See* TUSHNET, *supra* note 3, at 54. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court seemed to implicitly validate *Ex parte Young*. *Id.* at 75 (“Contrary to the claims of the dissent, we do not hold that Congress *cannot* authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme.”).

63. In addition to the Fourteenth Amendment power to abrogate the Eleventh Amendment, Tushnet notes that there the decisions of the Court have left ample room for other branches of government to take advantage of other constitutional provisions. *See, e.g.*, TUSHNET, *supra* note 3, at 40 (stating that the Court’s constriction of the Commerce Clause power is “limited”); *id.* at 58 (arguing that the Contracts Clause is not “promising as a broad constraint” on governmental power); *id.* at 65 (“[t]he goal of the constitutional law of economic regulation in the new constitutional order is to chasten the most aggressive forms of regulation, *not to revolutionize* the regulatory state or restore some imagined era of laissez-faire”) (emphasis added); *id.* at 66 (stating that “[n]o revolutionary return to the past” of the nondelegation doctrine “seems likely”); *id.* at 83 (noting the “Court’s reluctance, at least so far, to take on the question” of congressional power under the Spending Clause).

In *Seminole Tribe*, the Court held that, because the Fourteenth Amendment was later in time than the Eleventh Amendment, Congress could abrogate Eleventh Amendment immunity pursuant to a law passed under the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 65–66.

64. Tushnet has argued:

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. 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.” An enormous swathe of serious national policy falls within these two rules. In particular, the entire

government: Our fundamental commitments remain the same, even if they have not been expanded.

## II. THE METHODOLOGY OF POPULAR CONSTITUTIONALISM

It was just seventeen years ago that Robert Bork was nominated to the Supreme Court, prompting a national debate about the life of the constitution “outside the courts.”<sup>65</sup> Bork argued that the Founders “based a good deal upon the good sense of the people”<sup>66</sup> and therefore that elected representatives should have the capacity to influence constitutional law. In response, Senator Edward Kennedy of Massachusetts argued that “Robert Bork’s America”<sup>67</sup> was a land without judicial review, and hence “a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, [and] rogue police could break down citizens’ doors in midnight raids.”<sup>68</sup> Senator Kennedy’s comments were echoed in one version or another by commentators who worried about the “anarchy” of such a version of constitutional law.<sup>69</sup>

Not even twenty years later, studying the Constitution outside of the courts is one of the hot topics in contemporary constitutional scholarship. However, like the generation of constitutional scholarship before it that implicitly focused on life outside of the courts, much of this new scholarship pays rhetorical homage to the Constitution outside of the courts without actually studying it. If we want to take the Constitution outside of the courts seriously, we have to change the way we write about constitutional law. We need a legitimate populist constitutional law methodology.

For many decades, one group of constitutional scholars has been engaging in a prominent and powerful debate about the *proper* institutional role for courts exercising the power of constitutional review. Yet, as will be briefly discussed here in the context of a few examples, this scholarship tends to focus insufficient attention on the *actual* world of the Constitution outside the courts. Writing in 1962, Alexander Bickel was one of the first modern constitutional

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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.

Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 *IND. L.J.* 47, 49 (2003).

65. For recent discussions of the theoretical issues implicated by this debate, see Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 *Fordham L. Rev.* 1377 (2005).

66. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, 1987: Hearings Before the Sen. Comm. on the Judiciary*, 100th Cong. 114–17 (1987) (statement of Robert H. Bork).

67. 133 *CONG. REC.* S9188 (daily ed. July 1, 1987) (statement of Sen. Edward Kennedy).

68. *Id.*

69. See, e.g., Michael Kinsley, *Meese’s Stink Bomb*, *WASH. POST*, Oct. 29, 1986, at A19; Anthony Lewis, *Law or Power?*, *N.Y. TIMES*, Oct. 27, 1986, at A23; Stuart Taylor, Jr., *Liberties Union Denounces Meese*, *N.Y. TIMES*, Oct. 24, 1986, at A17.

theorists to reference the Constitution outside the courts. Bickel argued that judicial review was “deviant” because it undermined policy decisions made by accountable, elected officials;<sup>70</sup> judges were not accountable, at least at the federal level.<sup>71</sup> As a result, in difficult cases, the Supreme Court should use the “passive virtues,” jurisdictional techniques that allowed the Court to avoid deciding constitutional cases on the merits.<sup>72</sup> Bickel believed that broad judicial review inside the courts hindered constitutional accountability and interpretation outside the courts and that limited judicial review prevented judicial involvement in polarizing political controversies.<sup>73</sup>

Bickel did not seriously engage with the actual activities of the other branches of government.<sup>74</sup> His argument would have been stronger if he had utilized a case study—for instance, how other branches of government actually acted in response to some of the judicial decisions that he believed used the passive virtues—to prove his point about the passive virtues.

Writing in 1982, Guido Calabresi argued that “when the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a ‘second look’ with the eyes of the people on it.”<sup>75</sup> Calabresi argues that invoking this second-look doctrine aims to “to ask, cajole, or force . . . the legislature . . . to define the new rule or reaffirm the old.”<sup>76</sup> Calabresi believes that this dialogue-by-threat technique creates a fruitful legislative-judicial dialogue. But does it? How does the legislature respond to being bullied by the unelected judiciary? Surely we would need to know how the other branches of government actually responded to past examples of the “second look doctrine” to know if this approach is normatively desirable, yet

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70. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (1962). Christopher Peters has written that Bickel argued for judicial “minimalism chiefly as a method of protecting the judiciary’s own place in the constitutional system” because courts were undemocratic and hence deviant. Peters, *supra* note 54, at 1457 (2000).

71. BICKEL, *supra* note 70, at 18.

72. *Id.* at 112 (arguing that “these jurisdictional techniques and like devices have fallen into something of a state of disrepair”). Bickel focused mostly on standing, mootness, and ripeness, doctrines comprising the core of modern constitutional justiciability doctrine.

73. Cf. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1892) (judicial review “has had a tendency to drive out questions of justice and right, and to fill the mind[s] of legislators with thoughts of mere legality . . . . And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it”).

74. Bickel does reference Robert Dahl at one point, see BICKEL, *supra* note 70, at 18–19, and overtones of Dahl appear throughout the book. For instance, compare these two comments: BICKEL, *id.* at 16–28, 128 (“[S]ome do and some do not care to recognize a need for keeping the Court’s constitutional interventions within bounds that are imposed, though not clearly defined, by the theory and practice of political democracy.”); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283 (1957) (“[T]o affirm that the Court supports minority preferences against majorities is to deny that popular sovereignty and political equality, at least in the traditional sense, exist in the United States . . . .”).

75. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 61 (1982).

76. *Id.* at 165–66.

Calabresi does not have much to say on this point.

Likewise, Cass Sunstein, who has argued in favor of a “distinctive form of judicial decision-making” (called judicial minimalism) by which a court “settles the case before it, but leaves many things undecided,”<sup>77</sup> could have benefited from more comprehensively examining the Constitution outside of the courts. Sunstein argues that judicial minimalism promotes democratic deliberation, but in the two cases that he focuses on substantially—*Washington v. Glucksberg*<sup>78</sup> and *Vacco v. Quill*,<sup>79</sup> both cases involving the potential existence of a constitutional “right to die”—Sunstein does not focus much attention at all on what happened in the other branches of government. How did citizens respond to these decisions? This seems like a central point, especially since Sunstein’s main argument for judicial minimalism is that it would actually promote democratic deliberation outside the courts.<sup>80</sup> Sunstein’s book would have benefited from engaging the work of his colleague David Currie on the *Constitution in Congress*.<sup>81</sup>

In his earlier book on the Constitution outside of the courts, Tushnet argued for the near total abolition of judicial review because other branches of government could adequately interpret the Constitution.<sup>82</sup> In that book, as in *The New Constitutional Order*, Tushnet proves comfortable with scholarship from many academic disciplines, but his arguments still could have benefited from more evidence about how these other branches of government actually do interpret the Constitution.<sup>83</sup> Once again, if we to believe that it would be normatively desirable for the other branches of government to take a more central role in constitutional interpretation, we presumably would want to know how they have

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77. SUNSTEIN, ONE CASE AT A TIME, *supra* note 54, at ix (1999). Sunstein also has extensively defended judicial minimalism in a pair of earlier works. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) [[hereinafter SUNSTEIN, LEGAL REASONING]; CASS R. Sunstein, *Leaving Things Undecided*, *supra* note 54.

