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“Still Chastened”: Assessing the Scope of Constitutional Change under an “Obama Court”

Robert R. Robinson

Abstract

For the first time since 1968, the election of Barack Obama raises the possibility of a liberal majority on the Supreme Court. In this article, I assess whether such an “Obama Court” would lead to significant constitutional change. Drawing on research regarding both the internal dynamics of the Supreme Court and the effect of the Court’s external environment, I develop four benchmarks that historically correlate with more rapid and significant constitutional change. Taking each benchmark in turn, I argue that an Obama Court would lack the vision, the desire, and the power to fundamentally reshape the constitutional status quo. Instead, an Obama Court would likely be a mirror image of the later Rehnquist years, drifting to the left on the resolution of some constitutional problems, but in essence remaining a “chastened” institution mainly limited to incremental doctrinal change.

KEYWORDS: Supreme Court, Obama, political time, constitution, nomination

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Pundits who covered the 2008 presidential campaign drew attention to several unusual aspects of Barack Obama's candidacy, including his heritage, race, and rhetorical ability. Court watchers, however, may have also been interested in his experience as a professor of constitutional law. What would the election of someone so unusually familiar with Court doctrine mean for the future of the Supreme Court? During the campaign, conservative critics warned that Obama had previously advocated for radical constitutional change, such as reviving the abandoned doctrine of due process for welfare rights or pushing for the judicially mandated redistribution of wealth (Andrews 2008). Another reading of the same comments, however, suggested that Obama had embraced the conclusions of his former Chicago colleague Gerald Rosenberg, who famously argued that courts were ineffective vehicles for the advancement of significant social change (Rosenberg 1993).

Which of these views better captures how Obama will approach his constitutional obligation to staff the Supreme Court? The question is not academic. In his present term, Obama will likely nominate three justices to the Supreme Court; if re-elected, that number could go as high as six. Obama's first three picks will probably involve replacing members of the Court's liberal wing. The replacement of Scalia or Kennedy (both currently seventy-three), however, would create a majority of liberal justices on the Court for the first time in many years. If Obama could create a five- or even six-member liberal majority on the Roberts Court, what sort of changes could we expect?

In this article, I argue that the creation of a liberal majority on the Roberts Court—a potential development I will henceforth refer to as the "Obama Court," for sake of brevity—would not lead to radical or perhaps even substantial constitutional change. Instead, it would continue an institutional dynamic that Mark Tushnet has labeled the "chastening of constitutional aspirations" (Tushnet 1999). In contrast to the Warren Court, a paradigmatic "big Court" that began a doctrinal revolution in areas such as civil rights, criminal procedure, and standing to sue, an Obama Court would make only incremental changes to the current legal framework, at most reversing some of the Roberts Court's recent controversial and closely-divided cases. Such a Court is unlikely to be at the storm center of politics over the medium term. Obama does not need a big Court, and may not want it. Even if he wants it, moreover, it is not clear he can create it.

For the most part, I will not here offer specific predictions of how individual areas of law would change under an Obama Court. Instead, I wish to focus on the broad factors and trends that make the creation of dramatic doctrinal change and the rise of "big Courts" more likely. I suggest four benchmarks for assessing how conducive the legal and political environment is for the creation of significant constitutional change. My first two benchmarks assess the unity of purpose and like-mindedness of the justices who make up the most common

majority coalitions. Political science has firmly established that judicial decision-making at the Supreme Court level is heavily influenced by the ideological preferences of its members (Segal and Spaeth 2002). Legal scholars have likewise recognized that salient Supreme Court debates often boil down to disputes over “high politics,” disagreements over the “core political principles in constitutional doctrine” which cannot be answered by simple reference to the relevant text (Balkin and Levinson 2001, 1063). At the same time, majority opinions are created through collective and strategic decision-making (Epstein and Knight 1998; Wahlbeck et al. 1998), meaning that significant constitutional change is a product of group dynamics. My third and fourth benchmarks, by contrast, focus on the external political environment, particularly the goals and capabilities of the executive branch, which bear the primary role in nominating Supreme Court justices, and thus in shaping that branch over the long run.

- My first benchmark, an *ideologically homogeneous majority*, draws on recent work in quantitative empirical legal studies, which finds that consequential Supreme Court rulings are more likely to come from majority coalitions that are ideologically homogeneous (Epstein, Friedman et al. 2008; Staudt et al. 2007).
- My second benchmark, a *common constitutional vision*, approaches the question of group dynamics from the viewpoint of normative constitutional theory. If legal liberals unify behind a particular constitutional theory or interpretive method, for example, they might be in a better position to influence the nomination process and secure nominees who hold to that theory.
- My third benchmark, a *court-central agenda*, examines the presidential agenda as it relates to the Court. Put simply, a president who needs significant changes to the legal framework in order to achieve his policy goals will make changes in Court personnel, philosophy, and doctrine a higher priority than one who does not.
- The fourth and final benchmark, the presence of a *reconstructive president*, also focuses on the executive branch, but moves past the factors the executive branch can control to those it cannot. As Stephen Skowronek has famously argued, presidential success is not simply a function of will, charisma, or political skill. Presidents enter the office, in Skowronek’s terms, either opposed or aligned to a “partisan regime,” what Skowronek defines as “the commitments of ideology and interest embodied in preexisting institutional arrangements” (Skowronek 1997). Presidents who construct a new partisan regime from the rubble of the old, i.e. “reconstructive presidents,” have far greater leeway in changing the

constitutional framework than presidents in other categories of political time.¹

In the pages that follow, I first expound on the benchmarks introduced above. Second, I apply these benchmarks retroactively to the Rehnquist Court to assess their validity, examining the contention that the Rehnquist Court was an institution of “chastened constitutional aspirations,” capable of rightward drift but not revolutionary doctrinal change (Tushnet 1999). Third, I apply these benchmarks to a hypothetical Obama Court, arguing it would fall short on each. As such, the probability that radical constitution change will result from the addition of Obama’s nominees is small at best.

WHAT MAKES “BIG COURTS” AND “REVOLUTIONARY” CONSTITUTIONAL CHANGE?

Constitutional change is constant, but the rate of that change is not evenly distributed across time. Just as policy change is marked by moments of rapid transformation followed by periods of greater stability (Grossback et al. 2006; True et al. 2007), so too is constitutional law. Some such moments involve so many contemporaneous and interlocking changes that one can reasonably view them as demarcations between “constitutional regimes,” periods with a relatively stable set of underlying rules for normal politics. To take one example, the nation has on paper largely the same constitution in 2009 that it had in 1909. Nevertheless, the constitution in 2009 (at least as interpreted by the Supreme Court) permits a vast federal government that has far greater power than the constitution of 1909 would have allowed. Such changes were accomplished not through the amendment process, but through judicial reinterpretations of enumerated powers and the application of the 14th amendment. I define a “big Court,” then, as a relatively compact period of Supreme Court history where a persistent majority of the justices were committed to substantial and long-lasting doctrinal changes, and were successful in achieving them. In other words, big Courts are the primary vehicle through which punctuated changes in Supreme Court doctrine occur.

