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A Letter from the Section Chair

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Because of the crucial importance mentoring plays in a young academic's professional development, the issue of how to mentor graduate students and junior faculty is of perennial concern. I suspect that most successful scholars owe some part of their accomplishments to the input of graduate school mentors and senior colleagues. In appreciation of the importance of mentoring, APSA created its Task Force on Mentoring, which has released a report and begun a series of programs that focus on the career development of new political scientists. You can read about these opportunities at http://www.apsanet.org/about/mentoring/.

The question I wish to address in this column is the following: what role can the Law and Courts Section play in the mentoring of graduate students and junior faculty? My intention is not to answer this question but to foster a dialogue on it. While I hope this dialogue will occur in various forums (such as the Law and Courts Discussion List), I have created an Ad Hoc Committee on Mentoring (chaired by Elliot Slotnick) to report on ways the Section can facilitate the professional development of its members.

Let me begin by noting that I consider information to be the key resource the Section can offer its members. One of the principal ways we can foster the career development of our members is to make them aware of broad strategies and individual tactics that can help them achieve their professional goals. These goals include developing skills necessary for conducting research, obtaining funding for research projects, publishing articles in peer-reviewed journals, publishing books at university or trade presses, obtaining a first job, securing tenure and promotion, gaining recognition for research, and being an effective teacher. Importantly, the Section contains many highly successful political scientists who possess information about how to realize these goals. My objective with this column is to encourage us to think about ways to convey this information to members in an efficient and productive way.

Let me briefly consider a few of these career goals and the types of information the Section can provide its members. First, one of the most important objectives of graduate students and faculty is the development of a set of research skills that allows them to ask interesting

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General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer). Contributions to **Law and Courts** should be sent to the **NEW** editor:

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Articles, Notes, and Commentary

We will be glad to consider articles and notes concerning matters of interest to readers of **Law and Courts.** Research findings, teaching innovations, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review.* Please submit two copies of the manuscript electronically as either an MS Word document or as a PDF file. Contact the editor or assistant editor if you wish to submit in a different format. Graphics are best submitted as separate PDF files. In addition to bibliography and notes, a listing of website addresses sited in the article with the accompanying page number should be included.

Symposia

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when posible. Finally, authors should notify:

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questions and answer them in appropriate and rigorous philosophical, theoretical and empirical ways. While most of this training occurs in graduate school (or, once one obtains a job, from departmental colleagues), there are a host of opportunities for refining one's research capabilities. One way the Section can assist its members is by creating a list of such opportunities on its web site and encouraging young scholars to avail themselves of them. A few that come immediately to mind are ICPSR's Summer Program in Quantitative Methods of Social Research (http://www.icpsr.umich.edu/training/summer/about.html), The Empirical Implications of Theoretical Models Summer Institute (http://eitm.berkeley.edu/; http://wc.wustl.edu/eitm/), and the Consortium on Qualitative Research Methods (http://www.asu.edu/clas/polisci/cqrm/).

Second, we can mentor young researchers through the use of Short Courses at the annual APSA meeting. In recent years, most annual meetings feature at least one Short Course on professional development. These courses range in theme from getting a job at a private liberal arts college to learning how to publish. Public law scholars have also successfully used short courses for pedagogical purposes. At the 2002 meeting, for example, there was a Short Course on Comparative Constitutional Development and a Short Course on Formal and Empirical Applications in the Study of Judicial Politics. I suggest that we think about additional ways to use Short Courses as a mentoring tool.

Third, the Section can facilitate graduate student attendance at professional meetings. In fact, we have already begun working on this issue, and at the 2004 annual meeting the Executive Committee voted to fund travel awards for graduate students who are presenting research at the APSA meeting. Details of this program will be forthcoming in the near future.

Fourth, most of us value constructive feedback on our research before we submit it for publication. But, not all of us have access to colleagues who are able or willing to read our work. I therefore recommend that we consider ways the Section can foster communication among its members on their research. One example of such an enterprise is the The Judicial Working Group (http://oregonstate.edu/Dept/pol_sci/fac/spill/Conference/groups.html), which is a forum for young judicial scholars to circulate working papers and exchange ideas about their research. This group is a fabulous opportunity for young scholars, and I encourage them to take advantage of it. Another example is the Political Methodology Section's annual meeting, which brings together scholars interested in that particular subject matter. One notable feature of this meeting is that it is funded in part by the National Science Foundation and the host-university that year. Last, and certainly not least, the Law and Courts Discussion List (http://www.law.nyu.edu/lawcourts/pubs/index.html) is a valuable tool for the exchange of ideas. I encourage us to think about ways to build on these types of endeavors to help move forward the research and teaching programs of young scholars.

Fifth, many of us place a high priority on having our research published in peer-reviewed journals or university (or trade) presses. What are the most effective ways to get research published? I am sure that our members have much great advice they could dispense on this subject. We need to think of ways to bring this information to those who can profit from it. Perhaps one way to do so would be to have various senior scholars write occasional columns for the Law and Courts Newsletter on this subject. An example is Chuck Myers' (Princeton University Press) piece on how to publish a book, which can be accessed at http://www.apsanet.org/PS/july04/myers.pdf. The Section initiated an effort along these lines a few years back when it circulated a list of members willing to dispense advice on book publishing issues. Perhaps we could build on this idea and develop a program geared toward connecting junior scholars seeking publication guidance with more senior members of the Section. Alternatively, the Section could utilize APSA's Mentoring Database, which is a list of political scientists who are available to counsel new scholars on matters relating to the profession (http://www.apsanet.org/about/mentoring/database.cfm).

Sixth, the Section can make its members aware of funding opportunities and ways to maximize the chance of winning an award. Our Section members, for instance, have much knowledge regarding how to secure funds from such organizations as the National Science Foundation and the National Endowment for the Humanities. I suggest we consider putting together and disseminating information on how to obtain funding.

The above discussion is merely a starting point for a dialogue that I hope will result in some new and exciting ways to foster the professional development of new political scientists studying law and courts. In so doing, we can assist individual researchers in their pursuit of scholarly excellence as well as enhance the reputation of the Section. If you have ideas, feel free to contact me at jfspriggs@ucdavis.edu.

Syposium:
The Bush Presidency, The Supreme Court & the Constitution

EDITOR'S NOTE: On December 3, 2004, the Thomas S. Foley Institute for Public Policy and Public Service at Washington State University hosted a symposium on "The Bush Presidency, the Supreme Court, and the Constitution." A streamed version of the roundtable can be accessed on the Foley Institute's webpage at http://libarts.wsu.edu/foleyinst/. What follows are the written comments of the participants.

Introduction: The Bush Presidency and the New Right Constitutional Regime

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This is an opportune time to discuss the relationship between the presidency, the Supreme Court, and the Constitution, especially if we look beyond individual cases or legal issues. How a second Bush term may affect such things as abortion rights or gay marriage are important topics that have consumed much of the media's attention. Nevertheless, President Bush's reelection raises larger stakes for American constitutional development that will become apparent if we adjust our focus and adopt a broader, historical perspective. Indeed, there is every reason to believe that the nation is at a crucial juncture in its constitutional history, one that is being over-looked by the popular media and not fully appreciated by scholars. If the nation is at a crucial turning point in its constitutional regime, George Bush's presidency may have profound, long-term consequences for the American constitutional order beyond what one might normally anticipate from a two-term presidency.

The Idea of "Constitutional Regimes"

The American Constitution is typically thought of as the oldest constitution in the world. Yet anyone who has studied American history knows that today's political system bears little resemblance to the constitutional order that existed in 1789. While some changes to our constitutional system have been evolutionary, others have not. Indeed, constitutional historians identify periods of relatively abrupt change during which our constitutional system has undergone tectonic shifts and the entire architecture of the political system was realigned.[1] These periods of change produce a reasonably stable set of institutional arrangements through which ordinary political decisions are made over a sustained period, or a "constitutional regime" (Tushnet 2003).

Political scientists tend to explain these periods of constitutional transformation by focusing on electoral-party politics and especially on periods of "critical elections." These elections (usually presidential elections) produce dominant political parties or group coalitions for a generation or more in their wake. The ideological values of these dominant groups and parties in turn shape the terrain of political debate and structure public policymaking, thus creating durable "political regimes." The definitive statement of critical election theory remains Walter Dean Burnhan's *Critical Elections and the Mainsprings of American Politics* (1970). Perhaps the most important assessment of the role of the presidency during such periods is Stephen Skowronek's *The Politics Presidents Make* (1997), in which the author explains how "transformative presidents" use such elections to confront and change existing constitutional structures.

Law and courts scholars were among the earliest political scientists to recognize how critical elections and the emergence of dominant group or party coalitions influenced the role of governing institutions. Robert Dahl's classic 1957 article "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker" emphasized how the judiciary tends

to act as a partner with national governing coalitions when exercising the power of judicial review. Following Dahl's lead, Martin Shapiro developed an approach he labeled "political jurisprudence" which sought to treat courts "as part of the institutional structure of American government basically similar to such other agencies as the ICC, the House Rules Committee, the Bureau of the Budget …" Just as these institutions were influenced by the relationships within, and changes to, the dominant governing coalition, so too were courts (Gillman 2004 and Shapiro 1964). Subsequent law and courts scholars have established an important theoretical literature specifically examining the Court's role in relation to critical elections (Adamany 1980, Funston 1975, Gates 1987, Gates 1999, Halpern and Lamb 1998, Lasser 1985).

Much of the early research on the Court and the political regime was conducted when behavioralist and attitudinalist approaches to judicial decision-making were at their peak. Thus, as with Dahl's article, this early research tended to emphasize judicial selection as a mechanism that brings courts into line with the political preferences of the dominant governing coalition. In this sense, the courts' role in the political regime was seen as one of simply legitimizing the policy preferences of the dominant party coalition. Indeed Herman Pritchett's classic 1948 study, *The Roosevelt Court*, widely credited with generating the behavioral approach, can itself be interpreted in this way.

By contrast, a parallel literature emerging in law schools and the legal academy have tended to focus on the normative problems associated with constitutional transformation by focusing on what Bruce Ackerman (1991) has termed "constitutional moments." In this view a realignment of politics is brought about through the acceptance at a given point in history of a new constitutional vision, one that is both coherent and is principally embedded in legal documents, practices, or judicial understandings. Jack Balkin and Sanford Levinson (2001) have suggested that such periods of constitutional change do not necessarily arise suddenly but can, and ordinarily do, occur gradually through a process of "partisan entrenchment" when a single party comes to extend its control over all three branches for a period of time. Mark Tushnet (2003), on the other hand, has argued that new "constitutional orders" can both emerge gradually and need not necessarily require partisan entrenchment. Indeed, they even can be characterized by divided government and a chronic lack of ideological consensus. Interestingly, much of the most recent research in this stream echoes the behavioralist-era assumption in political science, in that it emphasizes patterns of judicial selection by dominant party regimes as the key to understanding the process of constitutional regime change (e.g. Balkin and Levinson 2001, Johnson 2003, Simon 1995).