78. 521 U.S. 702 (1997)

79. 521 U.S. 793 (1997).

80. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 54, at 132 (noting that his position would be “much strengthened by evidence that judicial decisions will in fact spur, or at least be a healthy part of, ongoing processes of public deliberation” and that “there are empirical issues that I have not resolved”).

81. E.g., DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1999); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–29 (2001).

82. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

83. Tushnet does have a chapter on how the Constitution creates incentives for Congress to enforce it, and his analysis is quite penetrating, including frequent mentions of the theories of Madison, *id.* at 96–99, and of Herbert Weschler, *id.* at 99–100. Tushnet does briefly mention how Congress handled one particular statute, *id.* at 101–02, and how it handled the confirmation hearings of Justice Thomas, *id.* at 109. He also has discussions of Proposition 187 from California, *id.* at 6, 18, 19, 30, 193–94, 200 n.67, flag-burning, *id.* at 22, 23, 58–60, 106, 118–30, 130, 156, 178, 179–80, but these are brief discussions and do not include any kind of comprehensive theory about how Congress has actually handled constitutional interpretation. *Id.* at 199 n.58 (“There is a common *intuition* that Congress cannot be trusted to protect either individual rights or federalism issues because of its self-interest . . . Somehow Congress’s power-maximizing interests are thought, not simply to operate alongside of, but to displace its good faith; I know of no reason to adopt that assumption with respect to Congress but not with respect to courts.”) (emphasis added).

handled this responsibility in the past. None of the reviews of his earlier book discuss this issue in any detail.<sup>84</sup>

There are other forms of contemporary constitutional scholarship that study the Constitution outside of the courts, but the questions they are trying to answer make the need for them to examine the actual evidence about the behavior of other institutions less compelling. Keith Whittington, for instance, has studied some examples of congressional constitutional interpretation from previous generations, as a means of drawing some lessons about the behavior of Congress and how it manipulates constitutional concepts.<sup>85</sup> Robert Post and Reva Siegel have argued that the Supreme Court has excessively limited the power of Congress to enforce section five of the Fourteenth Amendment.<sup>86</sup> Their scholarship, though, focuses more on the relationship between constitutional law and culture, and how concepts and understandings that the Supreme Court uses arise out of a general constitutional culture.<sup>87</sup>

In *The New Constitutional Order*, Tushnet describes a “reasonably stable set of *institutions* through which a nation’s fundamental decisions are made over a sustained period.”<sup>88</sup> These institutions include the Supreme Court, but they also include Congress and the executive branch. Since Tushnet’s project is self-consciously descriptive rather than conceptual, one would expect that he would

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84. Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416 (2000); Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359 (2000); James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215 (2000); Scott D. Gerber, *The Judicial Brezhnev Doctrine*, 24 HARV. J.L. & PUB. POL’Y 309 (2000); Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373 (2000); Neil Kinopf, *The Progressive Dilemma*, 75 NOTRE DAME L. REV. 1493 (2000); Joan L. Larsen, *Constitutionalism Without Courts*, 94 NW. U. L. REV. 983 (2000); Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet’s “Thin Constitution”)*, 34 U. RICH. L. REV. 461 (2000); Bruce G. Peabody, *Coordinate Construction, Constitutional Thickness, and Remembering the Lyre of Orpheus*, 2 U. PA. J. CONST. L. 662 (2000); Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541 (1999); Charles Tiefer, *Comparing Alternative Approaches About Congress’s Role in Constitutional Law*, 34 U. RICH. L. REV. 489 (2000).

85. KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999).

86. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Juricentric*].

87. See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law* 117 HARV. L. REV. 4, 8 (2003) (“I shall argue that constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture. Although Rehnquist Court decisions construing the scope of Section 5 power suppress this relationship, analysis of the 2002 Term will demonstrate that the Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law. It follows that to the extent that the Rehnquist Court actually draws confidence from its announced belief that constitutional law is autonomous from culture, that confidence is quite misplaced. Properly read, *Hibbs*, *Grutter*, and *Lawrence* each reveals a Court that defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors.”).

88. TUSHNET, *supra* note 3, at 1 (emphasis added).

have examined in greater detail the actual behavior of the other branches.<sup>89</sup>

Despite its stated ambition, though, the methodology used in the book could have benefited from devoting more attention to the actual behavior of other branches of government, thereby coming closer to fulfilling Tushnet's admirable promise of a complete interpretive picture of the Constitution.<sup>90</sup> Once again, none of the reviews notes this problem in any serious detail,<sup>91</sup> including

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89. *Id.* at 4 (“Ackerman’s way of thinking about our constitutional order has influenced my approach, but I believe that Ackerman’s formalism, derived from his normative concerns, obscures our ability to see clearly the present constitutional order.”).

90. There are other potential questions sounding in methodology that the book raises, such as some complications related to Tushnet’s statement that the new constitutional order is not *revolutionary*. First of all, how much needs to change for there to be some sort of “revolution”? Tushnet calls some changes “substantial,” *id.* at 2, but does not tell us why those changes are or are not enough to make this a *new* constitutional order. Second of all, when Tushnet discusses the *extent* of changes—particularly in constitutional rules—does he mean *doctrinal* or *practical*? Many of the Rehnquist Court federalism decisions are doctrinally revolutionary, but may not have had many revolutionary practical effects.

91. Michael Dorf, in his review, argues that “Tushnet devotes an unusually large portion (roughly two thirds) of *The New Constitutional Order* to Supreme Court cases.” Michael Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1256 (2004). Dorf also suggests that “the main reason why the era of big government is over is that most Americans and their elected representatives like it that way,” *id.*, and criticizes Tushnet for focusing too much on structural factors. Dorf never, though, seriously looks at the actual behavior of Congress or the President, or polling data about how citizens of America feel about a variety of issues. He briefly mentions the 1990 Clean Air Act Amendments as a potential constitutionally new form of regulation. *Id.* at 1266 (“The 1990 Clean Air Act amendments—which substitute a market in pollution emission credits for requirements of specific technology or specific emissions limits—typify the first “deinstitutionalized” form of regulation.”). Besides that, I see no mention of the Constitution outside of the courts.

In his brief review of the book, Alec Walen briefly mentions some potential activity outside of the courts, but besides that stays focused solely on the Constitution in the courts. Alec Walen, *Chastened Ambitions*, 2 INT’L J. CONST. L. 194, 202 (“Were that true, then it would not have been possible for the divided government to pass the Welfare Reform Act of 1996 (adopting time limits and other measures to reduce the welfare rolls), the Anti-Terrorism and Effective Death Penalty Act of 1996 (giving the president new powers to fight terrorism, and making it harder for convicts to appeal death sentences), the Violence Against Women Act of 1998 (establishing a federal cause of action for violence against women), and the USA PATRIOT Act of 2001.”).

Keith Whittington, in his review, does seem to make allusions to the kind of methodological critique I am making. Keith Whittington, *A New Order to the Age?*, 19 J.L. & POL. 417 (2003). For examples, see *id.* at 422 (“Tushnet backs up this conclusion with a careful, persuasive, and methodologically quite conventional analysis of the Rehnquist Court’s major decisions. He provides a readable overview of the Court’s work in federalism, economic liberties, separation of powers, and civil rights and civil liberties, all supporting the chastened aspiration interpretation”); *id.* at 423 (“Although this legal analysis is consistent with Tushnet’s broader argument for interpreting the present constitutional order as one of chastened aspirations, the substantive content of these doctrinal developments is largely left ungrounded”); *id.* (“[rather] than examining the substantive beliefs and policies of this political era, he has chosen to focus on the procedural elements”); *id.* (“There is equally little sense of the political common ground and terms of debate in the 1980s and 1990s. In making gridlock the main story of modern politics, he gives short shrift to the principles that have guided recent political decision making”).