What conditions maximize the chance of a big Court? In one influential vein of legal scholarship, judges are viewed as largely autonomous agents guided primarily by their own ideological preferences (Segal and Spaeth 2002). On courts with multiple members, of course, judges must compromise their legal policy goals within the collective action of majority-building (Epstein and Knight 1998). Under this lens, doctrinal change is a function of the ideological dynamics

¹ In Skowronek’s framework, presidents either begin a new regime (reconstructive), articulate the values of a vibrant regime (articulation), preside over the dissolution of a fading regime (disjunctive), or stand opposed to the values of a vibrant regime (preemptive). FDR, LBJ, Carter, and Nixon serve as modern examples, respectively.

of the sitting justices. Historical-institutionalists, by contrast, often take a broader perspective, viewing the Court as an (unreliable) agent of the elected branches. Dahl, for example, argued that except during times of partisan transition, the Court is a primarily passive institution (Dahl 1957), while Ackerman's theory of "higher lawmaking" views the Court more as the sum vector of social and political forces than as an independent actor (Ackerman 1991). Skowronek similarly (1997) views the president as the primary agent of major partisan change, treating the Court as, to use Keith Whittington's words, a "background condition" (Whittington 2007, 49). Under this second methodological approach, important doctrinal change will be primarily a function of what is going on outside the Court.

For most issues, most of the time, these internal and external factors are aligned, as the nomination process will ensure that most Supreme Court justices share the values of the current partisan regime. Regime values even affect nominations by the minority party: Earl Warren was no William Rehnquist, and Stephen Breyer was no William Brennan. As such, a theory of judicial autonomy and a theory which states the Court is part and parcel of the dominant partisan regime normally predict the same outcomes. When the Court disagrees with the elected branches, however, the theoretical debate becomes more important. On one hand, there is little systematic evidence that the votes of individual justices are affected by the policy preferences of the other branches in the instant case, particularly on salient constitutional matters (Sala and Spriggs II 2004; Segal and Westerland 2005). On the other hand, as Rosenberg (1993) and others have argued, the Court is a reactive institution which cannot implement its own decisions. As such, if a majority of justices desire significant legal policy change, they may require inter-branch collaboration to do so. Lucas Powe, for example, has shown the degree to which the Johnson administration worked with the Warren Court to advance a commonly desired civil rights agenda (Powe 2000), while Michael Klarman has argued that scholars and activists have overstated the importance of *Brown v. Board of Education* and Court decisions in general as catalysts for civil rights gains (Klarman 2006).

There is, frankly, validity in both perspectives. As such, assessing the conditions that favor the creation of a big Court requires paying attention to both the Court's internal dynamics as well as changes in the broader political system. Drawing in a heterodox manner from multiple literatures, I now present four benchmarks that I believe signal an increased likelihood of important constitutional change.

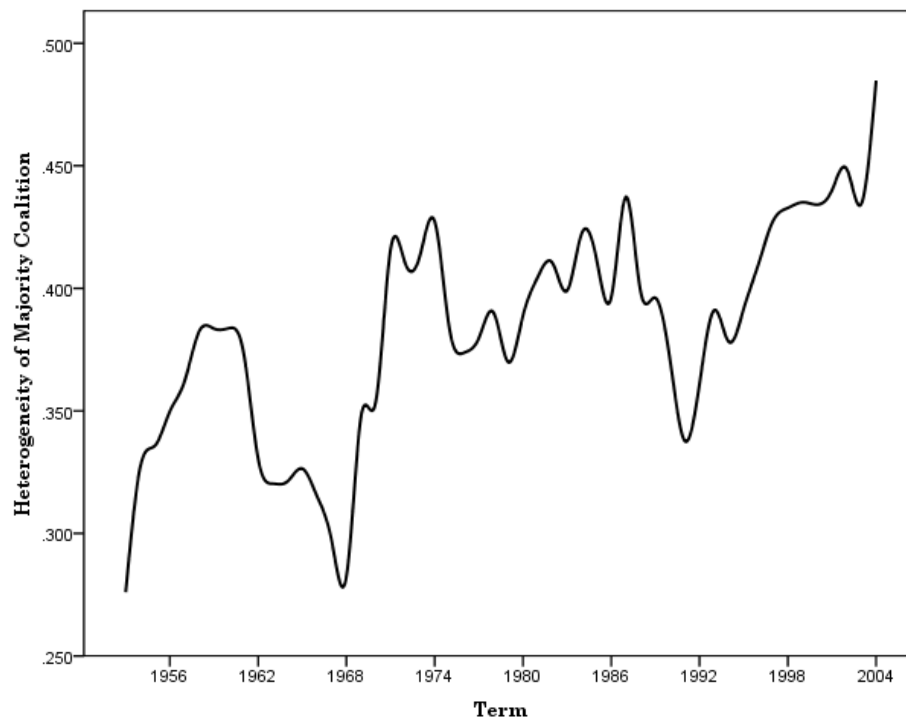
First, significant doctrinal change may be more likely when there is significant concurrence among the justices on the proper approach to constitutional problems. I assess the "like-mindedness" of such majorities in two ways. For the first benchmark, an *ideologically homogenous majority*, I rely on

Staudt et al. (2007), who find that the ideological homogeneity of a decision's majority coalition strongly correlates with its propensity for being "consequential."² As the majority coalition becomes more ideologically homogeneous, there is less need to engage in compromises that might weaken the clarity or the impact of the opinion (Schwartz 1992). Measuring ideological homogeneity as the standard deviation of the individual Martin-Quinn ideology scores within the majority coalition and controlling for relevant variables, the authors find that coalition heterogeneity has a strong, inverse relationship with the probability of a decision being deemed consequential. Viewing the average ideological heterogeneity of majority coalitions over time provides a useful way of digesting these findings, and I present a graphical representation of such in Figure One, below. Notably, average heterogeneity drops dramatically in 1962 and again in 1964, perhaps presaging the Warren Court's host of landmark decisions. Note also that the trend line over the entire period is decidedly upward.

However, while the use of quantitative ideological measures is appropriate and useful, there are other ways of examining the degree to which Supreme Court justices agree on the disposition of constitutional problems. The second benchmark, a *common constitutional vision*, relies on commonalities in legal philosophy. Such theories are not simply ideological attitudes by another name. Howard Gillman, for example, has shown that the jurisprudence of the 14th amendment prior to the New Deal simply cannot be distilled to ideological preferences towards laissez-faire economics (Gillman 1993). Likewise, originalism, though most often advanced in recent times by conservatives, need not have a specific valence, as liberal scholars such as Jack Balkin have shown (Balkin 2007). In practice, of course, it's difficult to know whether individuals favor particular legal philosophies because of their theoretical commitments, or because of the likely political results the implementation of such theories would entail. For the purposes of this article, thankfully, it does not matter whether judges, justices, or politicians favor particular legal philosophies for theoretical or instrumental reasons—if a particular philosophy attracts majority support among the justices of a particular national Court, the probability of significant legal change rises. Or, to put the point in less abstract terms, a Supreme Court containing five variants of Clarence Thomas would quickly become a big Court.

² Specifically, the measure for consequential cases is drawn from Epstein and Segal's New York Times measure, for which salient cases are those which appear on the front cover of the *New York Times* on the day after the decision.

Figure One: Average Heterogeneity of Supreme Court Majority Coalitions by Term, 1953-2004



This figure shows the average ideological heterogeneity of all Supreme Court majority coalitions in a given term, as measured by the standard deviation of the Martin-Quinn (Martin and Quinn 2002) scores of the justices within that coalition (Staudt, Epstein, and Friedman 2007). The graph uses a spline function to smooth the data and draw the line. Larger numbers indicate a more heterogeneous average majority coalition. The data for this figure comes from the Spaeth Supreme Court database, selecting for case citations (ANALU = 0) and standard decision types (DEC_TYPE = 1, 2, 4, 6, 7).