As with other areas of constitutional law and theory, there was in the past little dialogue across these two disciplinary literatures.[2] More recently, however, scholars have begun to bridge this divide. In particular, law and courts scholars in political science have moved beyond narrow behavioralist approaches that focused on individual judicial attitudes and the replacement of "liberal" or "conservative" judges. This new research has attempted to explain how judicial attitudes are themselves embedded in the larger normative structures and the web of institutional relationships that comprise the political regime (Clayton and May 2000, Gillman 2002, Graber 1998, Keck 2004, Kersch 2004, McMahon 2004, Pickerill and Clayton 2004, Powe 2001, Whittington 2001). There has also been an effort in this new research to shed light on the many ways that courts and judges interact with the political regime beyond serving as agents for the policy preferences of the dominant governing coalition (for an excellent overview of this work see Gillman 2004). This renaissance in the study of political regime theory and the courts is a welcome development and holds out the promise of connecting political science and legal academic research on constitutional change and a more complete understanding of constitutional regimes.

The New Deal Constitutional Regime and Regime Change

An important problem confronting scholars interested in constitutional regimes is in knowing precisely when regime transformation is underway, and, particularly, whether we are in the midst of regime change today. To understand this problem it is helpful to know something about previous periods of regime change. For example, the ascendancy of the Republican Party after the election of Lincoln in 1860 is usually seen as a critical election transforming American party politics. In the wake of that election Lincoln's Republican Party transformed the American constitutional order through a series of constitutional amendments and statutory reforms that helped to nationalize and democratize American politics. Similarly, the election of Franklin Roosevelt in 1932 is generally viewed as another critical election, and the reforms ushered in under the New Deal are thought to have led to the establishment of another constitutional order (Ackerman 1991, Burnham 1970, Skowronek 1997).

What both of these periods of constitutional regime change had in common was a crisis or series of cataclysmic events that allowed the constitutional vision of a "transformative president" to become "sticky" or to solidify within the political system. In the case of Lincoln it was the Civil War and the aftermath of Reconstruction. In the case of Franklin Roosevelt it was the Great Depression and WWII. Not enough attention has been paid to the function of these political crises in the entrenchment of regime change, but they do seem to play an important role. A sense of crisis can be used to demobilize and delegitimize political opposition to a president's transformative programs while simultaneously allowing a president to plausibly claim that constitutional change is necessary for the very survival of the constitution itself.

These two previous periods of constitutional regime change, however, differ in important ways as well. In contrast to the Civil War period, the New Deal did not produce formal constitutional amendments. Instead, the mechanisms for constitutional change were simply alterations to existing political practices and judicial re-interpretation of certain constitutional doctrines and understandings. Indeed, after his reelection in 1936, Franklin Roosevelt threatened to "pack" the Supreme Court (expanding its size from 9 to a maximum of 15 justices) if it did not change its interpretation of the Constitution to permit his New Deal programs. In the now familiar story, the Court blinked first in this confrontation, and in early 1937, it began upholding Roosevelt's policies. Roosevelt went on to appoint the next nine justices to the Supreme Court, guaranteeing that his New Deal political ideology would be constitutionally entrenched by the Court for years to come (Ackerman 1991, Leuchtenburg 1995).

During the New Deal "constitutional realignment," the Court responded to the president's ideological-constitutional agenda by altering numerous constitutional doctrines and understandings. These changes paved the road for the New Deal political coalition to construct the modern social-welfare, regulatory state. Moreover, as the Court legitimized the expansion of federal regulatory power, it also carved-out a new role for itself in social policy-making by developing a modern "Due Process" and "fundamental liberties" jurisprudence under the 14th Amendment. Unlike the *reactive* role played by courts in previous periods of constitutional realignment, the doctrines associated with this jurisprudence allowed courts to become *proactive* partners with the New Deal coalition in promoting constitutional change. Under the doctrines of "incorporation" and "substantive due process" the Court advanced elements of the New Deal ideological agenda, sometimes in concert with the elected branches and sometimes not, in policy areas ranging from race relations, to criminal justice and the rights of the accused, to gender equality and protection of political, social and religious minorities (Kersch 2004, Klarman 1996, McMahon 2004, Powe 2003).

The New Right Constitutional Regime

If we know that Roosevelt's New Deal ushered in a new "constitutional order" that restructured policy-making and the roles of different political institutions (including courts), there is a growing debate today about whether that constitutional regime still exists. In particular, there is controversy over whether it is being replaced by a "New Right" constitutional regime, one composed of the groups and ideas galvanizing the Republican Party since the election of Ronald Reagan in 1980 (Ackerman 1998, Balkin and Levinson 2001, Halpern and Lamb 1998, Simon 1995, Smith and Hensley 1994, Tushnet 2003).

The groups associated with this new regime include the religious right, neo-conservatives, and economic libertarians or so-called free-market liberals (Peele 1984). It remains to be seen whether this coalition of sometimes disparate groups shares a coherent constitutional vision, or whether their separate visions will ultimately prove incompatible. Nevertheless some of the ideas associated with the New Right Republican Party coalition are quite clear: the devolution of federal power to state and local governments; economic individualism and privatization of responsibility for social-welfare; the use of markets and market principles in lieu of administrative regulation of business, the economy, and the environment; and religious or moral revivalism often referred to as "the politics of values" or "culture wars"(Clayton and Pickerill Forthcoming, Hacker 2002, Hacker 2004, Peele 1984, Pickerill and Clayton 2004, Pierson 1994, Pierson1996, Whittington 2001). In advancing these ideas, Ronald Reagan clearly sought to become a "transformative" president and to usher in a New Right constitutional realignment. Indeed, his Office of Legal Policy even took the extraordinary step of producing a series of documents that constituted a blue-print for constitutional change that the administration hoped to effectuate via strategic litigation and judicial selection (Johnson 2003, O'Brien 1988).

One thing certain is that the New Deal Democratic Party coalition no longer exists. One can point to various reasons for its collapse, but two reasons seem obvious. First, the modern civil rights movement led the defection of the South from

that coalition and the demise of the southern wing of the Democratic Party. Second, the shift away from heavy industry and toward high-tech and information technology in the US economy during the latter half of the 20th Century dramatically reduced the power of a second key component of the New Deal coalition, organized labor (Cohen et. al. 2001).

As the New Deal political coalition weakened, central elements of its constitutional vision have come under attack. Recall that the New Deal constitutional order was constructed through changes to political practice and judicial reinterpretation of constitutional doctrines, not by formal amendments to the Constitution. Consequently, changes to that constitutional order likely will proceed in the same way, and so we should pay special attention to how such practices and doctrines are today being altered.

The justices who make up the current Rehnquist Court have now served together since 1993, longer than any natural Court since the turn of the last century. Six of the nine members of this Court were appointed (or elevated in the case of Rehnquist) by post-1980 Republican presidents. Each shares, more or less, the New Right political ideology. Moreover, this Court is arguably the most assertive Court since the 1930s, and possibly the most assertive Supreme Court in history (Keck 2004). Not only did it intervene in a presidential election four years ago to ensure that a New Right president would be in office, but over the past decade, the Supreme Court has handed down a succession of decisions challenging central elements of the New Deal constitutional order (Balkin and Levinson 2001). For example:

- The Court, for the first time since 1937, has struck down several federal regulatory statutes on the grounds that Congress exceeded it authority under the Interstate Commerce Clause (*Gregory v. Ashcroft* 1991, *United States v. Lopez* 1995, *United States v. Morrison* 2000).
- It has severely restricted Congress' power to legislate and protect minority groups under Section 5 of the Fourteenth Amendment (*Boerne v. Flores* 1997, *Adarand v. Pena* 1995, *Kimel v. Florida* 2000, and *United States v. Morrison* 2000).
- It has rehabilitated the doctrine of dual sovereignty under the 10th and 11th Amendments, using it to strike down a slew of federal regulatory mechanisms and programs (*Seminole Tribe v. Florida* 1996, *Alden v. Maine* 1999, *Florida Prepaid v. College Savings Bank* 1999, *Kimel v. Florida* 2000, *University of Alabama v. Garrett* 2001, *Gregory v. Ashcroft* 1991 , *New York v. United States* 1992, *Printz v. United States* 1997, and *Mack v. United States* 1997).
- It has expanded the autonomy and constitutional protection of private corporations. For instance, it has constitutionally indemnified corporations from private damage suits (*BMW v. Gore* 1996), it has extended free-speech rights to protect corporate advertising (*44 Liquor Mart v. Rhode Island* 1996, *Thompson v. Western States Medical* 2002), it has used the principles of the First Amendment to shield corporations from government regulatory programs (*United States v. United Foods* 2001), and it has protected corporations from federally mandates requiring corporations to fund pension funds for workers (*Eastern Enterprises v. Apfel* 1998).
- Finally, while the Rehnquist Court has continued to expand some rights under its "fundamental liberties" jurisprudence (e.g. *Lawrence v. Texas 2004)* it has moved decisively to curb the expansive liberal individualism of that jurisprudence in many other areas of constitutional law. For example, it has clearly retrenched the rights of the accused and convicted (*Minnesota v. Dickerson* 1993, *Ohio v. Robinette* 1996, *Thorton v. United States* 2004, *Arizona v. Evans* 1995, *Chavez v. Martinez* 2003, *United States v. Pantane* 2004, *McCleskey v. Kemp* 1987, *Payne v. Tennessee* 1991, *Lockhard v. Frewell* 1996, *Felker v. Turpin* 1996, *Calderon v. Coleman* 1998), it has significantly reduced the space that separates church and state in Establishment Clause jurisprudence (*Lamb's Chapel v. Moriches Union Schools* 1993, *Rosenberer v. University of Virginia* 1995, *Agostini v. Felton* 1997, *Mitchell v. Helms* 2000, *Zelman v. Simmons-Harris* 2002), it has retrenched the right to privacy in other areas (*Washington v. Glucksburg* 1997, *Vernonia School District v. Acton* 1995), and it has it has narrowed (and may yet) eliminate the abortion right (*Planned Parenthood v. Casey* 1993).