Lucas A. Powe, Jr., is the best on this point. Although he does not note how little Tushnet says on the Constitution outside of the courts, he has much more to say about how important constitutional-order level activity outside of the courts can be. L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647 (2003). For examples, see *id.* at 653 (“If social security or the Civil Rights Act are examples of the prior order, welfare reform typifies the new one, as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996”); *id.* at 656 (“My account begins in November 1963,

Calabresi's review, which argues that we have a libertarian-lite constitutional order but does not generally examine the behavior of institutions besides the Court,<sup>92</sup> and thereby misses out on major weaknesses in Tushnet's argument.<sup>93</sup>

Chapter 1 of *The New Constitutional Order* focuses on the "political institutions of the new constitutional order" and occupies twenty-five pages.<sup>94</sup> These pages are full of compelling arguments about the general structure of the new constitutional order. After these general observations, only tiny portions of other chapters include discussions of life outside the courts.<sup>95</sup> For instance, where are the so-called "super-statutes"<sup>96</sup> that have been passed since 1980, the date that Tushnet believes marked the beginning of the new constitutional regime, and what do these super-statutes say about the new constitutional regime? There were major changes in domestic budget packages offered by President Reagan, including the Economic Recovery Tax Act of 1981<sup>97</sup> and the Tax Reform Act of 1986.<sup>98</sup> These statutes substantially altered our federal spending priorities, and Tushnet's book would have benefited from discussion of them.

Likewise, Tushnet briefly notes that the first President Bush considered the passage of the Americans with Disabilities Act (ADA) to be "one of his administration's most important accomplishments."<sup>99</sup> However, besides this comment, Tushnet only mentions the ADA in the context of the constitutional challenges it faced *in the courts*.<sup>100</sup> The same is true of the welfare reform legislation signed by President Clinton, which Tushnet discusses only in a few

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with the assassination of President Kennedy. Regardless whether Kennedy would have abandoned Vietnam after his assumed reelection in 1964, the assassination changed the mood of the country"; *id.* at 665 ("During an era of decreasing voter turnout, Reagan energized a new group of voters—"born-again" Christians—who were already in the process of ending a decades-long, self-imposed exile from politics"). Indeed, there is just one section that is focused mostly on the Court. *Id.* at 674–780. In his review of Larry Kramer's new book on popular constitutionalism, Powe gives many examples of specific debates and policy agendas outside of the courts, and how Kramer misses these debates and agendas. L.A. Powe, Jr., *Are "The People" Missing in Action (And Should Anyone Care)?*, 83 *TEX. L. REV.* 855, 864–86 (2005).

92. Calabresi's title itself notes that his Review focuses on "the Rehnquist Court." Calabresi, *supra* note 6. In the rest of his Review, Calabresi states that he wants to focus on "the record of our recent presidents and congresses," *id.* at 1026, but he only briefly mentions a few constitutional amendments that Congress introduced but never passed, *id.* at 1036, and besides that just mentions in passing the Social Security Act, the Civil Rights Acts of 1964 and 1965, and the environmental laws. *Id.* at 1037–38.

93. The idea of a libertarian-lite constitutional order, of course, must make some mention of the No Child Left Behind Act, the most substantial federal intervention into education in American history, as well as the massive increase in military spending, the creation of a new national intelligence agency, and the passage of the Patriot Act. Calabresi is silent on all of these developments.

94. Tushnet, *supra* note 3, at 8–33

95. *See, e.g., id.* at 96–101, 106–12.

96. William Eskridge & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215 (2001).

97. Economic Recovery Tax Act of 1981, Pub. L. No. 97–34, 95 Stat. 172 (codified in scattered sections of 26 and 42 U.S.C.).

98. Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

99. TUSHNET, *supra* note 3, at 50–52.

100. *Id.* at 49, 50–51, 77–78, 79.



short passages.<sup>101</sup>

### III. THE DYNAMICS OF THE NEW CONSTITUTIONAL ORDER

This Part examines, however briefly, some of the evidence about the actual behavior of other branches of government. Tushnet is generally right that the Rehnquist Court has not been revolutionary. What Tushnet captures only in part, though, is a changing dynamic outside of the courts. Rather than a more liberal Democratic Party and more liberal Democratic Party voters battling a more conservative Republican Party and more conservative Republican Party voters, the situation is somewhat different.<sup>102</sup> Both parties have moved to the right of the political spectrum, so although Tushnet is right that there has been an increase in partisanship, this has only partly been a result of greater ideological divergences. The consequence of this dynamic is that when the parties agree to pass something, that legislation will typically be to the right of where it would have been a generation ago. Because Tushnet focuses substantially on judicial decisions, he occasionally misses this dynamic and its policy consequences.<sup>103</sup>

#### A. THE INSTITUTIONAL DYNAMICS

The new constitutional order, according to Tushnet, features two ideologically extreme parties, catering to increasingly ideologically extreme voters.<sup>104</sup> The only way that significant legislation can be passed is if some sort of enormously popular policy is proposed, which a bipartisan consensus of political figures can step forward to support.<sup>105</sup> American voters, though, are as a whole no more polarized than they were during the New Deal-Great Society constitutional order. The entire political debate, however, has been shifted to the right, so that whatever compromise the parties reach is farther to the right than the policies of the New Deal-Great Society constitutional order.<sup>106</sup>

Speaking at the 1992 Republican National Convention, Pat Buchanan argued

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101. *Id.* at 72, 114, 170.

102. Tushnet argues that “Republican voters are more uniformly conservative and Democratic ones more uniformly liberal than in the past.” TUSHNET, *supra* note 3, at 14. But the definitions of “conservative” and “liberal” have changed too, so while partisans from both sides are more loyal, all are more conservative. Tushnet states at one point that “the mainstream of the new constitutional order is more conservative than it has been in the recent past,” *id.* at 105, but that comment does not factor at all anywhere else in his book.

103. Michael Dorf, in his review of the Tushnet book, argues that ideology in general is a central but largely missed part of the story. Dorf, *After Bureaucracy*, *supra* note 91, at 1251 (“Tushnet understates the degree to which the chastened constitutional order he described simply reflects the dominant political ideology of the nation as a whole.”).

104. TUSHNET, *supra* note 3, at 14.

105. *Id.* at 22.

106. There are exceptions to this trend, of course. For example, as recent poll results from *The Economist* indicate, over the last ten years support for the death penalty has decreased, while support for legal homosexual relations and legal use of marijuana has increased. See *Social Attitudes: Not Quite Right*, THE ECONOMIST, Feb. 10, 2005, available at [http://www.economist.com/world/na/displayStory.cfm?story\\_id=3649303](http://www.economist.com/world/na/displayStory.cfm?story_id=3649303). And “by a huge 42-19% margin, Americans think they are more liberal than

that “[t]here is a kind of religious war going on in this country, a cultural war as critical to the kind of nation we shall be as the Cold War itself, for this war is for the soul of America.”<sup>107</sup> Some version of Buchanan’s claim—that America is bitterly divided—has become conventional wisdom,<sup>108</sup> and Calabresi heartily endorses it.<sup>109</sup> Tushnet’s argument seems to rely on this division.<sup>110</sup>

As several commentators have recently suggested, however, the country is not as divided as conventional wisdom would have it.<sup>111</sup> In 1964, for example, seventy-seven percent of Americans identified themselves with a party (fifty-two percent as Democrats and twenty-five percent as Republicans), while only seventy-four percent do now (thirty-seven percent Democrat, thirty-seven percent Republican).<sup>112</sup> The differences on many major issues are no more drastic than they were a generation ago. Consider the polarizing issue of abortion. While slightly less than fifty percent of Americans supported *Roe v. Wade*<sup>113</sup> right after it was issued, a little more than sixty percent support the decision now.<sup>114</sup> Democrats are ten to twelve points more likely than Republicans to feel that abortion should be “legal under any circumstances,” but only roughly one-third of Democrats believe that.<sup>115</sup> On the flip side, Republicans are about five to ten points more likely to say “illegal in all circumstances,” but only roughly one-quarter of Republicans take that position.<sup>116</sup> Within a few percentage points, therefore, Democrats and Republicans agree that abortion should be “legal under certain circumstances.” This agreement was borne out by polls taken after the Supreme Court decided *Casey v. Planned Parenthood of South-*

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their parents.” *Id.* Such a liberalizing trend, however, is not reflected in public policy or discussions among political leaders.

107. Nancy J. Davis & Robert V. Robinson, *A War for America’s Soul?: The American Religious Landscape*, in *CULTURAL WARS IN AMERICAN POLITICS: CRITICAL REVIEWS OF A POPULAR MYTH* 26 (Rhys Williams ed., 1997).

108. See, e.g., David Broder, *One Nation, Divisible; Despite Peace, Prosperity, Voters Agree to Disagree*, WASH. POST, Nov. 8, 2000, A1 (“The divide [goes] deeper than politics. It reach[es] into the nation’s psyche.”); John Harwood and Shailagh Murray, *Split Society: Year After Year, The Big Divide in Politics is Race*, WALL. ST. J. Dec. 19, 2002, at A1 (“[T]he real emotional splits in the country lie in gut-level social issues.”).