Third, the chances of a big Court will increase when the president and the dominant partisan coalition, or what Skowronek and others call a “partisan regime” (Skowronek 1997), have particular political commitments that require a *court-central agenda*. Elected officials use the Court for many ends. Politicians sometimes use the Court to change the rules of normal politics. For example, Clayton and Pickerill have traced how the Republican desire for smaller federal government later shaped the contours of the Rehnquist Court’s federalism jurisprudence (Clayton and Pickerill 2004). Similarly, Howard Gillman has explored how Republican control of the presidency and the Senate during the 1890s enabled the Supreme Court to expand its jurisdiction and promote economic nationalism (Gillman 2002). Under this view, the Court operates as something akin to a rogue bureaucratic agency, employing judicial review on

behalf of the majority regime against state and local outliers—be they progressives in the 1890s, New Deal opponents in the late 1930s and 1940s, or the proponents of segregation in the 1960s (Graber 1993).

Furthermore, the Court can also be used as a dumping ground for issues that, if addressed forthrightly, might destabilize the majority regime. Whittington demonstrates how the construction of judicial supremacy allowed politicians like Eisenhower, who were leery of wading into integration politics and alienating either blacks or southern whites, to support judicial supremacy as a means of evading accountability (Whittington 2007). In a similar vein, Kevin McMahon has shown how the FDR administration, unwilling or unable to directly challenge southern whites on civil rights, worked through judicial appointments to build a foundation of jurists who would ultimately be more receptive to civil rights claims (McMahon 2004).

In short, this scholarship suggests the simple axiom that constitutional change will become more substantial when the other branches desire it. Contrast the presidency of FDR, who needed constitutional changes in order to advance his New Deal vision, with that of Andrew Jackson, who fought against economic nationalism and the National Bank. For the former, doctrinal changes were critical for advancing his agenda; for the latter, the Court was a sideshow to the legislative arena where Jackson's battles were fought (Whittington 2007, 58-62).

Fourth and finally, widespread constitutional change may be more likely during or immediately following the election of a *reconstructive president*. Bruce Ackerman has carefully documented that revolutionary periods of constitutional change are often driven by sea-changes in public values and occur outside the Article V amendment process (Ackerman 1991). Ackerman calls such moments—which include the Founding, Reconstruction, and the New Deal—episodes of “higher lawmaking.” Ackerman's theory rightly advances the notion that our constitutional history is separated by periods of such revolutionary change that it can be divided into separate legal regimes. However, as Whittington notes, Ackerman does not always adequately explain how various actors view their particular constitutional responsibilities in these moments (Whittington 2007). Moreover, Ackerman's theory has little predictive value standing alone; it is unclear, exactly, what will trigger such an episode of higher lawmaking other than sufficient popular discontent, and even here the line between constitutional moments, lesser constitutional moments (such as 1800 or 1980), and failed constitutional moments (such as the 1896 defeat of William Jennings Bryant) is somewhat blurred.

Whittington improves on Ackerman's work by incorporating Stephen Skowronek's theories of political time. Skowronek contends that presidential power is determined not by individual attributes, but instead by a president's place within a cycle of “political time” (Skowronek 1997). He posits that the

political history of the United States can be roughly divided into a series of distinct partisan regimes, each with a set of particular policy commitments and a relatively stable set of partisan coalitions. Over time, however, these regimes grow increasingly unstable as intraparty conflicts worsen, or as the evolution of new issues creates cross-cleavages among elites and then among the public (Carmines and Stimson 1986). Ultimately, the regime fractures and a new regime emerges. Presidents such as Jefferson, Jackson, Lincoln, FDR, or Reagan, who “shatter” the order of previous regimes and begin new ones, are referred to as “reconstructive” presidents.

While Skowronek understandably focuses on the executive branch, Whittington (2007) supplements his work by examining the interaction between reconstructive presidents and the Supreme Court. Whittington argues that a reconstructive president can sometimes challenge the foundation of the current constitutional regime, rather than merely tinker with it at the margins. During reconstructive periods, presidents can more readily politicize the Court, attacking it as a partisan and reactionary defender of a crumbling regime rather than a neutral arbiter of the law. In its effort to retrench the dying regime, Whittington writes, the Court may actually hasten the regime’s destruction, serving as an effective foil for a popular president. Though Whittington does not explicitly claim that periods of great legal change are more likely to occur in the years following the election of a reconstructive president, the inference can reasonably be made.

To summarize the previous points, one would expect a big Court to become more likely when the following criteria are present: 1) a stable majority coalition of ideologically homogeneous justices, 2) a common interpretive philosophy shared by both politicians and justices, 3) a majority partisan regime which requires significant constitutional change to enact its political commitments, and 4) the election of a reconstructive president. I do not mean this to be an exclusive or exhaustive list, but do believe it provides a reasonable set of criteria for assessing the likelihood of a big Court in the years to come.

THE “CHASTENED ASPIRATIONS” OF THE REHNQUIST COURT

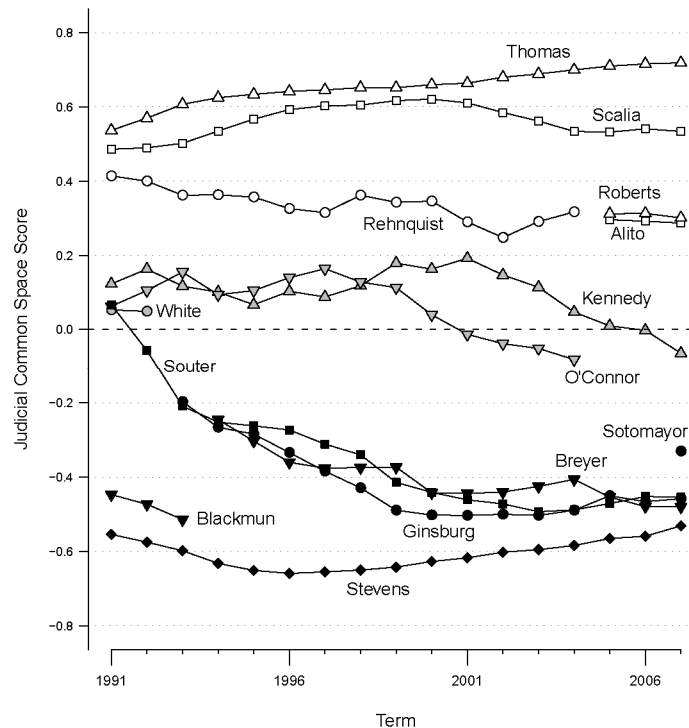
The application of these benchmarks can be further validated through their retrospective application to the Rehnquist Court. Under the partisan regime perspective articulated above, the Rehnquist Court is linked to the rise of the “New Right,” a loose coalition of fiscal conservatives, social conservatives, and military hawks that came to control the Republican Party in the 1980s (Clayton and Pickerill 2006; Pickerill and Clayton 2004; Klatch 1999; Teles 2008). The New Right regime sought a smaller federal government, a more robust and vigorous national defense, lower taxes, greater attention to traditional moral and

social values, and a reversal or limitation of liberal jurisprudence. Many of these goals would require action by the Supreme Court, as what had been done by the FDR and Warren Courts would have to be undone by its successors. Such a doctrinal “counter-revolution” included undoing or limiting restrictions on criminal procedure, placing formal boundaries on the power of the federal government, providing greater deference towards the executive in foreign policy, and reversing *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973).

Having secured four Supreme Court nominations by 1972, Richard Nixon successfully pushed the balance of power on the Court to the right. However, while the Burger Court broke from the consistent liberal activism of its predecessor, it was not a faithful ally of the nascent New Right regime. It was the Burger Court, for example, which decided *Roe*, the *bête noire* of New Right social and religious conservatives, by a margin of 7 to 2. More systematic analyses, both doctrinal and historical (Blasi 1983; Schwartz 1998) as well as quantitative (Lindquist et al. 2007), suggest that the Burger Court brought wild ideological variation rather than conservative counter-revolution. As such, it was a disappointment to many conservatives.