Despite these developments, it would be premature to mourn the passing of the New Deal constitution or to herald the arrival of a New Right constitutional regime. One can also point to numerous decisions by the Rehnquist Court suggesting that the New Deal constitutional regime lingers on and that only a "chastened" version of it has emerged (Tushnet 2003). Nevertheless, while institutional changes such as those sketched above do not dictate a singular direction for future constitutional change, they do create "path dependencies" that at the very least restrict some future developments (Pierson 2000). Indeed, the forces that create path dependencies in other areas of institutional change are further reinforced in the judicial arena as they are further buttressed by the institution of *stare decisis*. Thus we appear to be at an important

juncture in our constitutional history. Whether we are at a turning point toward a New Right constitutional order or simply seeing the continued decline of the New Deal order still remains to be seen. However, George Bush's reelection may well become crucial.

George W. Bush: Completing the Reagan Revolution?

While it is, of course, too early to tell what will happen in a second term, there are at least three major indicators that Bush's election in 2000 and his reelection in 2004, may become a pivotal point in constitutional regime change. First, Bush's reelection to a second term, with expanded and more conservative Republican majorities in both houses of Congress, is unprecedented in the post-1932 period. Election scholars have been calling Reagan's election an "incomplete" or "partial realignment" ever since 1980 (Beck 1988). Future political historians may well conclude that Bush's 2004 reelection, with a decisive popular vote and increased Republican majorities, completed the critical electoral realignment that began with Reagan.

Second, more than any president since Reagan, George W. Bush shares the New Right's constitutional vision. During the first term, the Bush administration's massive tax cuts, its efforts to privatize social welfare, its anti-regulatory and pro-business economic policy agenda, and its conservative, overtly religious, cultural policy views, all tracked the political-constitutional vision developed during the Reagan presidency (Campbell and Rockman 2004, Johnson 2003). Moreover, as David O'Brien and David Yalof discuss below, during the first term the Bush Justice Department, under Attorney General Ashcroft, pursued an ambitious New Right legal policy agenda and an aggressive judicial selection strategy aimed at elevating New Right jurists to the bench. It is predictable that these patterns will continue during a second Bush term, a period in which the President is likely to fill at least one, and probably two or three, vacancies on the Supreme Court.

Finally, President Bush built his reelection campaign around the crisis confronting the nation after 9/11 and his role as the commander-in-chief in the war on terrorism. As Nancy Kassop discusses below, during the first term the President effectively used the "terrorism crisis" to consolidate and expand the constitutional powers of the executive. Moreover, the sense of crisis projected by the Bush reelection campaign (nicely encapsulated by the infamous "wolfs are in the woods" campaign ad) effectively demobilized political opposition and legitimized many of the administration's otherwise constitutionally suspect first term policies (such as the erosion of civil liberties under the Patriot Act, the assertion of broad presidential powers over national security and executive secrecy, and the conduct of a unilateral foreign policy). Given the success that the administration had using the "terrorism crisis" to justify constitutional changes during the first term and to win a second term for itself, it may well prove to be the type of crisis that allows the New Right constitutional regime to stick and become entrenched..

Of course, it is possible that the Bush administration "terrorism crisis" strategy backfires and produces the opposite effect. Clearly if the Civil War had turned out differently, or if FDR had continued to preside over a country in economic depression or a failed war policy, the course of our constitutional history would have been much different. Thus, it is entirely possible that the Bush administration's policies to address the "terrorism crisis" will produce political dynamics that unhinge, rather than entrench, New Right constitutional aspirations. Even absent that, it is not clear that the various groups that compose the New Right electoral coalition share compatible constitutional visions. Surely some of the preferences of the Religious Right, such as censoring media corporations or protecting traditional forms of economic community against market forces, for instance, will not be acceptable to libertarians and free-market liberals. The New Right political coalition could conceivably collapse from internal stresses caused by cleavages between its groups, especially as these groups continue to solidify policy preferences into constitutional positions and doctrines. Indeed some of the bitter conflicts on the Rehnquist Court over civil liberties and civil rights may already reflect these fault-lines within the coalition as played out through the jurisprudential views of different justices. Whether some overlapping constitutional vision can be constructed is still an interesting question that merits more scholarly attention. All this is to say that it is indeed a particularly fascinating time to think about Court, the Constitution and the presidency, and where we are heading in this new century.

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Notes

1 I do not wish to imply that such periods produce a synchronized system of governance in which all political institutions march in lock-step with the ideological preferences of live majorities. The idea of political periodization can be taken too far, especially during periods of electoral dealignment and divided government such as those experienced in the US between 1968-2000. This same assumption lies at the heart of Orren and Skowronek's view of political

regimes as characterized by "multiple orders" (2004). Nevertheless, from a broader historical perspective, it is both possible and useful to describe distinct political and/or constitutional orders.

2 Generally this is more of a problem in the legal academic literature, which inexplicably ignores much political science research on constitutionalism and constitutional theory, see Graber 2002, especially fn 9. An exception to this is Tushnet 2003, which cites a good deal of political science literature.

"Onward, Christian Soldiers": What President George W. Bush's Reelection Bodes for Legal Policy & Judicial Appointments

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In spite of failing to win the popular vote and the Supreme Court's ruling cutting off the Florida recount vote in *Bush v. Gore* that determined the outcome of the 2000 presidential election,[1] George W. Bush governed in his first term as though he had an electoral mandate, especially after the international terrorist attacks on September 11, 2001. No president since Ronald Reagan has had a more ambitious agenda for legal policy reforms—reforms ranging from legislative changes to claims of broad presidential power and to the selection and appointment of federal judges. Nor is there any reason to doubt that Bush will now push even harder for that agenda in a second term.

The First Term

The Bush administration aggressively pursued a conservative agenda in legislation and litigation over claims of presidential power. For example, Bush supported and signed into law a federal ban on "late-term abortions"—the first federal ban on an abortion procedure since *Roe v. Wade* (1973)—in spite of the Court's invalidation of similar state laws in *Stenberg v. Carhart* (2000). He also signed into law the Unborn Victims of Violence Act, which makes it a separate offense to harm an "unborn child" when committing a violent federal crime against a pregnant woman. Challenges to both laws are certain to reach the Court and whether the bare majority's ruling in *Stenberg* survives depends on the composition of the high bench and whether in the interim Bush fills one or more potential vacancies on the Court.

Attorney General John Ashcroft not only aggressively interpreted and defended the sweeping changes in permissible governmental surveillance and the treatment of immigrants made in the 342-page 2001 USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) (For criticisms of the act, see Cole 2003). Ashcroft pushed the enforcement of federal law criminalizing the use of marijuana against terminally-ill patients' use of medicinal marijuana as permitted under California's Compassionate Use Act of 1996, and in ten other states, in *Ashcroft v. Raich*, which will be decided in the October 2004 Term. Shortly before announcing his resignation after Bush's reelection, Ashcroft also asserted the administration's "moral position" and "federal interest" in appealing to the Court to reinterpret federal law and challenge Oregon's law permitting physician-assisted suicide, thus disregarding deference to the states and federalism.

Undoubtedly, though, the most aggressive assertion of presidential power during the first term was the Bush's position on the unreviewable, indefinite detention and treatment of "enemy combatants." Not only did the administration, and in particular White House counselor Alberto Gonzales, claim that the guarantees of the Geneva Convention do not apply to the detainees held in Guantanamo Bay, Cuba and elsewhere, but also that the detainees—citizens and non-citizens alike—had no access courts or to judicial review of the basis for their detention and claims to constitutionally guaranteed protections. Significantly, only Justice Clarence Thomas agreed with the administration's claim of broad presidential power in "wartime;" the Court rebuffed Bush's position in *Rasul v. Bush* and *Hamdi v. Rumsfeld* (2004).

Another notable aspect of Bush's assertion of expansive presidential power was the administration's repeatedly broad claims of confidentiality and secrecy, not only in dealing with "enemy combatants" and foreign affairs but also in domestic affairs. The White House, for instance, refused to turn over to the Senate Judiciary Committee records of judicial nominee Miguel Estrada's work in the Solicitor General's office; initially declined to make public documents related to terrorism prior to 9/11; and successfully defended widening executive branch confidentiality in policy making, in *Cheney v. United States District Court for the District of Columbia* (2004).

Bush no less aggressively pursued a conservative agenda in staffing the Department of Justice (DoJ) with attorneys associated with The Federalist Society and who had previously served in the Reagan administration. In particular, Theodore B. Olson, who argued *Bush v. Gore* before the Court, served as Solicitor General. The DoJ in turn pursued Bush's agenda in structuring and conducting the process for selecting federal judges. Like Reagan and unlike Bush's predecessor, Democratic President Bill Clinton, who was institutionally constrained and placed confirmability in the Senate above ideological judicial appointments, Bush's DoJ imposed a rigorously ideological judicial selection process and the president used his office to press for the Senate's confirmation of his most controversial conservative judicial nominees (For further discussion, see O'Brien 2003 and 2004; see also, Goldman 1997).

To be sure, Bush confronted increasing difficulties over his judicial nominees from Democrats in the Senate. Democrats delayed his most controversial nominees and held filibusters in order to prevent confirmation votes on ten appellate court nominees. After two year, they forced Estrada and the administration to withdraw his nomination to U.S. Court of Appeals for the District of Columbia Circuit, from which three of the last six appointments to the Court have been elevated. In retaliation, Bush bypassed the Senate by naming two filibustered judges—Judges Charles W. Pickering and William H. Pryor—to recess appointments, which they hold until the next session of Congress in 2005. Finally, five months before the 2004 presidential election, the impasse over the Senate's confirmation of Bush's most controversial conservative judicial nominees was broken temporarily by a bipartisan deal. Democrats agreed to allow votes on the confirmation of 20 district court nominees and five appellate court nominees. In return, Bush agreed not to make any more recess judicial appointments. As a result, in his first term Bush named 199 lower federal court judges and the judicial confirmation process became increasingly bitterly divided, embittering both Bush's conservative base and liberal interest groups and their Democratic allies.

In short, like Reagan and unlike Clinton, Bush pursued a rigorously ideological judicial recruitment process and was willing to go to war over federal judgeships. Yet, the ultimate prize eluded Bush in the first term: one or more appointments to the Supreme Court. And that inexorably raised the ante for Bush's legal agenda and the politics of federal judicial appointments in the second term.