109. Calabresi, *supra* note 6, at 1025 (stating that the idea of a polarized country “seems to me to be an obviously correct description of the current state of our political parties and, in fact, I cannot remember a time when the two major parties were so internally unified in their mutual dislike of one another”).

110. It is not clear to me that a “moderate” cannot make big changes anyway; perhaps both parties can meet in the center and pass legislation that makes a major policy change (perhaps this is what the No Child Left Behind Act was), unless “moderate” is defined in a way that by definition precludes “moderates” from proposing *major* changes.

111. For notable dissents from the divided country thesis, see MORRIS P. FIORINA, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2004); Robert Samuelson, *Polarization Myths*, WASH. POST, Dec. 3, 2003, at A29.

112. Mark Gersh, *Battlefield Erosion*, BLUEPRINT MAG., Dec. 13, 2004, available at [http://www.ndol.org/ndol\\_ci.cfm?kaid=127&subid=900056&contentid=253080](http://www.ndol.org/ndol_ci.cfm?kaid=127&subid=900056&contentid=253080).

113. 410 U.S. 113 (1973).

114. FIORINA, *supra* note 111, at 36 fig. 4.1.

115. *Id.* at 43 fig. 4.7.

116. *Id.* at 43 fig. 4.8.

*eastern Pennsylvania*<sup>117</sup> in 1992. One survey asked respondents if they agreed with *Casey* after a brief description of its holding.<sup>118</sup> Fifty-eight percent of both Democrats and Republicans said yes.<sup>119</sup>

Instead of Tushnet's claim that the parties are more divided now than in the New Deal-Great Society order, and therefore meet in the middle, I would say that the parties are just as—but no more—divided as before, but that they are divided from a point farther to the right than a generation ago.

To be sure, Tushnet notes that the “mainstream in the new constitutional order is more conservative than it has been even in the recent past.”<sup>120</sup> But he does not expand on this important argument that the center of gravity has shifted substantially. It should matter just as much *where on the political spectrum* the parties are as *how far apart* on that spectrum they are. How far apart they are may provide evidence about the frequency with which the parties will agree on legislation, because it will determine how close the positions of the parties are and therefore how close they are to compromises. But where on the spectrum they are indicates what type of substantive agreements they will reach when they do pass legislation.

Tushnet argues that the Democratic Party is more liberal than it was a generation ago, and while this may be true on some issues, it is not true across the board. In the New Deal-Great Society constitutional order, the Democratic Party nominated clear liberals like George McGovern, Hubert Humphrey, and Adlai Stevenson for President. In the new constitutional order, the Democratic Party has nominated a pro-life Southern Governor (Jimmy Carter), as well as movement centrists like Bill Clinton and Al Gore. Most recently, John Kerry ran on a pro-war, pro-tax cut platform.<sup>121</sup>

The traditional stalwarts of the Democratic Party, at least in the New Deal-Great Society constitutional order, have been organized labor, minorities, and, more recently, women. Centrist groups like the Democratic Leadership Council

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117. 505 U.S. 833 (1992).

118. Survey respondents were read the following passage:

As you may know, the Supreme Court recently decided that a woman still has the right to have an abortion until the fetus is viable, but said that certain restrictions—such as a twenty-four hour waiting period, parental consent for girls under eighteen, and requiring doctors to provide information on alternatives to abortion—are legal as long as an undue burden is not placed on a woman seeking an abortion. In general, do you approve or disapprove of the Supreme Court's decision?

*American Viewpoint*, July 8–13, 1992.

119. *Id.*

120. TUSHNET, *supra* note 3, at 105.

121. The Democratic National Convention Committee, in its platform statement for the 2004 Democratic national convention, noted that “[p]eople of good will disagree” about the justness of going to war against Iraq. It talked about “strengthening” the military. On domestic issues, it spoke of the importance of “free markets” and “[c]utting taxes.” See THE DEMOCRATIC NAT’L CONVENTION COMM., STRONG AT HOME, RESPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA, available at <http://a9.g.akamai.net/7/9/8082/v002/www.democrats.org/pdfs/2004platform.pdf> (last visited Dec. 1, 2004).

(DLC) and the Progressive Policy Institute have now joined these groups at the core of the party.<sup>122</sup> Charles Peters has called this new ideology of the Democratic Party “neoliberalism.”<sup>123</sup> The efforts by these neoliberal groups to defeat Governor Howard Dean’s candidacy from the left for President in 2004 substantially undermined his campaign, demonstrating their power.<sup>124</sup> It was a Democratic President who, as discussed later, proposed the biggest reduction in welfare programs since the creation of welfare.<sup>125</sup> A Democratic President aggressively promoted the reduction of the deficit, even though traditionally deficit reduction had been a conservative issue.<sup>126</sup>

Democrats in the Congress have also become more conservative on many issues. For instance, in the vote on the first Persian Gulf War, Democrats in the House of Representatives overwhelmingly voted against supporting the first President Bush in his effort to pursue military action against Iraq, as did Senate Democrats.<sup>127</sup> By contrast, in 2002, forty percent of House Democrats supported the second Gulf War, and the majority of Senate Democrats supported the war.<sup>128</sup> The Democratic Party has long been the party that was hesitant about free trade. When Congress voted on legislation to authorize NAFTA, though, nearly half of House Democrats voted in favor of it, and half of Senate Democrats voted in favor of it.<sup>129</sup> The platform of the Democratic Party in 2004 supported the war in Iraq, the Patriot Act, and tax cuts.<sup>130</sup>

This move to the right by the Democrats clearly angered many traditional liberals, and the anger of these liberals serves as further proof of the move to the right. It explains the fact that Ralph Nader received 2,882,955 votes in the 2000 presidential election while referencing the parties as the “Republicanrats” and the candidates as “Gush and Bore.”<sup>131</sup> It explains the early success of Governor Howard Dean in 2003, before he was defeated thanks to the assistance of the neoliberal groups of the party.

The Republican Party has also become more conservative on a broad range of issues. This started with President Harry Truman’s executive orders in 1948, one desegregating the armed forces<sup>132</sup> and one mandating non-discriminatory

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122. Indeed, the only President that the Democratic Party has elected during this new constitutional order, Bill Clinton, was one of the founding members of the DLC and was a former president of the DLC. Cf. TUSHNET, *supra* note 3, at 11 (observing that Clinton liked to say “I hope you’re all aware we’re all Eisenhower Republicans . . . and we are fighting the Reagan Republicans”).

123. RANDALL ROTHENBERG, *THE NEOLIBERALS* 244-45 (1984).

124. For an excellent discussion of the Democratic Leadership Council, see KENNETH L. BAER, *REINVENTING DEMOCRATS* (2000).

125. *See infra* notes 212–26.

126. *See supra* note 52.

127. KENNETH BAER, *REINVENTING DEMOCRATS: LIBERALISM FROM REAGAN TO CLINTON* 13 (2000).

128. *Id.*

129. *Id.*

130. *See supra* note 121.

131. Sam Howe Verhovek, *What Makes Ralph (and Pat) Run*, N.Y. TIMES, Oct. 29, 2000, § 4 (The Week in Review), at 5.

132. Exec. Order No. 9981, 3 C.F.R. 722 (1948), 13 Fed. Reg. 4313 (July 26, 1948).

employment practices in the federal government.<sup>133</sup> Led by Strom Thurmond, many angry Democrats switched parties and became core supporters of the Republican Party.<sup>134</sup> In 1964, conservative Arizona Senator Barry Goldwater won the Republican nomination by positioning himself as fundamentally opposed to the New Deal-Great Society constitutional order.<sup>135</sup> With the success of Goldwater in the South, and later Richard Nixon's "Southern Strategy" of using racial issues to separate minorities and working-class whites, and bring the latter into the Republican Party, the Republican Party began to be dominated by westerners and southerners, and started consistently to be more conservative than it was earlier. The nomination and then the election to two terms of Ronald Reagan continued this process.

Before 1994, though, there was still some way to go before the Republicans became solidly conservative. Centrists such as Howard Baker, George H.W. Bush and James Baker were involved in the Reagan Administration, and the two Republican leaders in Congress (Bob Michel in the House and Bob Dole in the Senate) were centrists. With the landslide of 1994, and then the departure of Senator Dole from the Senate to run for President, two more conservative southerners, Newt Gingrich and Trent Lott, became the new leaders.