Under the Reagan and George H. W. Bush administrations, the Court continued to move to the right. Figure Two, which presents the Judicial Common Space ideology scores for Supreme Court justices in each term from 1991 to 2007, demonstrates that in 1991 there were seven justices on the Supreme Court who could be scored as at least moderate conservatives. Moreover, as Figure One illustrated, the addition of Justice Thomas not only appeared to cement a putative conservative majority, but also to create a Court whose average majority coalition would be the most ideologically homogeneous since the late 1960s. Initially, this dynamic seemed a harbinger of dramatic change. The Rehnquist Court would strike down Congressional reliance on the Commerce Clause for the first time in almost sixty years in *United States v. Lopez* (1995), strengthen the 10th amendment in *New York v. United States* (1992) and *Printz v. New York* (1997), and reinvigorate the doctrine of sovereign immunity in *Alden v. Maine* (1999) and *Board of Trustees v. Garrett* (2001). The Rehnquist Court also made important changes in the area of criminal procedure even prior to the addition of Thomas (in a period where coalition heterogeneity was declining), limiting the *Miranda* doctrine in cases such as *Duckworth v. Egan* (1989) and narrowing the scope of *habeas* appeals in *Teague v. Lane* and *Coleman v. Thompson* (1991). The Rehnquist Court also continued to expand the rights framework of the Warren Court to conservative litigants (Keck 2004), further extending First Amendment protections to commercial speech, for example, and reimagining the equal protection clause of the 14th amendment as favoring a “colorblind constitution” that frowns on affirmative action (Keck 2006).

Figure Two: Judicial Common Space Scores of Supreme Court Justices, 1991-2007



This figure shows the Judicial Common Space (JCS) scores for the justices of the Supreme Court over time. JCS scores place federal district and appellate court judges, Supreme Court justices, the president, and members of Congress in the same one-dimensional liberal-conservative framework. Positive scores indicate a more conservative ideology. Justice Sotomayor's score comes from her final year on the 2nd Circuit Court of Appeals. Justices commonly characterized as conservative, moderate, and liberal are marked by white, grey, and black markers, respectively. JCS scores may be downloaded at <http://epstein.law.northwestern.edu/research/JCS.html>.

It would thus be foolish to argue that the Rehnquist Court did not change the law in important ways. Nevertheless, compared to its predecessors, I argue the Rehnquist Court's rulings can hardly be called revolutionary. The major precedents of the New Deal remain in place, and while the Court's 10th and 11th Amendment jurisprudence has made the exercise of federal power more costly, it did little to restrict its use outright. Moreover, recent decisions such as *Gonzales v. Raich* (2005) suggest that much of the Court's earlier restrictions of federal power were more symbolic than real. The majority of liberal landmark decisions from the late Warren Court and the early Burger Court remain good law as well, such as *Roe v. Wade* (1973) and *Miranda v. Arizona* (1966). In some legal areas, the Rehnquist Court can even be described as having made liberal decisions of significant importance, such as *Lawrence v. Texas* (2003). Rather than serve as a

"counter-revolution" against New Deal and Great Society precedents, "the guiding principle of the [Rehnquist Court] ... is not that government cannot solve problems, but that it cannot solve any *more* [italics added] problems (Tushnet 1999, 63)." The Rehnquist Court was for the most part content to "increase the cost of implementing the national programs that Congress has already enacted, without stating new constitutional principles that would invalidate them (74)." Similarly, Thomas Keck has written that the Rehnquist Court, often surprisingly, has "reaffirmed, and even extended a number of landmark legal liberal precedents (Keck 2004, 215)."

That the Rehnquist Revolution would largely fail to materialize was certainly not obvious during its tenure. In 2001, two leading liberal law professors worried that the election of George Bush would catalyze revolutionary legal change (Balkin and Levinson 2001). They feared the end of *Roe v. Wade*, the flow of state money to religious schools, a return to some forms of state-sanctioned prayer, an end to further expansion of gay rights, a ban on affirmative action in education, and additional limitations on federal power (1060-1061). Surprisingly, they were correct only on the issue of school vouchers, and while *Zelman v. Simmons Harris* (2002) was important in the sense that it did not strangle the voucher movement, in hindsight it is certainly not, as some of its advocates stated after the ruling, comparable to *Brown v. Board of Education* in legal importance (Frieden 2002).

Why did revolutionary change fail to materialize? After all, New Right Republicans appeared to meet at least two of the aforementioned benchmarks. First, they had a *court-central agenda*. To take one example, Clayton and Pickerill (2004) demonstrated renewed attention by New Right Republicans to "fixed federalism," the notion that the lines of authority between the federal and state governments should be set by formal constitutional boundaries, rather than fluctuate as voters or legislatures desired. This legal policy change originated not in the Supreme Court, but in the Republican Party platform. However, given the difficulty Republicans had in gaining unified control of the federal government, in convincing voters that specific popular federal programs should be cut, or in themselves abjuring from the exercise of federal power at the expense of states, Republicans understandably delegated this task to the increasingly conservative federal courts, who faced neither elections nor the temptation to spend. There were other examples of court-central goals: overturning *Roe v. Wade*, protecting the executive branch from Congress, weakening criminal procedure rules. Second, the right had Ronald Reagan, a *reconstructive president*, as their standard bearer (Pickerill 2009; Skowronek 1997; Whittington 2007). Reagan had four nominations during his two terms—more than enough to reshape the Court, given its ideological makeup when he came into office.

In two other benchmarks, however, the Rehnquist Court fell short. Despite its electoral dominance in the White House, the New Right failed to create a stable, ideologically homogenous, majority conservative coalition. Moreover, though New Right Republicans possessed a *common constitutional vision*, adopting originalism as their primary legal principal, that theory was not embraced by enough Republican Supreme Court appointees. These failures are puzzling, given that Republican presidents appointed nine of eleven justices serving under Rehnquist.

Why did the New Right fall short on these benchmarks, given their success in meeting the others? Despite their overwhelming advantage in nominations, Republicans often failed to jointly control the Senate and the White House at the key moments when Supreme Court seats went vacant, or lacked the political capital necessary to appoint strong conservative justices. Examples abound: Nixon's resignation and the appointment of Stevens by Ford; the loss of the Senate in 1986 and the defeat of the Bork nomination; the desire of George H.W. Bush not to force a confrontation with a hostile Senate in 1990 and the Souter appointment (Greenburg 2007); Bush's defeat in 1992 and the subsequent retirements of Justices White and Blackmun in 1993 and 1994. Moreover, some of these nominations were based on patronage or politics, rather than policy (Goldman 1999). O'Connor's nomination, for example, was the result of a specific campaign promise by Ronald Reagan to nominate the first woman to the Supreme Court, and social conservatives prophetically grumbled that she would be an unreliable vote (Greenburg 2007).

So while New Right conservatives had both a *court-central agenda* and a *common constitutional vision*, they were unable to secure five votes to consistently support either. As both Tushnet (Tushnet 2005) and Thomas Keck (2004) have shown, there were several cleavages in the later Rehnquist Court between moderates Kennedy and O'Connor on the one hand, and conservatives Scalia, Rehnquist, and Thomas on the other. The moderates, the authors argue, were "country-club" Republicans, closer to libertarian than conservative in their social views, and closer to moderate than conservative on economic issues. The moderates also had little truck for originalism, content to embrace minimalism or decide cases without any overarching theory. These differences were further exacerbated by Souter's quick transformation from a moderate conservative to a mainline liberal justice, as well as the slower drift of O'Connor and Kennedy to the left at the end of the Rehnquist years (Epstein et al. 2007). Figure Two again illustrates these trends, showing the increasingly heterogeneous spread of Republican appointees' ideology over time. By 2004, the putative "conservative majority" of Thomas, Scalia, Rehnquist, Kennedy, and O'Connor was actually a mix of two strong conservatives, a moderate to strong conservative, and two centrists.