The Second Term

With winning a majority of the popular vote by a margin of 3.5 million in the 2004 presidential election, Bush could and did claim a mandate for pursuing a conservative legislative agenda and in appointing federal judges. As he put it the day after the election, "I earned capital in this campaign and now I am going to spend it." In addition, the size of Republican majorities in both the House of Representatives and the Senate increased. With the Republican-controlled majority in the Senate growing to 55 versus 45 Democrats, the battles over federal judgeships are certain to further escalate. Pressures are already growing to abandon the Senate's rule permitting 60-vote filibusters in favor of simple majority up-or-down votes on the confirmation of judicial nominees, and may well prevail if Democratic senators and liberal interest groups attempt to block the confirmation of a nominee to the Supreme Court.

Another sign of how Bush's reelection changed the configuration of governing was the uproar over Pennsylvania's Republican Senator Arlen Specter's assumption of the chairmanship of the Senate Judiciary Committee. Specter—a pro-choice supporter who voted against the confirmation of Reagan's nomination of Judge Robert H. Bork to the Supreme Court in 1987, and hence remains distrusted by Bush's base—created a furor by suggesting that judicial nominees opposed to abortion rights would face serious opposition in the Senate. He was forced to immediately backtrack and to promise to promptly move Bush's judicial nominees to the Senate floor for confirmation votes. Still, hard-line Bush supporters and conservative interest-groups remain unsatisfied and vow to "keep him on a short leash."

In other words, there is every reason to expect that Bush will continue to vigorously pursue his legal policy agenda through judicial appointments and that the war over federal judgeships will continue. Certainly, it appears likely that Bush will name even more conservative judicial nominees and, probably, re-nominate Judges Pickering and Pryor, as well as, perhaps, Estrada. Democratic senators and liberal interest groups, like the Alliance for Justice, are no less certain to "fight the good fight" in opposition.

Moreover, the ultimate prize—namely, appointments to the Supreme Court—may not prove elusive in Bush's second term. Within the federal city and beyond the beltway there is considerable speculation that Bush will have the opportunity to name two or more justices in his second term. The attention now primarily focuses on when (not whether) and who will replace ailing 80-year old Chief Justice William H. Rehnquist. There is also speculation that soon-to-be 75-year old Justice Sandra Day O'Connor might step down after 23 years on the bench. And 84-year old Justice John Paul Stevens, although apparently in good health, might not make it for four more years.

Asked to further speculate, I do so with the caveat and the old Chinese proverb in mind: "He who lives by the crystal ball, eats a lot of ground glass."

If Chief Justice Rehnquist were to step down in the near future, the direction of the Court would not likely change significantly, rather only the tone and tenor of the bench. By contrast, if Bush has the opportunity to fill either or both of the seats occupied by Justices O'Connor and Stevens, the Court could move much more sharply to the right on a range of social issues, including abortion, affirmative action, the separation of religion from the state, and the equal protection of the law. In historical perspective, Bush's filling either or both of those seats could result in a shift in the voting alignments on the high bench and the Court's direction, comparable to President Gerald R. Ford's appointment of Justice Stevens to replace the liberal Justice William O. Douglas in 1975, and Reagan's filling the seat of Justice Lewis F. Powell, Jr., who at the time cast the pivotal vote on "social- civil rights" matters. Recall, too, precisely because the balance on the Court would shift in 1987, a bitter confirmation battle ensued over Reagan's nomination of Judge Bork and the president was eventually forced to name a less dogmatic conservative, Justice Anthony Kennedy.

However, if Chief Justice Rehnquist were to step down before another member of the Court, Bush could maximize his impact on the bench by following Reagan's strategic and politically symbolic elevation of Rehnquist to the chief justiceship and appointment of Justice Scalia to his seat in 1986. Rehnquist, along with Judges Bork and Scalia, was a chief architect of Reagan's legal policy agenda and sent many former law clerks to work in the administration. In other words, Bush could elevate either Justices Scalia or Thomas to the center chair. Both are "darlings" of Bush's base and in his 2000 and 2004 presidential campaigns he vowed to appoint judges "like Justices Scalia and Thomas." Although viewed as the "Godfather" of The Federalist Society, as one of its founding members, and preferred by its members and those in the DoJ, Justice Scalia is 69-years old and, thus, may well be passed over in favor of elevating Justice Thomas, who is only 56-years old, even more conservative than Justice Scalia, and would become the first African American chief justice. To be sure, members of the Supreme Court or others in the DoJ might convince Bush that Justice Thomas would prove too controversial, in light of his heated confirmation hearings in 1991, or that he lacks the temperament to be chief justice. But, recall that Rehnquist was elevated to the chief justiceship in 1986 as the most conservative member of the Court with the reputation of being a "lone Ranger." At the time, he was denounced by liberal Democratic senators but still confirmed, and now the Republican majority in the Senate is even stronger and more partisan.

If Bush were to follow that course, then he could elevate Gonzales, depending on how his Senate confirmation hearings go for the position of attorney general in the second term. However, Gonzales is distrusted by some in Bush's base and may have to await still another vacancy, which in turn could also prove opportune in securing his confirmation as the first Hispanic member of the Court. Instead, Bush might elevate one of several federal appellate court judges, including Fifth Circuit Judge Emilio M. Garza (age 57), Third Circuit Judge Samuel A. Alito Jr. (age 54), D.C. Circuit Judge John Roberts (age 49), or Fourth Circuit Judge J. Michael Luttig (age 50). Other possibilities, though less likely because of their ages, are Fourth Circuit Judge J. Harvie Wilkinson (age 60) and former solicitor general Theodore Olson (age 64). Notably, Judge Luttig would appear a strong contender for a seat on the high bench, regardless of whether Justices Thomas or Scalia was elevated. After graduating from law school, he clerked for then-Judge Scalia on the D.C. Circuit, and subsequently returned (after having been an intern for several years at the Supreme Court) as a law clerk (and later chief clerk) for Chief Justice Burger. Thereafter, he went into the DoJ of the administration of George H.W. Bush and

participated in handling the confirmation hearings for Justice Thomas. Shortly afterwards he was named to the appellate bench as one of the youngest federal judges ever appointed. Moreover, Judge Luttig hails from Texas.

In sum, in Bush's second term supporters look toward reinvigorating and continuing the incomplete "Reagan revolution" by further refashioning and moving the Supreme Court and the federal judiciary in still more sharply conservative directions. Undoubtedly, there will be even more heated Senate confirmation battles over judicial nominees in Bush's second term than in the first term.

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Notes

[1] For an excellent analysis of the Court and the 2000 presidential election, see Gillman 2001.

On Lame Ducks, Election Spoils and the Incredible Shrinking Term

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Unwilling to leave future speculation to astrologists and others practiced in the supernatural, public law scholars in recent times have made a habit of trying to forecast the future actions and decisions of the United States Supreme Court. Each spring the supervisor of the law and courts listserve, Howard Gillman, conducts a parlor game of sorts in which he invites members of the list to boldly offer predictions on how the high profile cases of the term will be decided, votes and all. More recently on the scholarly front, some of our section members have joined colleagues from other areas of the discipline in moving beyond "retrospective orientations" to engage in more systematic efforts to predict the U.S. Supreme Court's decisionmaking patterns. In a recent symposium in *Perspectives on Politics* entitled "Forecasting U.S. Supreme Court Decisions," some leading scholars presented formal statistical models that produced outcome predictions more accurate than those offered by the so-called "experts" (See Symposium 2004).

What about predicting future Supreme Court nominees? To be sure, with George W. Bush's reelection this past November, the cast of potential nominees is already well known, at least among avid court-watchers. For starters, in the May-June 2002 issue of *Judicature*, scholars Kenneth Manning, Bruce Carroll and Robert Carp statistically analyzed a handful of likely Bush nominees: Janice Rogers Brown, Frank Easterbrook, Emilio Garza, Edith Jones, J. Michael Luttig and J. Harvie Wilkinson. Add to that list Alberto Gonzales, whose current assignment to head the Department of Justice may well be a temporary detour en route to an appointment on the high Court. U.S. Court of Appeals Judges Samuel Alito, John Roberts and Michael McConnell are also possibilities, as is former D.C. Circuit nominee Miguel Estrada. Finally, putting aside Janice Rogers Brown, the state courts are filled with lesser-known wildcards who could be tapped as "stealth" candidates. (Recall that Arizona jurist Sandra Day O'Connor was barely known at the time she was named to the high Court in 1981). From the combined pool described above may come one, two or even three future justices of the Supreme Court. These candidates and others have already been subject to considerably intense review by teams of lawyers working in the White House Counsel's Office and elsewhere.

What type of nominee will President Bush look to? Many think that he will name extreme ideological conservatives, regardless of whether or not their nominations would risk incurring significant political backlash from Senate Democrats. Not all presidents in the modern era have been so willing to engage in all-out Supreme Court confirmation battles, in part because such fights may force compromises upon other parts of the president's policy agenda. President Kennedy toyed with naming William Henry Hastie as the first African-American Justice in 1962, but quickly backed off the idea when he realized just how much political capital he would have to expend on such an appointment – the administration's economic program remained a higher priority. President Bill Clinton followed a similar path. After considering Mario Cuomo, Bruce Babbitt and other more controversial nominees, Clinton settled on United States Court of Appeals Judges Ruth Bader Ginsburg and Steven Breyer for the high Court. The looming health care fight demanded all the political capital he could muster; as it was, Clinton still could not overcome the obstacles to comprehensive health care reform that lay in his path throughout the summer and fall of 1994.

Of course there exists spirited disagreement about which individuals can rightfully be characterized as so-called "moderate conservatives" who might be deemed acceptable to both sides of the aisle. For example, on "Scotusblog," the weblog about Supreme Court activities sponsored by the law firm of Goldstein & Howe (http://www.goldsteinhowe.com/blog/index.cfm), Tom Goldstein suggested in a series of posts that given the ease by which John Roberts was confirmed for the D.C. Circuit, it would be difficult to muster solid opposition against his nomination to the high Court. But is Roberts really a readily confirmable moderate-conservative? NPR correspondent Nina Totenberg and others have suggested that a Roberts nomination might well invite serious opposition. Attorney-general designate Alberto Gonzales has also been labeled as "easily confirmable" by some, but his actions as attorney general may shift that calculus, if it was even accurate in the first place.