Remaining moderates had a hard time in the party. Former Massachusetts Republican Governor William Weld, appointed to be the ambassador to Mexico (by a Democratic President as an act of compromise), was rejected by the Senate at least partially because of Weld's more moderate views.<sup>136</sup> In the election of 2000, conservative interest groups such as The National Right to Life Committee and the Christian Coalition attacked moderate Republican presidential candidate John McCain. Organizations like the Club for Growth targeted moderate Republican senators like Lincoln Chafee of Rhode Island and Arlen Specter of Pennsylvania.<sup>137</sup> The result is that there are only a handful of prominent Republican moderates remaining, figures such as George Pataki of New York, former Governor and head of the Environmental Protection Agency (EPA) Christine Todd Whitman, and former Secretary of State Colin Powell. After the election to the Senate of staunch conservatives such as Jim DeMint of South Carolina and Tom Coburn of Oklahoma in 2004, there are by most estimates only five moderate Republicans left in the usually more moderate Senate (Susan Collins and Olympia Snowe of Maine, Lincoln Chafee of Rhode Island, Arlen Specter of Pennsylvania and John McCain of Arizona).

Indeed, in many ways the country in general is more conservative than it was a generation ago, and this is reflected in the changing division of power between the two major political parties. No Democratic candidate for President has won

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133. Exec. Order No. 9980, 3 C.F.R. 720 (1948), 13 Fed. Reg. 4311 (July 26, 1948).

134. MICHAEL LIND, *UP FROM CONSERVATISM: WHY THE RIGHT IS WRONG FOR AMERICA* 24 (1996).

135. BAER, *supra* note 127, at 16–17.

136. *Id.*

137. Alison Mitchell, *Ads Brawl in a Never-Ending Political Season*, N.Y. TIMES, July 3, 2001, at A13.

a majority of the popular vote in nearly thirty years. In 1994, after being out of the majority in the House for forty years,<sup>138</sup> the Republicans won 230 seats.<sup>139</sup> They continued their success over the next decade, winning 226 seats in 1996, 223 in 1998, 221 in 2000, 229 in 2002 and 231 in 2004.<sup>140</sup> In 1936, at the start of the New Deal-Great Society constitutional order, the Democratic Party controlled 333 seats in the House; today it controls 205.<sup>141</sup> This earlier Democratic domination was not just at the start of the New Deal-Great Society constitutional order; in the 89th Congress, in office from 1965-67, Democrats controlled 295 seats and Republicans 240 seats. In 1936, at the start of the New Deal-Great Society constitutional order, the Democratic Party controlled 75 Senate seats; today it controls only 48.<sup>142</sup> The same trend is apparent at the state level. A generation ago, Democrats controlled over two-thirds of seats in state legislatures.<sup>143</sup> In 2002, for the first time since 1952, Republicans won a majority of state legislative seats.<sup>144</sup> A generation ago, Democrats controlled about two-thirds of statehouses.<sup>145</sup> Today, Republicans control 27, and Democrats 23.<sup>146</sup>

Americans have also tended increasingly to identify themselves with the Republican Party instead of with the Democratic Party. Fifty years ago, nearly fifty percent of Americans identified themselves as Democrats,<sup>147</sup> more than twenty percentage points more than identified themselves as Republicans.<sup>148</sup> In 1982, Democrats had a fourteen point edge in identification (forty to twenty-six percent).<sup>149</sup> By 1992, the same proportion of the American population identified themselves as Republicans as identified themselves as Democrats.<sup>150</sup> In a world in which both parties have moved on the ideological spectrum, and the conservative party has enjoyed a political resurgence, it is hard to believe that these structural dynamics would lead to no major substantive changes.

#### A. THE SUBSTANCE OF THE NEW REGIME

##### 1. The Rehnquist Court

As a part of the new constitutional order, the Rehnquist Court has been

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138. Fred Barnes, *The (Finally) Emerging Republican Majority*, Oct. 27, 2003, THE WKLY. STANDARD.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. About 17% Americans generally identify themselves as liberals, and the rest define themselves as either "middle-of-the-road" (about 40%) or "conservative" (about 35%). *Id.*

subject to the same institutional dynamics discussed earlier. Two Justices (Justice John Paul Stevens and Chief Justice William H. Rehnquist) were appointed before President Reagan was elected, so they were appointed in the earlier constitutional regime. Seven Justices have been appointed during this constitutional order, five by Republican Presidents (Justices O'Connor, Scalia, Kennedy, Souter, and Thomas) and two by a Democratic President (Justices Ginsburg and Breyer).

For each one of the nominations, the argument earlier about the shift to the right holds true: The Republican Presidents considered conservative to very conservative nominees, while the Democratic Party considered slightly liberal to centrist nominees. This has led to a range of decisions that are, by and large, to the right of where they would have been a generation ago, although Tushnet is surely correct that these decisions have not been extremely conservative. When faced with a choice between a moderately conservative and a very conservative decision, the Rehnquist Court has often opted for the moderately conservative decision. This moderate element of the Rehnquist Court becomes evident by glancing, once again, at the actual life of the Constitution outside of the courts. In many instances, Congress was able to create alternative pieces of legislation that were almost identical to the original statutes that the Court invalidated.<sup>151</sup> To be sure, Tushnet's compelling argument that the Court has not revolutionized our political and daily lives may be true of all Supreme Courts, but that is a broader claim, beyond the scope of this Review.

Tushnet argues that the anti-commandeering cases, *New York* and *Printz*, left ample room for the federal government to pursue its desired goals.<sup>152</sup> As a result, Congress has passed several laws that would coerce state courts, for instance, and has passed several of these pieces of legislation. One such law, the Y2K Act of 1999<sup>153</sup> specifies a procedure to be followed in disputes in both federal and state court related to Y2K failures, specifically because such procedures were necessary to ensure that Y2K problems "do not unnecessarily disrupt interstate commerce."<sup>154</sup> The statute requires potential plaintiffs to send written notice to defendants before bringing suit, and to delay filing for a specified period pending possible settlement.<sup>155</sup> This statute also requires parties to abide by a series of special pleading requirements<sup>156</sup> and describes a special

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151. After *Lopez* and *Kimel*, the Court was able to pass legislation to respond to the Court's decision. On a related point, Calabresi's argument that the laws *invalidated* in the federalism cases were "major federal statutes," Calabresi, *supra* note 6, at \_\_\_ (emphasis added), seems hard to sustain. While the Americans with Disabilities Act is a major statute, the provisions called into question by Court decisions were minor provisions and could still be enforced in other ways. The Violence Against Women Act had only been used in a small number of cases, and the Religious Freedom Restoration Act, after it was invalidated in *Boerne*, was quickly replaced by another statute.

152. See *supra* note 78 and accompanying text.

153. 15 U.S.C.A. §§6601–6617 (West Supp. 2000).

154. §6601(a)(4).

155. § 6606(e)(1).

156. § 6607(b)-(d).

set of rules regarding class actions.<sup>157</sup> The Y2K statute illustrates how much room the *New York* and *Printz* Courts had left for Congress. While several senators debated its constitutionality, raising serious concerns,<sup>158</sup> Congress still was able to pass it.

Indeed, the argument that the Rehnquist Court has not radically transformed the daily life of the nation is perhaps most strongly reinforced by its most high-profile decision: *Bush v. Gore*.<sup>159</sup> Surprisingly, this case hardly features in the Tushnet book,<sup>160</sup> in the Calabresi review,<sup>161</sup> or indeed in many of the general reviews of the tenure of the Rehnquist Court.<sup>162</sup> Many felt—and still feel—that the case “is one of the most important Supreme Court decisions in American history.”<sup>163</sup> At some level, this is absolutely and undeniably true: The Supreme Court intervened in the midst of a closely divided and contested presidential election. That alone is enough to make it a subject of substantial interest.

In terms of immediate impact, though, the idea that the case is “worse than *Dred Scott*”<sup>164</sup> is not quite correct. The *Bush v. Gore* doctrinal principle—that equal protection requires “formulation of uniform rules to determine [voters’]

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157. § 6614(a)-(b).

158. Surprisingly, there were objections by many Democrats. Senator Patrick Leahy (D-VT) argued that the bill is “an arrogant dismissal of the basic constitutional principle of federalism.” 145 CONG. REC. S8020 (daily ed. July 1, 1999) (statement of Sen. Leahy). Senator Fritz Hollings (D-S.C.) believed that the statute ignored the Tenth Amendment. 145 CONG. REC. S4411 (daily ed. Apr. 29, 1999) (statement of Sen. Hollings).