Given these dynamics, there was little support for the sort of dramatic constitutional change, perhaps best exemplified by Justice Thomas's concurrence in *United States v. Lopez* (1995), needed to realize the most sweeping New Right goals. While Kennedy and O'Connor were not moderates on every issue (e.g. federalism), they defected or threatened to defect often enough to blunt the potential impact of a New Right majority on salient issues such as abortion, affirmative action, and the scope of executive power. New Right Republicans thus had the vision and the political agenda, but not the power to implement significant constitutional change.

Finally, it is worth revisiting the fourth benchmark—Reagan's value as a reconstructive president. It is possible that the New Right was simply unlucky, its failure to reconstitute the Court a result of idiosyncratic moments of weakness in an otherwise stable partisan regime. After all, Skowronek's framework dictates probabilities, not certainties. However, it also may be that Skowronek's framework is breaking down. While reconstructive presidents still possess greater power relative to other presidents, their absolute power to challenge previous constitutional meanings and ignite new regimes may be decreasing. There is not enough space here to air out the full implications of this theory, or provide detailed evidence of its existence. Nevertheless, the sense that creating significant political and constitutional change has become increasingly difficult over time is shared by many influential scholars of constitutional history. Skowronek himself described this tendency as the "waning of political time," or the "practical disintegration of the medium through which presidents have claimed authority for the exercise of their powers since the beginning of our constitutional history" (Skowronek 1997, 442). Whittington traces this decline, describing how the challenges by reconstructive presidents to the Court became weaker over time. Painting in broad strokes, Jefferson credibly threatened to impeach the Marshall Court; Lincoln ignored the wartime rulings of the Taney Court when it suited him; FDR had a realistic shot at "packing" the Court. The Reagan administration, by contrast, was reduced to tactics such as levying harsh rhetoric against the right to privacy (Whittington 2007).

Such attenuation may exist because the tools created by reconstructive presidents survive the regimes that create them, serving as a "residue" or "sediment" that frustrates future transformative opportunities. The persistence of divided government, increasingly fractured political coalitions, the increasing power of interest groups, and the weakening of party organizations all have led to what Whittington calls the "attenuation of reconstruction" (273-274). Tushnet (1999) agrees, and is more specific about the particular New Deal "sediment" that hampered the New Right. His response is worth quoting in full:

Because the political process is encrusted by the network that links interest groups to the administrative bureaucracy, it is difficult for either the president or Congress to carry out a comprehensive program that would destroy (and then reconstruct) the programs adopted during the New Deal/Great Society regime. A concerted attack on those programs would carry a high political cost as the interest groups rally behind them. Divided government makes such radical revisions nearly impossible, and even if a unified government comes into being for a brief period, the resistance in the bureaucracy and by the interest groups is likely to make real transformation very difficult. Existing programs are thus likely to persist, undergoing modest revisions and gradual transformation (74).

As the Bork nomination showed, interest groups are quite willing to oppose those judicial nominees who might remove the constitutional supports of the interests they protect. This fact, along with increasing political polarization, has decreased congressional deference to the President's nominees (Epstein, Segal et al. 2008), meaning that creating an ideologically homogeneous majority costs more political capital than it once did. This is not an exhaustive list; other factors contribute to the weakening of reconstructive presidents. The lesson of the New Right years, however, should be clear: reconstructive presidents retain a *relative* advantage over other presidents in advancing a constitutional vision that may lead to revolutionary legal change. Their absolute ability to reconstitute the Court, however, may be shrinking over time.

THE OBAMA COURT—STILL CHASTENED?

If Obama succeeds in creating a liberal majority on the Roberts Court, what chance would it have of becoming a big Court? In fact, an Obama Court would be even *less* likely to pass significant decisions than its predecessors. The recent landmark cases *District of Columbia v. Heller* (2008) and *Citizens United v. FEC* (2010) give us some indication of what the Rehnquist Court could have been, had it obtained five consistent conservative votes. It is hard to imagine decisions of similar importance emanating from an Obama Court. The New Right had both a coherent constitutional vision and a court-centered agenda; it simply lacked the power to implement them. The Obama administration, by contrast, appears to have neither adequate power, nor a coherent vision, nor a court-central agenda. Moreover, Obama is likely not a reconstructive president, and as such, fails the fourth benchmark. Even if he ultimately does achieve reconstructive status, the

attenuation discussed above suggests his impact on the Court will be modest at best.

FIRST BENCHMARK: A HOMOGENEOUS MAJORITY COALITION

Here Obama may fare no better, and will perhaps fare worse, than the New Right. As I will argue below, Obama's policy commitments do not justify expending political capital on Court nominees. As such, we should expect Obama to nominate moderate liberals and highlight non-ideological criteria for their nomination, such as diversity or compelling personal narratives. Given that it has been only eighteen months since Obama's election, the available evidence regarding his judicial nominees is thin, but the rate of nomination, the type of nominees he has selected thus far, and the rhetoric used to defend them supports the hypothesis. The Obama administration has been slow in nominating judges to the federal bench. To be sure, Republican Senators slowed the process further through their use of holds and other Senate procedures, but the administration has not been willing—as the George W. Bush administration was—to make the confirmation of its nominees a high priority by drawing media attention to the slowdown, or by spending political capital picking a fight with Republicans. This fact alone indicates that putting strong liberals on the federal bench takes a backseat to other administration priorities.

Both the nature of Obama's nominees and the rhetoric used to advance their nominations also support the idea that the judiciary is not an important administrative priority. Given the paucity of nominations, this evidence is more anecdotal than systematic, but the anecdotes are suggestive nonetheless. Three nominations stand out thus far: the elevation of Judge David Hamilton to the Seventh Circuit, and the more salient nominations of Judge Sonia Sotomayor and Elena Kagan to the Supreme Court. As nominees with prior judicial experience, Hamilton and Sotomayor's ideology can be quantitatively measured. Hamilton possesses a Giles score (a widely used measure of judicial ideology within the empirical legal studies community)³ of $-.223$ (negative scores indicate a liberal ideology), which places him around the 50th percentile of all potential Democratic appointees serving in the district courts (Howard 2009). Hamilton (Obama's first nominee) was touted by the administration as exemplifying the president's

³ Giles scores accord the judge the DW-NOMINATE score of the appointing president, unless there is a home-state Senator of the president's party (Giles 2001). In that situation, the judge instead receives the Senator's score (or the average of the two, if appropriate). While this method is a significant improvement on the simple binary measure of the appointing president's party, it has the disadvantage of replicating the NOMINATE scores' tendency to put presidents at ideological extremes. Furthermore, it cannot distinguish between more and less ideological appointments when there is no Senatorial courtesy in play. At present, however, it remains the best and most widely used metric of lower-court ideology.

promised “post-partisan” approach to governance, and was notably supported by home-state Republican Senator Richard Lugar. While he was predictably attacked as being too liberal, Hamilton seems precisely the sort of nominee Obama would choose if he sought to minimize nomination conflicts, rather than transform the bench or push for significant constitutional change.