Although it may be difficult to predict which nominees would invite only nominal opposition, it's not so hard to identify those individuals whose nominations to the Supreme Court would be seen as tantamount to a declaration of war by

Senate Democrats, and whose successful confirmation — if it is even possible — would force the administration to expend considerable amounts of political capital. Certainly all of the lower court nominations that have been filibustered during the past four years, including those of Janice Rogers Brown and Miguel Estrada, would be seen as "swinging for the fences." The appointment of John Ashcroft to the Court would be viewed similarly. And while Clarence Thomas and Antonin Scalia are already sitting on the high Court, the promotion of either to the Supreme Court's center seat would invite loud protests from even some moderate Democratic Senators.

That said, the current conventional wisdom is that President Bush will indeed "swing for the fences" and put up considerable political capital to help secure the appointment of an "ideologically pure" conservative. The rationale for this growing consensus is plain: As a second-term president emboldened by his first clear election victory, President Bush believes he enjoys an electoral mandate to stock the Supreme Court with young conservative justices who will be expected to tow the conservative line on abortion, school prayer and other high profile issues. In making hard political choices during his first term, President Bush often undertook certain courses of action – the war in Iraq being the most high profile example — that took little account of how they might affect the "unity of the country" or the "spirit of bipartisanship." Few expect that now, with the prospect of facing an electorate behind him, President Bush will suddenly subordinate his own conservative policies to help narrow the daunting divisions found both in the Congress and in the country as a whole.

Still, modern political history offers a few notes of caution to those members of the opposition who have already resigned themselves to put up with the most extreme ideologues President Bush has to offer. Second-term presidents enjoying even stronger political positions than Bush have left election night just as optimistic, only to find the walls quickly closing in on their presidencies – as those walls narrow, so also do the opportunities the presidency offers to affect transformative change. Consider the following political realities with which the Bush administration will have to contend in the context of Supreme Court nominations:

The Lame Duck Factor

Obviously, the President no longer faces the threat of a re-election campaign. With that freedom comes a burden, however – constitutionally ineligible to run for reelection, President Bush is now a "lame duck." In modern times, second-term presidents have looked to foreign affairs as their principle means of influence, perhaps because Congress offers the chief executive considerable leeway in that particular arena. By contrast, policy matters that require explicit Congressional approval had better reach fruition by halfway through the president's second term, lest those policies suffer at the hands of a powerful committee chair or even a Senate leadership team with interests that don't always align precisely with those of the chief executive. To succeed in the Supreme Court appointment process, which requires explicit Senate approval, the President must depend heavily on the good will of the Senate.

What's the best guess on when this reservoir of good will runs dry? The only filibuster of a Supreme Court nominee occurred in 1968, when Abe Fortas's bid for chief justice ground to a halt late during President Johnson's final year in office. It should be noted that some key Senate Democrats, including Senator Richard Russell (D.-Ga.), played critical roles in helping to undermine Senate support for Johnson's nominee. Ronald Reagan's failed attempts to first appoint Robert Bork and then Douglas Ginsburg to the high Court also occurred less than 18 months before his own presidency had run its course. In the case of Bork, Ronald Reagan famously lost the support of one moderate Senate Republican, Arlen Specter (R.-Pa.), the same Senator who will serve as Senate Judiciary Committee Chairman at the outset of President Bush's second term. (Conservatives are already wary of Specter, as evidenced by their efforts to pressure him out of that important post based on his publicly expressed skepticism about confirming judges opposed to *Roe v. Wade*). Reagan also lost the support of such Republican stalwarts as Senator John Warner (R.-Va.), whose steadfast loyalty to Reagan rarely wavered up until that point. One should also note that the Senate Judiciary Committee chairman who oversaw Bork's appointment in 1987 was Senator Joseph Biden, himself an aspirant for the White House the following November. Unlike Biden, Senator Bill Frist (R.-Tenn.), the current Senate Majority Leader, is expected to act in concert with the president on judicial nominations. But Frist's own White House aspirations, along with that of other presidential contenders in the Senate such as John McCain (R.-Az.), Chuck Hagel (R.-Neb.) and Rick Santorum (R.-Pa.), make for a mixture of political intrigue that may or may not play out to the president's benefit, especially if he appoints a hardened conservative.

The Simultaneous Vacancies Scenario

Bush administration officials are no doubt relishing the possibility that they might be able to fill more than one vacancy at the same time. Among the more aged subset of the Court that includes Chief Justice Rehnquist, 80, Justice Sandra Day O'Connor, 74, and John Paul Stevens 84, the possibility lurks that two will choose to leave the court at or near the end of the current term. Justice Ruth Bader Ginsburg, 71, is also a possibility for retirement in the not-so-distant future. Yet what seems on its face to be a scenario rife with opportunity for the current administration is also one filled with its own set of complications, driven by the unique set of expectations that would accompany such a scenario. Naturally, the threat of waging two all-out fights for the Supreme Court remains a distinct possibility. Yet while a simultaneous vacancies scenario literally multiplies the transformative possibilities for President Bush, it also increases expectations for compromise, and may encourage the president to tackle an assortment of interests at the same time.

During the Nixon administration's first term, the simultaneous vacancies scenario reared its head not once but twice. In 1969, Abe Fortas resigned from the court at the same time that Earl Warren's retirement announcement from the previous year remained in effect. (Warren had promised Nixon that he would serve through the spring of 1969, until his successor was named). Wisely, Nixon chose to handle the vacancies in succession, rather than together. He appointed Burger as Warren's replacement for chief justice on May 21, 1969, just a week after Fortas left the Court. Burger, a strong conservative but one who was not deemed overly controversial, was confirmed on June 9, 1969, by a 74-3 vote. The administration then waited nearly two months to name Clement Haynsworth as Fortas's replacement. Of course Haynsworth's appointment was extremely controversial; he was eventually rejected by the Senate by a 55-45 tally. His successor to the post, G. Harrold Carswell, also went down to defeat. If Burger and Haynsworth had been nominated at the same time, the dynamics of the appointment process might well have been altered. Burger's confirmation might have been held hostage by the other controversy. Senate Democrats emboldened by their success in challenging Haynsworth and Carswell would have given Burger and his conservative speeches a second look as well.

A second simultaneous vacancies scenario occurred later in Nixon's first term. In September of 1971, Justices Hugo Black and John Marshall Harlan retired from the court for health reasons less than a week apart. In a memo to the President the following week, Patrick Buchanan, no moderate to be sure, urged Nixon to appoint a controversial southerner to one vacancy, and then to the second seat "a judiciary Committee type…the most distinguished strict constructionist we can find, a real heavyweight in everyone's eyes." In short, red meat for one camp (the conservatives) and an olive branch for the other side. Buchanan mentioned Elliot Richardson, a former attorney general from Massachusetts who had clerked for both Learned Hand and for Felix Frankfurter, as a likely candidate for the latter category. The final two nominees for those two seats – William Rehnquist and Lewis Powell – fit Buchanan's criteria indirectly: Powell played the role of eminently confirmable Southerner perfectly, while Rehnquist was the controversial young assistant attorney general whose confirmation proved more contentious. Similarly, in 2005 or 2006, the presence of two vacancies at the same time will put the administration under considerable pressure to balance an extreme ideologue with a more moderate, highly esteemed conservative. If so, Democrats may actually benefit from the simultaneous vacancies scenario.

A Recalcitrant Senate Minority

During the past four years Senate Democrats have proven themselves stubbornly defiant in waging war against President Bush's lower court nominees. The debate waged two decades ago over whether Senators should be able to oppose nominees on the basis of their ideology appears to be over – Presidents pick nominees for their views on high profile issues, and so Senators now feel free to fight them on the same basis. Recent talk of a "nuclear option" – whereby the Senate Republicans would use procedural maneuvers to effectively end the filibuster of judicial nominations on a simple majority vote (rather than the two-thirds normally required to change Senate rules) – has given way in recent weeks to political reality. Although the Senate Republicans now stand 55 strong, the strength of their ranks is considered questionable on a vote for the "nuclear option." Senators John McCain and Charles Grassley (R.-Iowa) have expressed public doubts about the proposal; Moderate Republican Senators Olympia Snowe (R-Me.), Lincoln Chaffee (R.-R.I.) and Susan Collins (R-Me.) may also break ranks on the issue. Other Republican Senators such as Senator George Voinovich of Ohio have formed (along with moderate Democrats) a "Centrist Coalition," whose stated aim is to "help break the impasse on issues that moderates in both parties can agree are important to the nation as a whole." Taking into account these members of a bipartisan coalition dedicated to compromise, it may be especially difficult to secure enough votes to enact the "nuclear option." While the nuclear option theoretically remains, its real value as a threat has been diminished

somewhat. And with the filibuster rule still in place, as few as 41 Senate Democrats will be able to draw the line against President Bush's more hard-line conservative nominees, no matter the cost.

The Bottom Line?

No one can reasonably think based on the limited evidence currently available that President George W. Bush will offer olive branches to the Democrats when the long expected Supreme Court vacancies do finally arise. Tax reform and Social Security privatization may well be high priorities during the Bush Administration's second-term, but the current president has shown no signs that he plans to sacrifice the opportunity to name extremely conservative Supreme Court justices of his choosing in order to achieve policy successes elsewhere. Still, just as Presidents Nixon and Reagan found the going tough when making their own controversial Supreme Court appointments, so may President Bush, notwithstanding the fact that he (unlike those other chief executives) enjoys a clear Republican majority in the United States Senate. Right now, with the 2004 election results still fresh in everyone's mind, President Bush seems nearly invincible. But the walls often close in quickly during a second term. In fact, if history offers any guide, President Bush has only a matter of months before the wide range of options available to him become far more limited.

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The Bush White House: Governing without Congress or the Courts

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When George W. Bush leaves office in January of 2009, he will leave behind not only a *policy* legacy, as every outgoing president does, and not only a likely legacy on the make-up of the Supreme Court, as *some* presidents are lucky enough to be able to have – but a *structural* and *constitutional* legacy, as well. Not since the days of Richard Nixon has a president so affected the constitutional balance of power among the branches as Bush has managed to do in his first term, and appears determined to continue to do into his second. This is no accident, but, rather, this circumstance grows out of a very calculated mission, articulated frequently and vigorously by Vice-President Cheney, for this administration to leave the institution of the presidency stronger than it found it by restoring executive prerogatives that it believes recent presidents (including Reagan) had allowed to erode.[1] In the finite equation that is the basis for checks and balances in our separation of powers system, an increase in power in one branch produces, correspondingly, a diminution of power in the other two. The strengthening of the presidency comes at a cost of reduced influence of Congress and the courts. President Bush's father, George H.W. Bush, was characterized by one scholar as having a strategy of "governing without Congress" (Tiefer 1994). George W. Bush is completing that circle through his strategy of "governing without the courts."