159. 531 U.S. 98 (2000).

160. TUSHNET, *supra* note 3, at 3, 7, 32, 127–28, 136, 139, 198 n.182. The first two references to the case are in the context of an argument made by others about the case, to which Tushnet just briefly references. *Id.* at 3, 7. Other references are generally brief. *Id.* at 32, 136, 139, 198 n.182.

161. Calabresi only mentions the case twice. Calabresi, *supra* note 6, at 1048, 1059.

162. None of the other reviews of the Tushnet book discuss the case in any great detail. Dorf, *supra* note 91, at 1249 n.22 (mentioning the case only as it is cited in the title of another article); Powe, *The Not-So-Brave New Constitutional Order*, *supra* note 91, at 648, 673, 678, 680 (briefly mentioning the case as an example of how one might argue that the Rehnquist Court is revolutionary); Walen, *supra* note 114, at 204 n.42 (briefly mentioning the case); Whittington, *supra* note 91 (failing to mention the case). John McGinnis’s overview of the Rehnquist Court, probably the best before Tushnet’s marvelous effort, says the case is not worth studying. John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 521 n. 175 (2002). (“In any event, *Bush v. Gore* concerned a putative constitutional crisis and not the construction of constitutive structures to generate beneficial social norms on a day-to-day basis, which is the subject of this Article.”). Thomas Merrill’s piece has a slightly more sustained discussion of the case. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 650–51 (2003).

163. Erwin Chemerinsky, *How Should We Think about Bush v. Gore*, 34 LOY. U. CHI. L.J. 1, 20 (2002).

164. Jed Rubenfeld, *Worse than Dred Scott*, in *BUSH V. GORE: A QUESTION OF LEGITIMACY* (Bruce A. Ackerman ed., 2002); Sanford Levinson, *Return of Legal Realism*, THE NATION, Jan. 8, 2001 (“The Court’s decision in *Bush v. Gore*, however, seems an exercise in low rather than high politics . . . [It] is all too easily explainable as the decision by five conservative Republicans—at least two of whom are eager to retire and be replaced by Republicans nominated by a Republican president—to assure the triumph of a fellow Republican who might not become president if Florida were left to its own legal process.”).



intent”<sup>165</sup>—was quite broad. This principle, despite one attempt by a panel of the Ninth Circuit in the California recall case,<sup>166</sup> has not been used in any great detail by any other court since *Bush v. Gore*.<sup>167</sup> By the time President Bush was sworn in as President in 2001, it appeared that Bush would have won even if Gore had succeeded with the claims that he pressed in court.<sup>168</sup> *Bush v. Gore* has not affected public respect for the Court,<sup>169</sup> despite what some predicted.<sup>170</sup>

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165. *Bush v. Gore*, 531 U.S. 98, 106 (2000).

166. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003). The panel relied on *Bush v. Gore* to establish the proposition that “right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.* at 895 (quoting *Bush v. Gore*, 531 U.S. at 105, quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Because “the fundamental right to have votes counted in the special recall election is infringed because the pre-scored punchcard voting systems used in some California counties are intractably afflicted with technologic dyscalculia,” *Southwest Voter Registration Educ.*, 344 F.3d at 892, the Ninth Circuit panel delayed the recall election. On rehearing en banc, the Ninth Circuit overturned this decision. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003). The en banc panel discussed *Bush v. Gore* very briefly in one place, *id.* at 917, and only slightly more in depth in another place. *Id.* at 918 (“In *Bush v. Gore*, the leading case on disputed elections, the court specifically noted: ‘The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.’”) (quoting *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

167. My research indicates that the case has been cited by courts 124 times since it was issued, but never as a central part of the decision of any court (Westlaw search on November 1, 2004).

168. *See, e.g., Review Shows Bush Gained 6 Votes in Miami-Dade County*, FLA TIMES UNION, at B3 (Jan 16, 2001).

169. In September of 2000, nearly two-thirds of Americans expressed confidence in the Court; in June 2001, the number was essentially the same. Jeffrey M. Jones, *Hispanics, Whites Rate Bush Positively, While Blacks Are Much More Negative*, Gallup News Service, June 21, 2001. Tushnet, in his one, slightly longer, discussion of *Bush v. Gore*, says this is because Republicans viewed the Court in even higher terms and Democrats in even worse terms. TUSHNET, *supra* note 3, at 127-28 (“Survey evidence indicates that contrary to the views of some, mostly liberal, scholars, the Court as an institution did not suffer substantial damage to its reputation, at least in the short term, by giving the 2000 presidential election to George W. Bush. What did happen is more interesting: The Court suffered no *net* harm, because its losses among Democrats were offset by gains among Republicans.”). This was true at first, but now the numbers have changed back to their pre-*Bush v. Gore* levels.

170. *Bush v. Gore*, 531 U.S. 98, 128-29 (Stevens, J., dissenting) (“The endorsement of [the majority’s position] can only lend credence to the most cynical appraisal of the work of judges throughout the land. . . . Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”); *id.* at 157 (Breyer, J., dissenting) (“[T]he participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. [A]bove all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.”); ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 3 (2001) (“The five Justices who ended election 2000 . . . have damaged the credibility of the U.S. Supreme Court, and their lawless decision . . . promises to have a more enduring impact on Americans than the outcome of the election itself.”).

It is possible that the Rehnquist Court decisions were dramatically important, but more because of their role in consolidating earlier, more liberal decisions on controversial social issues, simply by defying expectations. For instance, *Roe v. Wade*<sup>171</sup> was a controversial decision even at the time it was issued. When Ronald Reagan took control of the Republican Party, opposition to *Roe* became part of the Republican Party platform.<sup>172</sup> The Reagan Justice Department decided to push to have the Court overrule *Roe*.<sup>173</sup> With the appointment of new Justices, Justices that everyone assumed would be opposed to *Roe*, the demise of the case seemed imminent.

With the appointment of Clarence Thomas in 1991, Justice White was the only remaining Justice appointed by a Democratic President, but he had opposed *Roe*. The Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>174</sup> invalidating a Pennsylvania law requiring a husband's consent for abortion, was something of a surprise. Justice Kennedy had earlier joined the opinion for the Court in *Webster* and had decided to confront *Roe*.<sup>175</sup> But in *Casey*, he joined Justices O'Connor and Souter in writing for the Court to uphold the "essence of *Roe*."<sup>176</sup> Given the expectations of what was going to happen to *Roe*, the fact that *Roe* was legitimated in this way reiterated how hard it would be to change *Roe*.

The same dynamic has prevailed for the use of race in government decisions. At its political and policy peak, affirmative action was still not a popular policy with the Court. Even in *Regents of the University of California v. Bakke*,<sup>177</sup> the Court, although permitting race as a consideration in college admissions,<sup>178</sup> was sharply critical of the quota policy used by the University of California at Davis Medical School.<sup>179</sup> In 1989, in *City of Richmond v. J.A. Croson Co.*,<sup>180</sup> the Court invalidated an affirmative action program for minority businesses in Richmond, Virginia. The Court decided that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."<sup>181</sup> It seemed that either *Bakke* would be overruled, as it was at the state level via initiatives in a variety of states, or that the application of strict scrutiny truly would be "strict in theory, fatal in fact."<sup>182</sup>

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171. 410 U.S. 113 (1973).

172. See David M. O'Brien, *Reagan Justice Policy*, in W. ELLIOT BROWNLEE & HUGH DAVIS GRAHAM, EDs., *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* (2003).

173. *Id.*

174. 505 U.S. 833 (1992).

175. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 498 (1989).

176. *Casey*, 505 U.S. at 846.

177. 438 U.S. 265 (1978).

178. *Id.* at 319-20.

179. *Id.*

180. 488 U.S. 469 (1989).

181. *Id.* at 494.

182. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Nonetheless, the Court's decision in *Grutter v. Bollinger*<sup>183</sup> affirmed the *Bakke* holding that a "[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."<sup>184</sup> The Court explicitly addressed—and independently affirmed—the analysis in *Bakke*,<sup>185</sup> solidifying the legality of affirmative action in the face of social and political expectations that *Bakke* would be overruled and that any consideration of race would be forbidden.

In many areas, of course, the Court has adopted quite conservative positions, but Tushnet understates this by focusing mostly on federalism decisions.<sup>186</sup> The Court, for instance, has been incredibly strict in its rulings regarding desegregation efforts, saying that continued de facto segregation is permissible if it is due to reasons of individual choice and/or problems with inherent constraints on judicial capacity to remedy segregation.<sup>187</sup> The result has been a large number of lower court cases ending desegregation efforts,<sup>188</sup> and the massive re-segregation of the South.