Sotomayor’s scores indicate she is more liberal than Hamilton, but not extremely so. Her Judicial Common Space score of $-.318$ makes her more liberal than about 80% of all sitting appeals court judges as of the 2007 term.⁴ As Figure Two demonstrates, Sotomayor’s score is more conservative than the scores of the four sitting liberal justices, and her addition slightly increases the ideological heterogeneity of the Court’s liberal bloc. Similar to Hamilton, Sotomayor’s nomination was sold in strictly non-ideological terms. Jeffrey Toobin notes that the rhetoric used to support Sotomayor employed the sort of arguments about the proper role of the Supreme Court in a democratic society usually employed by political conservatives (Toobin 2009). In other words, Sotomayor was sold not only in non-ideological terms, *e.g.*, excellence, competence, common sense, but also through rhetoric more often employed by conservatives to describe their own nominees, *e.g.*, a belief in judicial restraint or a “keen understanding of the appropriate limits of the judicial role” (44). Sotomayor’s nomination also demonstrated that Obama, like most presidents, was keenly aware of how Supreme Court seats serve patronage demands as well as policy and legal needs. In this sense, her appointment as the first Hispanic justice may mirror Reagan’s appointment of Justice O’Connor, in that both Justices were chosen by Presidents who did not make ideological purity and the potential for significant constitutional change important criteria for selecting their first nominee.

Kagan, finally, lacks prior judicial experience, making the calculation of her ideology an educated guess at best. To be sure, her prior experience in the Clinton White House and her appointment as Solicitor General in the Obama White House suggests she is at least a moderate liberal. That said, her appointment again illustrates a White House more concerned with a smooth nomination process and hoarding political capital than with transforming the Supreme Court. Despite that after 2010 he will almost certainly have a smaller Senate majority, and despite that he had qualified, more openly liberal nominees such as Diane Wood to choose from, Obama selected Kagan, a nominee with little history of taking strong liberal stands or little scholarship that suggests she will be a progressive innovator. For Obama, this lack of evidence was more a feature than a bug, as Kagan’s limited paper trail will make it more difficult for

⁴ Lee Epstein et al. have folded the Giles process into a broader scoring system, the Judicial Common Space, which creates a common measurement framework for federal judges, presidents, and members of Congress. These scores may be downloaded at <http://epstein.law.northwestern.edu/research/JCS.html>.

Republicans to rally against her. Her selection—which angered some liberal interest groups who reasonably thought that Kagan could have been “saved” for a future appointment (such as Ginsburg’s seat) when the White House holds a weaker political hand—provides further evidence that maintaining the doctrinal status quo is this administration’s primary legal policy goal.

Even if Obama does desire to create a strong, homogeneous, liberal majority on the Supreme Court, it might be difficult for him to do so. As noted in the prior section, a hostile Democratic Senate played a critical role in either blocking New Right appointments (Bork) or in forcing the President to nominate someone that did not fully support New Right goals (Souter). Indeed, as Epstein et al. have noted, ideological distance between the President and individual Senators has played an increasingly important role in predicting the probability of a pro-confirmation vote over the past few decades, particularly following the failed Bork nomination (Epstein, Segal, and Westerland 2008).⁵ When combined with increasing polarization in Congress and the increasing use of the filibuster, easy confirmation battles have likely become a thing of the past (McCarty and Razaghian 1999).

Consider again the nomination of Justice Sotomayor. President Obama nominates the first Hispanic candidate to the Supreme Court, at a time in which both parties presumably wish to court Hispanics as a swing voter bloc. She replaces Justice Souter, who is commonly understood to be part of the liberal bloc on the Court. As such, her nomination does not threaten the current balance of power. The nominee, though undoubtedly liberal, has shown few strong indications of liberal activism, and has both a compelling life story and a background as a prosecutor and a corporate litigator. In short, she may have been the best nominee the Republicans could reasonably expect from a Democratic president, and was one for whom a negative vote may have been electorally costly. Given all of this, Sotomayor was nevertheless only able to attract nine Republican votes.

One can thus only speculate what would be unleashed should Obama nominate a true “liberal lion,” or should he be required to replace Kennedy or Scalia. In the latter scenario, of course, Republicans would do everything in their

⁵ To be precise, they describe how ideology and perceived qualifications (as defined in Segal and Cover (1989)) interact to affect the probability that a Senator will vote for a particular nominee. For example, their findings show a 95% predicted probability of pro-confirmation vote for a nominee who is maximally qualified (e.g. Justice Scalia or Justice Ginsburg) and is minimally distant ideologically from the Senator in question (121). Their findings also show that ideology is now the more important factor: the same probability drops to less than 20% when ideological distance is at the data’s maximum, even with high qualifications. Qualifications matter most when the nominee is minimally qualified (Nixon’s nomination of G. Harrold Carswell comes the closest to an actual score of zero), as even when the nominee’s ideological distance from a Senator is zero, the predicted probability for a vote to confirm is only 40%.

power to force the nomination of a centrist, attempting to maintain the swing-vote dynamic that currently requires majority coalitions to be relatively heterogeneous. Moreover, Obama has shown little indication to date that he would do battle to appoint a strong liberal to that key fifth seat. Given both potential institutional barriers and a seeming lack of will, it seems likely (though by no means certain) that an Obama Court would be similar to the courts before it—a Court with two ideological blocs that depend on swing justices to build a majority.

SECOND BENCHMARK: A RETURN TO MINIMALISM?

At present, progressives lack a common constitutional vision; there is no liberal counterpart to originalism. The best evidence for this can be found in a recent compilation by Jack Balkin and Reva Siegel, *The Constitution in 2020* (Balkin and Siegel 2009). According to the editors, this volume, which contains twenty-six articles from preeminent liberal legal scholars, provides a defense of “redemptive constitutionalism” (2-3), a mode of constitutional interpretation by which each generation of Americans tries anew to bring the Constitution into line with its purported commitments.

However, the various works in this book do not come to a consensus on what this means. Indeed, what is surprising about *The Constitution in 2020* is how many of its authors do *not* rely upon the Court to achieve their desired legal policy goals, instead resting their hopes on legislation or institutional reforms. Of the twenty-six chapters within the book, only eight (by my count) present a clear and unambiguous plan for making specific significant changes in existing doctrine or precedent.

Admittedly, some of these eight authors present ambitious goals. Tushnet, for example, would revolutionize the current state action doctrine (Tushnet 2009). Balkin and Siegel would substantially reform equal protection doctrine, replacing the current “all or nothing” tiers of scrutiny approach with legal presumptions that would force state governments to justify the existence of substantive inequality (Balkin and Siegel 2009). Noah Feldman restates his earlier argument that the First Amendment’s establishment clause should be deferential towards the presence of public religious symbols but rigorously reject the intermingling of religious organizations and public funds (Feldman 2009). Liv Goodwin would resurrect the Privileges and Immunities Clause of the 14th amendment, transforming national citizenship from a paucity of negative protections into a full-blown set of (not entirely identified) affirmative guarantees (Goodwin 2009). As a final example, Pam Karlan takes a page from the Rehnquist Court’s 11th amendment jurisprudence, arguing that the “structure and relationship” of constitutional principles effectively establish an affirmative right to vote, even if such a right is not present in the constitutional text (Karlan 2009).