The Return of the Imperial Presidency

One hears increasing references these days to a return of "the imperial presidency," the term coined by Arthur Schlesinger Jr. in 1973 (Schlesinger 1973). I would modify that term, and say, more accurately, that the imperial presidency has given way to an arrogant one – a characteristic that implies disdain for others and a preference for drawing all power into oneself. This definition is an apt description of the conduct of the George W. Bush administration. It is illustrated by three closely-related patterns of behavior: an expansive interpretation of presidential power, centralization of policy-making power in the White House, and marginalization of the courts.

One does not need to look very far to find examples of these patterns, and they operate in a mutually reinforcing way: when the president construes his powers broadly, he draws greater control over policy-making into the White House; and when he interprets that control as absolute and exclusive, he effectively denies the authority of the other institutions to perform their constitutional functions and, in the case of the courts, to review the validity of his actions.

Admittedly, the national security environment since September 11th has offered this president fertile opportunity to do what all presidents do during wartime. But, as President Bush never fails to remind us, the war on terrorism is a different kind of war, and it is that very distinctiveness of this conflict – its indeterminate quality – that creates a context separate and apart from other wars and from other instances of increased presidential authority during military confrontations (Remarks 2002).

Bush's authorization of military tribunals by executive order, without any oversight by Congress, his arrogating to himself the sole authority to designate enemy combatants, and his determination that the Geneva Conventions apply neither to the detention nor to the prison treatment of unlawful combatants are all examples of actions taken on presidential authority alone — actions that have raised serious constitutional questions, and that have prompted ongoing challenges in the courts.[2]

Although the war on terrorism offers a convenient pretext for expanded executive power, the Bush administration's concentration of authority in the president is intended to shore up, as well, the constitutional prerogatives of the office beyond those in the realm of foreign affairs and national security alone. Examples include the assertion of aggressive claims of executive privilege, even when those claims were made on behalf of prior administrations (Clinton, of all people!), and the privilege claim by Vice-President Cheney in refusing to turn over to either the GAO or watchdog groups limited information about his energy task force meetings (Rozell 2003; Tiefer 2003). It is likely that Cheney was the driving force behind these executive privilege matters because he has noted publicly that he believes that previous

presidents have not protected executive privilege sufficiently, and, thus, he is on a mission to reaffirm and strengthen this prerogative for the institution of the presidency (Fleischer 2002; Blum 2002; Bumiller 2002; Clymer 2002). Cheney's professed concern may have been for the principle, but when principle begets policy, the administration can appear to take the "high road" while, at the same time, benefit from the advantages of the policy.

In addition to these *claims* of executive privilege, the administration has also advanced a *policy* on executive privilege as it relates to public access to official White House records of former presidents. This policy, which was announced in an executive order on November 1, 2001, reversed the existing one adopted in the Reagan administration; curiously, the new Bush policy relies on the same failed arguments made by Nixon's lawyers in two federal court cases from twenty years ago (Kassop 2005).[3] Most significantly, it expands the executive privilege claims that former presidents may make, and in additional ways, restricts public access to presidential records, and in effect, overturns the Presidential Records Act of 1978 ("PRA"). Scholars and others who use archival records were puzzled and outraged by the change in policy, and open-government groups questioned the need for these revisions. There was no explanation forthcoming from the White House, other than that it would make for a "more orderly process" of records management (Fleischer 2001). Left to speculate, there are at least three other possible purposes underlying the change in policy: (1) to protect Bush's father, whose vice-presidential records containing information about the Iran-contra scandal became publicly accessible, under the PRA, on January 20, 2001, and whose presidential records will become available on January 20, 2005, or (2) to protect current administration members who had served in either the Reagan or George H.W. Bush administrations (e.g., Powell and Cheney), or (3) to ultimately set down guidelines to allow George W. Bush to have greater control over his own records after he leaves office.

Another non-national security issue where the administration has shown disregard for the other branches and has closely controlled policy from the White House is the matter of judicial appointments. David O'Brien and David Yalof address this issue directly in this symposium. Nonetheless, I would like to draw a connection to the appointment process from some comments by Senate Majority Leader Bill Frist at a recent Federalist Society meeting to illustrate, once again, the pervasive approach of this administration, as orchestrated here by its party members in Congress, to control all of the institutions of government.

I refer here to Majority Leader Frist's comments where he characterized the Democratic minority's use of the filibuster against judicial nominations as "dangerous," "radical," and "unprecedented," and with the consequence that a Senate minority was capable of frustrating the president's constitutional authority to appoint federal judges (Frist 2004). Frist's indulgence for the president's power here seems to suggest that he thinks the Senate's role in that process should be one of complete deference to the president's choices, thereby, a rubber stamp, without independent Senate judgment of the fitness of judicial nominees. Frist concludes that the Senate should roll over and accommodate the president without question; otherwise, it is interfering with a power that is one for the president alone to exercise. Thus, Frist's position is identical to that of the White House. The last time I read Article II, the Senate was still included as a constitutionally authorized player in the judicial confirmation process.

If you are wondering where all of this is leading, and if there is some common thread to tie together the national security elements with executive privilege policy and the judicial appointment process, there is — and it can be stated in two simple words: Alberto Gonzales.

The Gonzales Connection

Gonzales is the current White House Counsel, recently tapped by President Bush to succeed John Ashcroft as Attorney General. He is a young (49 years old) Texas lawyer with, as the press always describes it, "an inspiring personal story" as the son of uneducated Mexican-American immigrants, and the only one of eight children in his family to go to college and, ultimately, to Harvard Law School. He rose quickly in the Texas legal community, first, as a private corporate attorney, then as Bush's gubernatorial counsel, then as Texas Secretary of State, and then as a Texas Supreme Court justice before coming to Washington in January 2001, when Bush asked him to take up the role of Counsel to the President (Taylor 2004).

Gonzales is the thread that ties together all of the various issues catalogued here because the role of White House Counsel places him at the very center as the policy architect of every one of them. To review briefly, the Counsel's office under

Gonzales's direction, was responsible for the following:

- it drafted the November 13, 2001, military order providing for indefinite detention of enemy combatants and the authorization for military tribunals;
- it drafted the November 1, 2001, executive order reversing the existing policy of executive privilege by former presidents under the Presidential Records Act, now giving them far greater control over public access to their official White House records;
- it wrote the January 25, 2002, memo that established the policy of the inapplicability of the Geneva Conventions to the indefinite detention and treatment of enemy combatants, describing the Conventions as "quaint" and "obsolete" towards present day needs in the war on terrorism. It also approved the August 1, 2002, Bybee memo from OLC that guided the conduct of military interrogators at Guantanamo Bay and Abu Ghraib, and that is at the heart of the debate over whether the administration defined "torture" so narrowly as to condone tactics that, in effect, amounted to torture;
- and, finally, Gonzales is the president's point person on judicial selection, as this process is now anchored in the Counsel's office. The nominations process is a joint one, traditionally shared between the Counsel's office and the Office of Legal Policy in the Department of Justice, but recent administrations have wrested away the lion's share of that power from Justice and have planted it firmly in the Counsel's office and, thus, under the control of the president and his White House staff.

Thus, Gonzales has managed, over the last four years, to be the central figure responsible for policies that illustrate all three patterns of behavior noted at the beginning of this article: expansive interpretations of the president's constitutional powers, centralization of policy-making in the White House, and marginalization of the courts by maintaining the legal position in memos and briefs that the president's powers are unreviewable by courts. This last point was a consistent theme appearing throughout the administration's briefs in the enemy combatant cases of *Hamdi v. Rumsfeld* (2004) and *Rasul v. Bush* (2004) decided by the Supreme Court last summer. And it is front and center again in the current case of *Hamdan v. Rumsfeld* (2004), in which a federal district court in Washington ruled in early December that the government may not try enemy combatants in military commissions until a competent tribunal determines that the enemy combatant is not a prisoner of war and until the rules for military commissions are amended to make them consistent with the Uniform Code of Military Justice.

The next step to watch closely will be the Senate confirmation hearings of Gonzales to become Attorney General, scheduled for early January.[4] These hearings will offer a striking and unpredictable setting for senators to probe the full contours of the legal and constitutional thinking behind the actions mentioned here. The "unpredictable" part is that the Senate (more likely, Democrats in the Senate) will scrutinize Gonzales very closely and will pay careful attention to his answers. Yet, the central feature of the White House Counsel's office is the occupational requirement that Counsels operate under the radar screen with the utmost of discretion and confidentiality because, in fact, a good deal of their work in arriving at administration policies is done through the deliberative process with the president – a process that no president and no White House Counsel will be willing to share with the Senate. Thus, Gonzales will be in the rather curious and unenviable position of being under pressure to respond to tough questions from inquiring senators, and he will be inclined to resist answering them because no Counsel would ever be willing to divulge that information publicly.

This prompts the question – did anyone in the White House actually think this one through fully? Did they not realize that this would put Gonzales in an untenable position if he resists answering senators' questions forthrightly? Such behavior would infuriate Democrats, who could take out their frustrations by jeopardizing his confirmation altogether. Democratic senators, such as Patrick Leahy (D-VT), have commented that they expect Gonzales to be confirmed, but that they also intend to question him vigorously (Lichtblau 2004). But if Gonzales refuses to respond sufficiently to questions or if he claims that his policy-making discussions with the president were part of the deliberative process that should remain confidential, this could presage a head-to-head conflict with the Senate.

I cannot recall any other White House Counsel, a position that, as part of the White House staff, requires no Senate confirmation, moving from the Counsel's office to a cabinet position, where Senate approval *is* required. Other White House staff members *have* gone to cabinet slots, such as Henry Kissinger, who moved from National Security Adviser to Secretary of State in the Nixon administration, as Condoleezza Rice will be doing, and Ed Meese, who went from "counselor to the president" to Attorney General during Reagan's term in office. Meese's move *might* be comparable,

although the range and seriousness of the issues that Gonzales has handled are of an entirely different magnitude than the issues that Meese encountered in the 1980s.

The focus on Gonzales is not to target him personally as the source of everything that is constitutionally suspect about the Bush presidency, although it is undeniable that he is the key person responsible for all of the controversial policies discussed here. The simple fact is that all of these policies emanated from the Counsel's office, and the moment of reckoning is coming soon. It will fall upon Gonzales in early January in ways that no other Counsel has ever had to confront.