And the Rehnquist Court has also consistently ruled in favor of the government in criminal procedure cases, which occupy a substantial portion of the Court's docket. In 1989, in *Teague v. Lane*,<sup>189</sup> the Court made it much harder to obtain habeas corpus relief.<sup>190</sup> The Court has also enforced a narrow interpretation of the limits that the Fourth Amendment places on law enforcement officials.<sup>191</sup> These decisions and areas of law make a relatively brief appearance in Tushnet's book, which is problematic given their importance to most people's lives—a single Fourth Amendment decision, for example, may affect the day-to-day decisions of thousands of police officers and the millions of citizens who interact with them.

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183. 539 U.S. 306 (2003).

184. *Id.* at 328.

185. *Id.* (stating that *Bakke* had served as the "touchstone for constitutional analysis").

186. TUSHNET, *supra* note 3, at 36-57, 82-90 (discussing issues related to federalism); *id.* at 57-73 (briefly discussing each of the many other areas of constitutional law).

187. *E.g.*, *Freeman v. Pitts*, 503 U.S. 467, 492 (1992) (holding that a court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power); *Missouri v. Jenkins*, 515 U.S. 70, 89 (1994) (noting that "[t]he ultimate inquiry is 'whether the constitutional violator has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable'") (internal citations omitted).

188. *NAACP, Jacksonville Branch v. Duval County Sch.*, 273 F.3d 960 (11th Cir. 2001); *Belk v. Charlotte-Mecklenburg Board of Ed.*, 269 F.3d 305 (11th Cir. 2001).

189. 489 U.S. 288 (1989).

190. Under *Teague*, a prisoner cannot enforce a "new rule" of law in a federal habeas corpus proceeding (with only two narrow exceptions) if it turns out that this "new rule" was announced after the prisoner's conviction became final. *See Odell v. Netherland*, 521 U.S. 151 (1997).

191. *United States v. Drayton*, 536 U.S. 194 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *United States v. Sokolow*, 490 U.S. 1 (1989); *Florida v. Riley*, 488 U.S. 445 (1989).

## 2. The Political Branches

A great degree of legal scholarship, to the extent it focuses on life outside of courts, focuses on larger political trends without discussing public policy developments.<sup>192</sup> Tushnet is right to direct us to these developments as a central part of the story of any constitutional order.<sup>193</sup> In reality, as Theodore Lowi put it, the changes of the last generation “left all of the New Deal state intact but made it almost impossible for it to work. Drastic tax cuts coupled with maintenance of defense [] commitments effectively killed government capacity.”<sup>194</sup> Because the political discussion started from a more conservative point, the policy outcomes were far to the right of the policies of the previous generation.

This all started when Ronald Reagan was elected President in 1980, winning forty-four out of fifty states. Reagan had campaigned as the first ideological conservative since Barry Goldwater in 1964, and his election has been analyzed by some as the beginning of a new age of American politics.<sup>195</sup> In 1981, Reagan started to promote his budget. The Democrats objected to some of his proposals, but many started from the quite conservative position that there should be broad tax cuts for all income brackets. The eventual substantive result was dramatic: the Reagan budget cut taxes on the top income bracket from seventy percent to twenty-eight percent, severely cut food stamp programs, and cut billions of dollars other social service programs.<sup>196</sup>

In 1985, Reagan proposed a budget that would have eliminated thirteen important domestic social spending programs.<sup>197</sup> Democrats again started from the point of agreeing that some of these programs should be limited; they just did not favor abolishing them altogether.<sup>198</sup> Reagan also proposed altering Social Security, by increasing some benefits but tightening the administration of the program and limiting disability benefits.<sup>199</sup> In the final vote the Reagan bill

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192. Without a doubt, Peter Schuck is right to note several of the reasons that law professors do not engage in empirical research: The lack of training, time constraints, ideology, absence of rewards for such research, and so on. Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEG. EDUC. 323, 331-33 (1989). Unlike doing surveys or other forms of “empirical” research, though, studying the activities of Congress can be done in substantial fashion by reading the statute books and the formal records of Congress.

193. Tushnet himself admits this. TUSHNET, *supra* note 3, at 1 (stating that the “constitutional order extends beyond the Supreme Court and includes the national political parties, Congress, and the presidency”); *id.* at 4 (“I believe that *constitutional* principles can be, and typically are, reflected in the statutes that characterize successive constitutional orders”).

194. See GARY WILLS, REAGAN'S AMERICA xiv (2000) (quoting Lowi).

195. See generally ROBERT DALLEK, RONALD REAGAN: THE POLITICS OF SYMBOLISM (1999); see also John L. Palmer & Isabel V. Sawhill, *Overview*, in THE REAGAN RECORD: AN ASSESSMENT OF AMERICA'S CHANGING DOMESTIC PRIORITIES 1 (John L. Palmer & Isabel V. Sawhill eds., 1984) (“Not since 1932 has there been such a redirection of public purposes.”).

196. See WILLS, *supra* note 194, at 13–14.

197. CHARLES P. BLAHOUS III, REFORMING SOCIAL SECURITY 18 (2000).

198. *Id.*

199. SYLVESTER J. SCHIEBER & JOHN B. SHOVEN, THE REAL DEAL: THE HISTORY AND FUTURE OF SOCIAL SECURITY 186–87 (1999).

passed a Democratic Senate and House.<sup>200</sup>

President Clinton, the former head of the centrist Democratic Leadership Council (DLC), defeated several more liberal competitors in the Democratic primaries in 1992, such as Senator Tom Harkin of Iowa and former Governor Jerry Brown of California, and became the Democratic nominee for President. Clinton ran from the political center, and former DLC policy activists such as Bruce Reed dominated his Administration. Initially, though, President Clinton pushed a series of aggressively old-fashioned liberal initiatives. It was at least partially the failure of these initiatives (coupled with the midterm losses suffered in 1994, perhaps because of these failures) that caused his retreat back to the center, and the solidification of the much more conservative new constitutional order.

The first failure was his health care plan, called the Health Security Act.<sup>201</sup> All citizens and legal immigrants would have received a card guaranteeing them health care benefits. This program, as Joe Klein noted, was “more of an Old than a New Democrat”<sup>202</sup> policy solution, and the Clinton health care proposal did not survive in Congress, barely attracting the support of his own party.

President Clinton’s first budget reflected the new constitutional order. Clinton, a Democratic President, proposed cutting spending by hundreds of billions of dollars,<sup>203</sup> including cutting \$2.8 billion in Title XX funds that provided family support.<sup>204</sup> He also proposed cutting taxes by \$351 billion over ten years,<sup>205</sup> and making substantial changes in the structure of several social welfare programs. While the parties bitterly disagreed about their respective budget proposals, the discussion was already far to the right of where one would have expected it to be in the previous constitutional order. Eventually, Clinton’s budget passed, but without a single Republican vote in either the House or the Senate.<sup>206</sup>

The debate about the North American Free Trade Agreement (NAFTA) further demonstrates the increasingly conservative attitudes of voters in the country and of the parties. Liberals had consistently opposed free trade agreements in the past.<sup>207</sup> While Representatives Richard Gephardt (D-MO) and

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200. *Id.*

201. Health Security Act, H.R. 3600, S. 1757, 103d Cong. § 1001 (1993).

202. JOE KLEIN, *THE NATURAL: THE MISUNDERSTOOD PRESIDENCY OF BILL CLINTON* 119 (2002).

203. HOWARD JACOB KARGER & DAVID STOESZ, *AMERICAN SOCIAL WELFARE POLICY: A PLURALIST APPROACH* 238 (2002).

204. *Id.* at 425.

205. *Id.* at 238.

206. Lloyd N. Cutler, *All for None*, WASH. POST, Sept. 12, 1993, at C7. I am not arguing that the parties are identical, but rather that they are more conservative than they were a generation ago. Clearly, there are big differences—in regards to the Clinton budget bill, for instance, in addition to the spending increases the Democratic proposal to raise taxes on higher income brackets was approved. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, 1993 U.S.C.C.A.N. (107 Stat.) 312. *See also* CHARLES P. BLAHOUS III, *REFORMING SOCIAL SECURITY* (2000).