Perhaps one could draw from this group the theme of a more egalitarian notion of American citizenship. However, a slight majority of the authors in the edited volume do *not* rely on the Court to implement their goals, and in some cases actively warn against attempts to create a big Court. Cass Sunstein, for example, reiterates his support for “minimalism,” an interpretive strategy by which judges avoid “broad, ambitious judicial rulings,” either by refusing to extrapolate rules much beyond the instant case, or by using justiciability or procedural rules to avoid far-reaching rulings altogether (Sunstein 2009). Robin West argues that the Constitution is both a set of higher laws as well as a set of foundational principles, and that while the Court is good at interpreting the former, it is institutionally ill-suited to impose the latter (West 2009). Bruce Ackerman proposes several ideas for restoring meaningful national citizenship, such as deliberative polling, a citizen “debit card” for campaign contributions, and providing each citizen with a lump sum of money upon turning eighteen (Ackerman 2009). None of his ideas, note, involve the Court in any meaningful way. Continuing on, William Eskridge, Jr., argues against the constitutionalization of family law (Eskridge Jr. 2009), while Dawn Johnsen argues that litigation “should not remain the principal means of safeguarding reproductive rights” (Johnsen 2009). Perhaps the best statement of the reluctance to advance a new progressive constitutional regime through the courts comes from Richard Ford, who flatly states that, “I doubt that constitutional law as typically conceived will do much to better the most severe social injustices that face us in the early twenty-first century” (Ford 2009). For these progressives, it is neither possible nor advisable to resurrect the Warren Court in the new century.

At first glance, rejecting the big Court model of the Warren years seems an odd strategy for progressives, given that Democrats may be on the verge of constituting a new partisan regime in the wake of 2008. After all, minimalism bears a close resemblance to the arguments embraced by Warren Court skeptics such as Bickel or Kurland, who attacked what they saw as sweeping egalitarian change untethered from clear textual guarantees (Bickel 1970; Kurland 1970). Indeed, Keck has shown that after gaining power, the New Right mainly abandoned a conservatism of democratic deference and adopted a conservatism of judicial activism (Keck 2004). In other words, minimalism appears best-suited as an “out-party” interpretive theory, whose support is strongest among members of the minority party and wanes when their fortunes change for the better.

Sunstein and other scholars may sincerely support minimalism regardless of its likely valence in particular cases. It would be unusual, however, for a partisan regime’s principles, politics, and political positions to be divorced from one another for very long. Democratic voters, interest groups, and politicians, at least, are less likely to care about a legal theory’s foundations than they are about

its ability to credibly justify and help realize particular partisan commitments. Why, then, is minimalism so appealing to a large number of these progressive legal scholars?

THIRD BENCHMARK: OBAMA DOES NOT NEED THE COURT

One likely reason is that minimalism is not only an appealing out-party strategy, but is also an excellent strategy for a majority party satisfied with the current constitutional status quo. Here we move to the third benchmark: whether the Obama administration has a Court-central agenda. The answer here is a resounding “No”. A consequence of the weakness and sometimes unexpected moderation of the Rehnquist Court is that the twin pillars of liberal lawmaking—the economic precedents of the New Deal and the rights-based jurisprudence of the Warren Court—remain in place, if battered in places. A contrast between 1933 and 2009 illuminates this clearly: FDR was forced to jettison a formalist jurisprudential regime that limited the manner and ends for which government could constitutionally act (Gillman 1993). Obama, by contrast, can trust that the constitutional status quo will not prevent the implementation of his agenda.

Of course, Obama will rely on the Court for regime maintenance, and for bringing local outliers who contest the constitutionality of his agenda into compliance with existing precedent. But one suspects that any Supreme Court nominee to the left of Anthony Kennedy will suffice for this. Despite occasional howls from those who currently desire a more robust 10th Amendment, healthcare reform, immigration reform, or “cap and trade” regulation are currently justified under longstanding interpretations of Congressional power to tax, spend, and pass laws under the Commerce Clause. Maintaining the constitutional status quo should therefore not require expending a great deal of effort or political capital. In regime terms, Obama’s agenda is not revolution but restoration—a return to the values of the New Deal and the Great Society, albeit with a nod towards the failures of command and control economics.

Given this scenario, it makes good strategic sense for Obama to embrace minimalism. He may even do so sincerely, as he has previously suggested that the primary locus of social change should be the ballot, rather than the courtroom (Andrews 2008). Regardless of his sincere beliefs, however, Obama might be well advised to embrace minimalism, given his political goals and the current constitutional landscape. Doing so might help his administration attack rightward movement under the current Roberts Court, as well as weaken the ability of political opponents to demonize his nominees. Of course, such a strategy would disappoint liberals who desire a more active court. But as noted above, progressives currently lack an alternative overarching constitutional vision with which they can credibly pressure the president. To the degree to which

progressive groups are involved in the process, their efforts will likely center on patronage or identity politics, rather than new doctrine.

FOURTH BENCHMARK: OBAMA IS NOT A RECONSTRUCTIVE PRESIDENT

Finally, we move to the discussion of whether Barack Obama is a reconstructive president. While there is evidence on both sides of this debate, I believe that at present, Obama does not fit Skowronek's reconstructive mold. There is evidence to the contrary. To be classified as reconstructive, one must follow a disjunctive president who presides over the collapse of the prior partisan regime. Bush resembles the disjunctive type, given disastrous approval ratings during his second term, the increasing unpopularity of the Republican Party, and the emergence of a full-blown economic panic. Moreover, Obama's soaring rhetoric, lofty goals, and campaign for "change" elicited reactions from the public similar to those garnered by Reagan and FDR.

Obama also won Electoral College victories in states that Democrats had not captured for decades, claiming the White House alongside a Congress that itself had heavily tilted towards the Democratic Party. Obama's strong support among voters under the age of thirty raises the possibility that Democrats will "lock in" a generational cohort, giving the party an edge in future elections. Similarly, his strong support among non-white voters—who make up an increasingly larger segment of the electorate—suggests rich demographic dividends for Democrats over the long term. If the "Obama coalition" can be recreated on a regular basis, the argument that we have entered a new Democratic regime is not unreasonable.

On balance, however, the argument that Obama is not a reconstructive president is the more persuasive. First, it is not obvious that Bush's tenure marked the end of the Republican era or that Bush himself was disjunctive. In 2005, Skowronek himself labeled Bush as an "orthodox-innovator" who attempted to carry on the viewpoints of the New Right while finding new stances towards education, immigration, and faith-based welfare programs (Skowronek 2005). Gerald Magliocca expanded on these observations in the wake of Bush's second term, arguing that the events of 9/11 forced Bush simultaneously to articulate the values of the New Right regime and to construct a new set of foreign policy commitments in regards to Iraq and the general spread of democracy (Magliocca 2009). Bush thus overreached in trying to maintain the stability of his political coalition at the same time he launched a risky—and ultimately unpopular—venture abroad. Under this analysis, the Bush administration may be a failed presidency, but not necessarily a disjunctive one, better matched to LBJ than Hoover.

Second, Obama's election, while obviously historic in regards to the tortured history of American race relations, probably did not redraw the political map or reshape partisan loyalties. While he did make inroads into states where Democrats had not won for some time, Obama's victory was far from the sort of landslide or even "big" win that often signals a shift in political coalitions (Ceaser and DiSalvo 2009). His wins in states such as Virginia or North Carolina may instead have been the result of small but meaningful demographic changes, as well as a short-term reaction to economic conditions. Third, it remains unclear whether the coalition that elected the president in 2008 can be replicated in midterm elections, for future Democratic presidents, or even in 2012. Obama's election has not dissipated public distrust of government involvement or public disdain for federal political institutions, and appears to have energized conservatives in much the way that Bush's election energized liberals.