The convulsive responses of the administration in its crafting of antiterrorism policies in the wake of the events of September 11th fell to Gonzales, perhaps, more than anyone else, along with Attorney General Ashcroft. The Counsel's office is at the intersection of law, politics and policy, and by its very nature, is involved with every issue and every piece of paper that crosses the president's desk (Borrelli, Hult and Kassop 2003). It is quite possible that Gonzales was simply "out of his league" here. There was nothing in his corporate and legal background that prepared him for the extraordinarily complex, sensitive and historic issues with which he had to grapple. Perhaps, no one else as Counsel could have been prepared for these, either. Thus, one of the hallmarks of the job of White House counsel is to know who the experts are and to whom to turn for advice on those issues where one has no personal expertise.

Gonzales surrounded himself in the Counsel's office with sharp, conservative lawyers who had far more Washington experience than he did. People such as Brett Kavanaugh and Timothy Flanigan (and David Addington as the Counsel for Vice-President Cheney) had reputations as rigid, uncompromising, conservative lawyers, familiar with the ways of Washington politics (Milbank 2004). It is not unreasonable to assume that they were the forces behind translating the president's constitutional powers into administration policies here. Additionally, C. Boyden Gray, Counsel to former President George H. W. Bush, is a visible figure in the Washington legal establishment who provides advice to the current administration (and who presently heads the Committee for Justice, a group that is actively involved in promoting conservatives for federal judgeships). When he headed the Counsel's office in the late 1980s and early 1990s, Gray was publicly committed to using that office to advance expansive interpretations of the president's constitutional prerogatives (Moore 1991).

Conclusion: Governing without Congress or the Courts

The conclusion here is that the Counsel's office is the one most central to advising the president on legal policies and constitutional authority, with an eye, all the time, towards politics. Any identifiable shifts in these, by definition, either originate in or must carry the imprimatur of the Counsel's office. Over the last four years, the policies and constitutional interpretations generated by this office have been considerably more aggressive, assertive and expansive than most of its predecessors.

The most troubling – and most distinctive – part of this conclusion is the administration's dismissive attitude towards the judiciary. Here, Majority Leader Frist's remarks to the Federalist Society dovetail perfectly with those of Attorney General Ashcroft's comments to the same group the following day. Recall that Frist criticized Senate Democrats for interfering with the president's judicial appointment power. Ashcroft was similarly critical, though not of the Senate and not on the matter of judicial appointments, but, rather, of the federal courts for their decisions in the *Hamdi* and *Rasul* cases last summer. He warned of "the danger we face as a nation from excessive judicial encroachment into the functions assigned to the president under Article II," functions that included "the most fundamental aspects of the president's conduct of the war on terrorism." He characterized the behavior of the judiciary as "invasive oversight and micro-management of executive functions by unelected courts," termed this "a profoundly disturbing trend in our national political life," and cautioned that the behavior of judicial activists that conflicted with "centuries of judicial precedent….threaten[s] the president's constitutional responsibility to defend American lives and liberties." Finally, he stated that "… it is firmly accepted as essential in our constitutional system that reviewing courts should accord some corresponding degree of deference to the determinations made by the executive in administering the law" (Ashcroft 2004).

Together, as a pair, Frist complained that the Senate stood in the way of the president in the judicial selection process, while Ashcroft was equally cranky in noting that the Court prevented the president from doing what he needed to do in

the area of national security. In Frist's and Ashcroft's ideal world, then, there would be only a president and no other competing branches. But this is not the constitutional system of limits on government power that the Framers designed, although it is the vision – and the increasing reality – that the Bush administration has advanced and implemented.

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Notes

[1]Vice-President Cheney made the following comments in January 2002: "…there has been a constant, steady erosion of the prerogatives and the power of the Oval Office and a continual encroachment by Congress…where presidents have given up, if you will, important principles. So, the office is weaker than it was 30, 35 years ago. What we're committed to is to make sure we preserve the office, as least as strong as we found it, for our successors" (Clymer 2002); "Time after time, administrations have traded away the authority of the president to do his job. We're not going to do that in this administration" (Blum 2002).

[2]See "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,8333 (November 13, 2001) for military order on detention of enemy combatants and authorization of military tribunals. See "Memorandum for the President from Alberto R. Gonzales, re: 'Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban'," Jan. 25, 2002, available at http://www.watchingjustice.org/pub/doc_250/gonzales_memo.pdf, where Gonzales states that the war on terrorism "renders obsolete" some of Geneva's limitations and "renders quaint" some of its provisions. See "Memorandum for Alberto R. Gonzales from Assistant Attorney General Jay S. Bybee re: 'Standards of Conduct for Interrogation under 18 U.S.C. Secs. 2340-2340A'," August 1, 2002, available at http://news.findlaw.com/hdocs/docs/doj/bybee80101mem.pdf. For court challenges, see, for example, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711(2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); and *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

[3] See Executive Order 13233. 2001. "Further Implementation of the Presidential Records Act." *Public Papers of the President: George W. Bush*. November 1. 1581-1584. See *Nixon v. Freeman*, 670 F. 2d 346 (1982) and *Public Citizen v. Burke*, 843 F. 2d 1473 (1988) for cases where arguments urged by lawyers for former President Nixon were rejected by the courts. At issue in *Public Citizen v. Burke* was a 1986 Office of Legal Counsel memo by Charles Cooper, urging a particular interpretation of the president's Article II, Section 3 "take care" duty and the statutory construction of the Presidential Recordings and Materials Preservation Act. Close scrutiny of this memo will show that the arguments urged by Cooper in 1986 and rejected by the court in 1988 are identical to the ones underlining the new policy announced by Bush in Executive Order 13233. Cooper interpreted the PRMPA as requiring (1) that a former president's claim of executive privilege must be honored and accepted by a current president and the NARA Archivist, and (2) that a requester for presidential records must go to court to get a favorable decision on contested documents, rather than the former president shouldering the burden to keep records confidential. Both of these positions, declared "erroneous" by the court, form two of the key provisions in EO 13233.

[4] Although the Gonzales hearings have already been concluded at the time of publication, these comments were prepared and delivered a month before those hearings took place.

Federalism: The Counterrevolution that Was, Wasn't, Was???

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The President has promised that his, "nominees to the high court … would be strict constructionists who saw their duty as interpreting law not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social forces and political viewpoints on the American people." (*New York Times* 1968, as quoted in Perry and Powe, forthcoming).

Familiar as the words may sound in 2004, the President was Richard Nixon some 36 years ago. Nixon sought to make judicial appointments that would undo significant portions of the Warren Court revolution. The Burger Court contained enough Nixon appointees that, when added to sympathizers already on the Court, there was a majority to effect great change. So what happened? The title of a book edited by Professor Vincent Blasi (1983) summarizes the results fairly well: *The Burger Court: The Counter-Revolution That Wasn't.*. Efforts to turn back much of the Warren Court's legacy had failed or were only marginally successful. That story is now fairly well accepted. But at the time of Nixon's election, and even after some bruising Supreme Court nominations, few predicted the outcome that resulted. Predicting the future of the U.S. Supreme Court is risky business. In the past, when I have tried to look smart and decisive when giving a media interview or public lecture, I have discarded the typical academic caveats, and Tevyesque "on the one hand, on the other hand" type responses. I have usually come to regret it. Older and wiser, I am hesitant to predict with much confidence what the law will look like after Bush appointments to the Court. The issues that will come to define future courts and their internal coalitions might be quite different from what we predict today.

What I am willing to say with more confidence is that for all the talk about abortion, gay marriage, criminal rights, etc., the big story of the Rehnquist Court, to date, has been about federalism, notwithstanding the obsession by the media, pundits, and the public over whether or not *Roe vs. Wade* (1973) will survive. The federalism story is a very important one. That is not to say that issues of abortion or gay rights are not important. They certainly are significant for the impact they have on those affected and more broadly for our understanding of liberty. And, they have other ramifications. For example, my colleague Sandy Levinson has suggested that one of the best things that could happen to Democrats is for the Supreme Court to overturn *Roe vs. Wade*. He believes that Republicans have been able to mobilize and energize support around this issue without having to pay the price that would ensue if women lost the right to choose. Such an action might well move many moderate Republican women and others into the Democratic Party. In any event, such hot-button issues are important for a variety of obvious reasons. Less obvious is that the effort to curtail the power of the federal government to govern is an issue that could transform our society as we know it. Granted, it does not start hearts racing as do issues of civil liberties, but the federalism counterrevolution spearheaded by Justice Rehnquist poses questions central to our political order. Moreover, the battle has been of a different sort. Sustained counterrevolutions are relatively rare on the Court. (As an aside, outside the United States, few topics related to governing are hotter these days than those wrestling with how to allocate power between the center and more local authorities. Witness Iraq, the European Union, and many Latin American countries to name a few.)

Borrowing from the subtitle of the Blasi book, I want to talk about the federalism counterrevolution that was, then wasn't, then was, and speculate about its future.

Much of our constitutional history has been about the growth of national power. It was a central theme for the Marshall Court as embodied in important cases such as *Martin v. Hunters Lessee* (1816), *McCulloch vs. Maryland* (1819), and *Gibbons v. Ogden* (1824). The Court gave expansive readings to federal power. But Marshall feared, as reflected in his opening paragraphs in *McCulloch*, that disagreements about the relationship of the nation to the states might not be resolved peacefully. Unfortunately he was prescient; it took a civil war. It is interesting how constitutional law students, immersed in their study of doctrine, often ignore the little fact of the Civil War and which side won.

Fast forwarding to the turn of the century, the general story is one of expanding federal power under the Commerce Clause. As anyone who has had a course in constitutional law knows, but often comes as a surprise to others, the main constitutional provision for national power is the clause granting Congress the power to regulate commerce among the states. Most of the federal government's authority to act domestically comes from that clause. The Spending Clause and Sec. 5 of the Fourteenth Amendment are also important sources of power, but they pale in comparison to the Commerce Clause. Permit me to give an oversimplified Cliff Notes version of constitutional history in order to set the stage for the counterrevolution.

In the wake of the problems generated by the industrial revolution and the increasing nationalization of the economy, the federal government began regulating things traditionally controlled by the states. The legislation ranged from the health and safety of the food supply to interstate prostitution. For example, the feds were allowed to regulate intrastate rail rates because of their relationship to interstate commerce. They were allowed to ban the shipment of lottery tickets to protect commerce even though the clear purpose was to ban lotteries. Opponents had argued to the Supreme Court that regulating such things had been part of the traditional "police powers" of the states and had not been delegated to the federal government. They lost. The ever-expanding federal power came to a screeching halt, however, with the famous case of *Hammer vs. Dagenhart* (1918), which overturned a federal regulation that restricted child labor.