207. I.M. DESTLER, *AMERICAN TRADE POLITICS* 222–28 (3d ed. 1995).

David Bonior (D-MI) opposed NAFTA throughout its consideration,<sup>208</sup> the leader of the Democratic Party, President Clinton, supported it. Republican leaders supported it as well. This was demonstrated by a public appearance in September 1993 in which President Clinton stood with Presidents Ford, Carter and President Bush Sr. to demonstrate their solidarity in support of NAFTA.<sup>209</sup> NAFTA passed 234 to 200 in the House, with one-third of Democrats and two-thirds of Republicans voting for it. In the Senate, it passed by a vote of sixty-one to thirty-eight.<sup>210</sup>

The same dynamic prevailed when President Clinton pushed welfare reform, with increasingly conservative parties battling, but battling far to the right of where they had been a generation ago. In the New Deal-Great Society constitutional order, President Nixon spoke of a guaranteed minimum income.<sup>211</sup> When the welfare debate started under the Clinton Administration, politics were very different. President Clinton announced that he wanted to “end welfare as we know it . . . to change it from a system based on dependence to a system that works toward independence . . . to change it so that the focus is clearly on work.”<sup>212</sup> The welfare reform bill that President Clinton introduced in Congress on June 21, 1994, as the Work and Responsibility Act (WARA) of 1994 was far to the right of what any Democratic President would have proposed in the last constitutional order. Its treatment of key concepts like time limits and work requirements related to welfare payments were particularly conservative.<sup>213</sup>

Again, this is not to say that the Republican proposal was not very different, or that there were not strong partisan disagreements, as Tushnet’s description of the new institutional order would suggest. For instance, Clinton vetoed the first two reform proposals sent to him because he stated that they were “too harsh on children.”<sup>214</sup> After the eventual compromise welfare bill was passed, several liberal figures, including Assistant Health and Human Services Secretary Peter Edelman, resigned in protest.<sup>215</sup>

The substantive change that resulted from this new institutional dynamic was surely very significant. As historian Charles Noble wrote:

The changes were historic. AFDC was converted to a block grant, ending its entitlement status. A tough work requirement was imposed: the law required

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208. *Id.* at 16.

209. *Id.*

210. *Id.*

211. PATTERSON, *supra* note 45, at 168, 197 (1994).

212. William Clinton, Remarks by the President to Officials of Missouri and Participants of the Future Now Program (June 14, 1994), *available at* 1994 WL 258369, at 3.

213. See generally Larry Cata Backer, *Welfare Reform at the Limit: The Futility of Ending Welfare as We Know It*, 30 HARV. C.R.-C.L. L. REV. 339 (1995).

214. Todd S. Purdum, *Clinton Seeks New Welfare Bill, Saying G.O.P. Plan is Too Harsh*, N.Y. TIMES, Apr. 19, 1995, at 4.

215. See, Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43.

states to place at least 25% of cash welfare recipients into jobs or work programs by 1997, and 50% by 2002. Adults who failed to find work within two years were to be denied all federal funds. No one could receive federal cash assistance for more than five years. States could deny welfare benefits to women who had additional children while on welfare, and to unmarried persons under eighteen. Federal funds were denied to unmarried parents under eighteen who did not live with an adult and attend school. Legal immigrants' access to any form of public assistance was radically limited. In one fell swoop, the nation had given up its commitment to income maintenance as a right.<sup>216</sup>

Rather than an ideologically liberal party battling—and failing to agree—with an ideologically conservative party, in fact the evidence from the past generation seems to demonstrate that two parties, both farther to the right of where they were a generation ago, now reach the occasional agreement far to the right of the policies of the past generation.

#### CONCLUSION

It is always difficult to know when one constitutional order stops and another begins. Is it too early to say that we are in a new constitutional order? Some have suggested that September 11, for instance, could result in a general increase in trust in government, leading to a re-evaluation of federalism and other constitutional structures and a potentially new constitutional order.<sup>217</sup> While trust in government did increase at first,<sup>218</sup> it is now sunk back to its pre-September 11th depths.<sup>219</sup>

So what will the future hold for our constitutional order?<sup>220</sup> For one thing, foreign policy has once again emerged as an issue of substantial concern for the American people. In June of 2002, the Democratic Congressional Campaign Committee publicized a poll that showed that more than half of likely voters felt that domestic issues were the most important to them, while less than one in three voters felt that foreign policy and the war on terrorism were the most important issues.<sup>221</sup> But the 2002 elections were a clear triumph for the Republi-

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216. CHARLES NOBLE, *WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE* 128 (1997).

217. See, e.g., Powe, *supra* note 93, at 680-87; Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. Times, Sept. 30, 2001, § 4, at 14.

218. See Richard Morin & Claudia Deane, *Poll: Americans' Trust in Government Grows*, Sept. 28, 2001, at <http://members.cox.net/fweil/WP010928.htm>.

219. See Claudia Deane, *Trust in Government Declines: Post-9/11 Jump in Americans' Confidence in Washington is Fading*, WASH. POST, May 31, 2002, at A29, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A36238-2002May30>.

220. Although Tushnet's book was published in 2003, it is almost entirely about events predating the presidency of George W. Bush. For instance, his only mention of the second Bush presidency is his speculation that the new President Bush might look at to Abraham Lincoln as a guide about how to exercise presidential leadership during times of potential crisis. TUSHNET, *supra* note 3, at 108.

221. Press Release, Democratic Congressional Campaign Committee, *More Good News for Democrats*, June 26, 2002 (on file with author).

cans and their use of foreign policy and national security issues to defeat Democrats such as Max Cleland of Georgia. The war in Iraq and terrorism were by far the most important issues of the presidential campaign in 2004. By an eighteen-point margin, voters said that they trusted President Bush more than Senator Kerry to handle the war on terrorism. This explains President Bush's significant gains among women, particularly white working women.<sup>222</sup> Does this portend a unified Republican government,<sup>223</sup> riding the coattails of its more popular foreign policy, and presiding over a government with the voting majorities that would enable it to push a strong conservative agenda?

And what about the Supreme Court? If recent terms are any example, perhaps the Court is moving to the left. In *Nevada Department of Human Resources v. Hibbs*,<sup>224</sup> the Court upheld the constitutionality of the popular Family and Medical Leave Act, despite previous pro-state decisions that indicated the statute might be vulnerable.<sup>225</sup> In *Grutter v. Bollinger*,<sup>226</sup> the Court used broad language to validate race-conscious programs. In *Lawrence v. Texas*,<sup>227</sup> the Court spoke of "liberty of the person both in its spatial and more transcendent dimensions"<sup>228</sup> in invalidating state sodomy prohibitions.

These cases are also interesting from a comparative institutional perspective. It is hard to imagine the new Republican Congress voting to approve any of these decisions, yet it is also hard to imagine that a majority of the American people would disagree with the decisions. With unified Republican government for at least two more years, and likely more, perhaps the near future will involve a very conservative President and Congress doing battle with a more moderate Court (and country).

No matter what is to come in the future, though, Tushnet's comprehensive and compelling book paints a clear way forward for constitutional scholarship. In the era of popular constitutionalism, looking at Supreme Court decisions alone should not suffice. Tushnet shows us how to avoid this yet still focus on judicial decisions: we can integrate judicial decisions into a larger political and social fabric that, when all put together, create what can be called a "constitutional order."

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222. See Will Marshall, *Heartland*, BLUEPRINT MAG., Dec. 13, 2004, available at [http://www.ndol.org/ndol\\_ci.cfm?kaid=127&subid=171&contentid=253055](http://www.ndol.org/ndol_ci.cfm?kaid=127&subid=171&contentid=253055).

223. There are, of course, two ways of viewing the elections of 2004. On one hand, if 60,000 George W. Bush voters in Ohio had voted for Senator Kerry instead, we would be talking about the potential reversal of the two Reagan and two Bush Administrations. On the other hand, Vice President Gore won by at least 540,000 votes nationally, but President Bush won in 2004 by 3.5 million popular votes (and President Clinton won by 8 million votes in 1996). See Mark Gersh, *Battlefield Erosion*, BLUEPRINT MAG., Dec. 13, 2004, available at [http://www.ndol.org/ndol\\_ci.cfm?kaid=127&subid=900056&contentid=253080](http://www.ndol.org/ndol_ci.cfm?kaid=127&subid=900056&contentid=253080).

224. 538 U.S. 721 (2003).

225. See particularly *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

226. 539 U.S. 306 (2003).

227. 539 U.S. 558 (2003).

228. *Id.* at 562.