Fourth, Obama's rhetoric speaks not only of change, but also of creating a post-partisan world where Republicans and Democrats can work together on major reforms. Such language is not usually the hallmark of a reconstructive president. Finally, while the White House ultimately succeeded in passing health care legislature, the reform's grinding development and close passage in the face of a skeptical public does not bring to mind the sort of popular, sweeping reforms associated with past reconstructive presidents. Given these points, Obama may ultimately be closer to Bill Clinton and Richard Nixon than FDR: a "preemptive" president who stands opposed to a weakened-but-still-living New Right Republican regime, much as Nixon stood opposite a flailing New Deal Democratic regime.

There is another option, however, besides labeling President Obama as either reconstructive or preemptive. Instead, we may have entered an era where Skowronek's framework has simply broken down. As previously discussed, the ability of reconstructive presidents to reshape law and politics has decreased over each cycle of political time, with the Reagan administration having the weakest impact of any reconstructive administration. There is every reason to think Obama would fare even worse as conditions for reconstruction continue to deteriorate.

The "thickening" of political institutions and the bureaucracy, in which the creation or expansion of particular programs cause interest groups to form and defend them, will notably hinder Obama's legislative proposals but also any attempts to shift Supreme Court doctrine in a leftward fashion. Both Keck and Steven Teles have described how the New Right developed its own interest groups, foundations, and societies (Keck 2006; Teles 2008) in response to organizational innovation on the left. Such groups will presumably attack any nominee that threatens recent conservative or libertarian gains, and will wage a slow war in the labyrinth of the lower courts to defend their gains. The tension

here is clear: the legacy of the New Deal and the Warren Court promotes the idea that government action is central to promoting equality, prosperity, and economic security, even as the legacy of the New Right argues such involvement is counterproductive or even malignant. As the recent health reform debates have shown, significant change becomes increasingly difficult when the public desires neither abolishing the modern welfare state nor having it take on new problems (Tushnet 1999).

Not all broad political trends hurt the chances of successful reconstruction. Contrary to its decline during much of the New Right era, partisanship is on the rise among both political institutions and the voting public (Brewer 2005). However, while rising partisanship may have contributed to increased voter turnout and involvement over the past two presidential elections, it may also contribute, paradoxically, to even greater protection for congressional incumbents. There is evidence that voters, especially elites, are "sorting" themselves by moving to districts that appear to match their ideological preferences (Abramowitz et al. 2008; Gelman et al. 2008). Though there certainly remain "swing" areas whose outcome can be influenced by a popular (or unpopular) president, most congressional seats will remain uncompetitive during a general election. While greater partisanship and political participation was of great use to candidate Obama in 2008, it will be of less help in pressuring key congressional players to support the administration's agenda.

In short, the distance between reconstructive and preemptive presidents is growing smaller over time, and it may be the case that no president, Republican or Democrat, will again possess the reconstructive capabilities held by leaders of prior regimes. This development will enable the Court to be increasingly autonomous, given that no regime or institutional actor has the power to effectively constrain it, but will also make it increasingly powerless, too moderate and too heterogeneous to do much more than to just drift to the left or right (Tushnet 2006).

CAVEATS AND CONCLUSION

This prediction should be taken in the cautious spirit it is offered. Historical patterns such as Skowronek's cycle of political time are useful for understanding the past, but they cannot always predict the future. The quantitative literature on important cases is nascent, and may offer different conclusions as it develops. Finally, much of the above is premised on the observation of only eighteen months of Obama's presidency, an admittedly narrow slice of time. As such, some caveats should be offered here. What events might raise the currently low likelihood of a big Court in the future?

First, if Obama succeeds in creating a liberal majority on the Roberts Court, it would likely take his second term to do so (assuming reelection). In the meantime, Republican appointees will maintain the natural majority, and thus may continue to move rightward in some doctrinal areas. While the early Roberts Court appears to have carried on the incremental change that characterized its predecessor (Clayton and Christensen 2009), at least two dramatic decisions, *District of Columbia v. Heller* (2008) and *Citizens United v. FEC* (2010), suggest it retains some capability for vigorous action in areas where Justice Kennedy is actually conservative. More such decisions might actually increase the probability of a stronger liberal majority. Rosenberg (1993) has famously argued that controversial court decisions do a better job of galvanizing the opposition than they do of creating lasting social change. Whittington has similarly shown how a Court that attempts to entrench the values of a failing regime may allow a reconstructive president to use it as a symbol of the old regime's lack of legitimacy (2007). The Court thus might become an effective foil for liberal attacks.

At the same time, however, it is not clear on what other issues the Roberts majority might fatally overreach. The presence of Justice Kennedy should prevent substantial rightward movement on more salient issues, such as abortion rights or the constitutionality of the Civil Rights Act, which might truly ignite the left or make doctrinal change a top Democratic priority. *Citizens United* undoubtedly angered good-government groups, as well as many liberals and moderates concerned about corporate involvement in elections. It is certainly unpopular in public opinion polls. I submit, however, that while it excites elites, the issue of campaign finance is unlikely to greatly concern the general public in the midst of an ongoing economic crisis and an unfolding environmental disaster.

Second, the nation may move further to the left if the economy recovers, if health care reform comes to be viewed a success, or if Obama is reelected, deflating conservative hopes for a quick return to power. A rising egalitarianism might encounter increasing constitutional roadblocks or face institutional problems that only the Court could resolve. If strong support for removing those roadblocks coalesces, change becomes much more likely. A third possibility is that a deepening recession or an extended jobless recovery might lead to a strong third-party challenge, or some other fundamental resettling of the current partisan structure. Unfortunately, assessing the probabilities or the contours of such a change is difficult in and of itself, and there is almost no chance of predicting how it would affect the Court.

A fourth and final change that might shift the landscape would be, paradoxically, the derailment of the administration's legislative agenda. If President Obama can make little headway on his remaining policy commitments—perhaps due to deficit concerns or increased Republican

congressional power—he might shift greater attention to the courts. President Bush's second term, while largely regarded as a failure in domestic policy terms, provided conservatives with two reliably conservative votes on the Supreme Court. Perhaps a weakened President Obama might do the same.

Predicting the future is a dangerous game. But given what we know about the history of the Supreme Court, regime theory, the relationship between the Court and the President, and the relationship between Court dynamics and the creation of significant cases, a prediction that an Obama Court would not become a big Court appears a good bet. Liberals might hope for the overturning of controversial 5-4 decisions from previous courts. While this is plausible for little-known and little-loved decisions such as *Seminole Tribe v. Florida* (1996), overturning cases such as *Heller* or *Citizens United* will be more problematic. Once granted, rights are difficult to remove. A more likely development might be a reverse of the recent rightward shift in abortion cases, seen in cases such as *Gonzales v. Carhart* (2007). For the most part, though, we should see a mirror image of the later Rehnquist years: a Court that has autonomy to make moderate changes in a liberal direction, but lacks the vision or coherence to create more lasting change.

The increasing likelihood that the Court will produce evolutionary rather than revolutionary change may be happy news to those who feel that the Court is too active in our political system. Nevertheless, this development should give readers pause. The Court's increasing incrementalism results from a contagion that has spread from the broader political system. The progressive authors in the *Constitution in 2020* do not often make this connection, abandoning the Warren-era trope of relying on the Court for social change while in the same breath taking seriously the possibility that our fragmented electoral institutions could alleviate inequality in the way that they desire. Sweeping goals of any ideological stripe seem increasingly implausible in a world where government intervention is simultaneously desired and decried. If the Court's weakened impact is the result of political fragmentation, institutional thickening, and the waning of political time, then scholars need to pay greater attention to the possibility that American institutions are losing the ability to reinvent themselves. If we have lost the ability to generate punctuated equilibrium in our political institutions, we must resign ourselves to a government that is only capable of incremental change.

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