The familiar story proceeds through the Great Depression and the efforts by the Roosevelt administration to try to provide national solutions to the economic disaster. But FDR was continually rebuffed by the Supreme Court, often on a 5-4 vote. Then came the "switch in time that saved nine;" the 5-4 votes began going the other way. Many believe this saved the Court from FDR's court packing plan, which would have expanded the Court beyond the nine members allowing him to pack the Court with his appointees. The switch actually involved another area of the Constitution, but the effect spread to the Commerce Clause and the Supreme Court began upholding exercises of federal power. After 1937, no use of federal power under the Commerce Clause was ruled unconstitutional until 1995. But that gets ahead of my story.

Counterrevolution that Was

After the revolution of 1937, the only restraints on the power of the federal government to regulate commerce were political, not Court imposed. Eventually, a counterrevolution started brewing, and its leader was William Rehnquist. First in dissent, Rehnquist began questioning the extent of federal power. He then achieved a startling victory in *National League of Cites v. Usery* (1976). The restraint of federal power was not done by limiting Commerce Clause power *per se*, but there was a claim that the Tenth Amendment limited the Commerce power when governing the wages and hours of state employees. Though limited in its scope, the decision was stunning in its implications. The Court noted that it was not returning to a pre-1937 vision, but many wondered if the door had been opened to serious Court imposed limitations on the power of the federal government.

Counterrevolution that Wasn't

Alas, the counterrevolution was short-lived. After several years of trying to draw lines between appropriate and inappropriate uses of federal power, Justice Harry Blackmun, who had been in the majority in *National League of Cities*, switched sides in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) claiming that it was impossible for the Court to draw lines in a principled manner. Protection of the states belonged to the political system. Justice Rehnquist was not about to give up, however. In an extraordinarily frank, brief dissent he said, "I do not think it incumbent upon those of us in dissent to spell out further the fine points of principle that will, I am confident, in time again command the support of the majority of this Court." In other words: we lost today but we will be back when we can get another vote. Justices may often think this way, but they usually do not put it quite so bluntly.

Counterrevolution that Was

True to his promise, Rehnquist and his new federalism allies appointed by Presidents Reagan and Bush returned. In 1995, there was a shocker. The Supreme Court overturned an effort by Congress to ban handguns in the vicinity of schools based on its power to regulate interstate commerce. The "effect on interstate commerce" had been the justification

used since 1937 to permit federal authority in most legislation, including much of the civil rights legislation of the 1960's. Rehnquist, in criticizing the government's and dissent's position said, "Under the Government's 'national productivity' reasoning Congress could regulate any activity…[including] family law, marriage, divorce, and child custody for example." Some commentators believed that there were unique aspects to this case and that Congress would have little problem overcoming questions of its authority to legislate. Five years later, in *United States vs. Morrison* (2000), Chief Justice Rehnquist removed any doubt about the majority's seriousness in limiting federal power. The Court did so primarily by furthering its Commerce Clause objections, but it also suggested limitations of Congressional power under the 14th Amendment. Moreover, in complicated cases—notably *New York v. United States* (1992), *Printz v. United States* (1997), *Seminole Tribe v. Florida* (1996), *Alden v. Maine*, (1999)— the Court resurrected 10th and 11th Amendment objections to federal authority.

As I throw caution to the wind to make predictions about federalism and the counterrevolution, I will stick with my book theme, this time using a familiar line from a book rather than a subtitle. For federalism, "it is the best of times, it is the worst of times."

Best of Times

Presidents often see second terms as a time to secure their reputation for history. If what we read about President Bush and Karl Rove is true, they see Bush's legacy enhanced by *not* seeking conciliation and a middle ground. Rather, they believe that history will look more favorably on him if he does precisely the opposite and pushes for dramatic changes that by their nature will not unite. Bush appointees to the courts will likely not be compromise candidates, and the candidates that he appears to favor are ones generally with Rehnquist-like views on federalism. Many are considered as part of the so-called "Constitution in Exile" movement that seeks to return much doctrine to a pre-New Deal or earlier understanding. Granted, the small Republican majorities might not constitute exactly the best of times, but things are pretty good. Republicans control all of the political branches, and while not facing a veto or filibuster proof legislature, Democrats will pick and choose their battles. If a judicial nominee publicly commits to overturning *Roe*, expect a battle royal, but a no-holds-barred battle over approaches to federalism seems unlikely.

It is good times on the Court as well. Rehnquist in the early days was somewhat of a loner, but with O'Connor, an ardent worrier about the power and integrity of states, and Thomas who seems committed to returning to a pre- 1937 era for commerce clause jurisprudence, the counterrevolution has a new cadre of leadership. Scalia is a bit of a Johnny-come-lately to the federalism cause, and some doubt that he is a true believer, but he seems now to be a solid member of the coalition. Kennedy is sympathetic. In short, there appears to be a solid 5 vote majority, at least, on the Court to restrict national power, and there is a federal judiciary that is far more sympathetic to such concerns.

Worst of Times

How then, can it also be the worst of times? Indeed, my prediction—here it comes—is that the federalism counterrevolution won't go much further. Efforts to effect a real counterrevolution could not have come at a worse time. Just when it looked like all the ducks were lining up, something went wrong. As President Bush is so fond of saying, 9-11 changed everything. I actually believe that the counterrevolution would have been limited any way.

Historically, during times of war and economic distress, citizens and politicians turn to the national government. Relatedly, as Professor Kassop has argued, President Bush is even more committed to strengthening the powers of the President. Reducing national power can tie the hands of a President as well as Congress. In theory, one can separate war powers from domestic ones, but in reality they often are commingled. A classic example of that can be found in the Steel Seizure Case (*Youngstown Sheet & Tube Company v. Sawyer* [1952]). Given the nature of a war on terror, the line becomes even blurrier. Much about fighting this "war" has to do with what is traditionally considered criminal activity. Fighting terror requires chasing bank accounts, preventing explosions at a local site, monitoring suspicious activities, etc. Moreover, failure to prevent terrorist acts will be laid at the feet of the federal government, not state and local officials. It is inconceivable that President Bush or many national politicians are willing to tie their hands and turn the nation's fate, or their own political fate, over to state and local officials. This may be done by labeling suspects as enemy combatants, or by calling traditional acts of crime "terrorist" acts, but either way, power flows away from the states to the federal government. They may try to blame shift and burden shift, but there is little interest in seeking to reduce their flexibility

constitutionally. A recalcitrant sheriff who refuses to run handgun checks or thwart federal anti-terrorism efforts in the name of federalism is unlikely to receive the support of the Bush administration in court. Indeed the Bush administration seems dedicated to expanding federal police powers as it relates to terrorism and drugs. Given its economic policies and the effect on the budget of the war in Iraq, it must rely on the cooperation of state officials. Resistance to "cooperation" in these times, however, seems unlikely to be tolerated. It is also likely that the justices—at least those for whom federalism is not of surpassing importance—will not choose to thwart the federal government either. Justice Scalia, for example, seems far more concerned about Presidential power than the power of states. O'Connor and Rehnquist are different stories, but my guess is that they would artfully draw lines.

President Bush and the Republican Party's nationalizing efforts are not limited to crime and terror. Unlike the quote from Justice Rehnquist above seeing "family law, marriage, divorce…" as state issues, they seem to believe strongly that there is need for a national standard for marriage, if it happens to be a gay couple. There also needs to be national standards for abortion, medicinal marijuana use, educational testing, etc. President Bush and many Republicans favor national standards for tort reform, especially with regard to medical malpractice where there may be efforts to move the business from state courts to federal courts. In short, the commitment to federalism seems a bit thin.

The Court, especially with new appointees, may continue to restrict federal power here and there, but to the extent that it does, it will do so in ways that tend to be case specific rather than the (re)development of doctrine that fundamentally changes the authority of the federal government. Note that the Court has yet to rein in federal power via the Spending Clause which some have called the Achilles heal to federalism. Much depends upon who retires and when. Chief Justice Rehnquist is the justice who cares most about this federalism battle, and it seems likely that he will be the first to go. The names floated as potential justices are ones who would share Rehnquist's views, but it remains to be seen if they care about it as deeply as does Rehnquist. Even if they do, if he is the only justice to go, then there would be little change. If several others leave, the counterrevolution may only have started. My guess, however, is that in an increasingly smaller and globalized world, few national political leaders will favor a serious reduction in national power; and as a political scientist, I believe that matters in predicting the behavior of the Supreme Court.

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Books To Watch For

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The University Press of Kansas has recently published the 8th edition of **Freedom and the Court: Civil Rights and Liberties in the United States** by **Henry J. Abraham** (University of Virginia) and **Barbara Perry** (Sweet Briar College). Originally published in 1967 by Oxford University Press, the 8th edition has been updated to cover Supreme Court decisions through 2003 and to address essential questions of how to reconcile civil liberties with national security in the aftermath of 9/11.

Does legal mobilization provide an effective means of social change? **Ellen Ann Andersen** (Indiana University) examines this general question through the study of gay rights claims in **Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation** (University of Michigan Press). The book calls attention to the institutional and sociolegal factors that shape the legal options available to social movements. Focusing on the Lambda Legal Defense and Education Fund and its litigation concerning sodomy law reform, anti-gay initiatives, and same-sex marriage, **Andersen** shows how shifts in the legal opportunity structure have variously opened up or closed down the legal space within which litigation may be advanced. In doing so, **Andersen** not only explains why judicial receptiveness to gay rights claims has varied over time and by issue, but also sheds light on the promise and the limits of effecting social change through the courts.

Is there anything to sex scandals beyond the sex? **Public Affairs: Politics in the Age of Sex Scandals** (Duke University Press, 2004), edited by **Paul Apostolidis** (Whitman College) and **Juliet Williams** (UC Santa Barbara), presents a series of essays that examine sex scandals in order to assess American culture and the meaning of public life in the "society of the spectacle." The contributors consider how political sex scandals take shape, gain momentum, and implicate basic features of the national landscape, including political parties, Hollywood, the Christian right, new communications technologies, the corporate media, feminist debates, and civil rights. The essays situate contemporary sex scandals like the Clinton/Lewinsky affair in the context of historical sex scandals (such as the affair between Thomas Jefferson and Sally Hemings), more purely political scandals (such as Teapot Dome and Watergate) and sex scandals centered around public figures other than politicians (such as the actor Hugh Grant and the minister Jimmy Swaggart). By charting a critical path through the muck of scandal rather than around it, **Public Affairs** illuminates why sex scandals have become such a prominent feature of American public life. Contributors: Paul Apostolidis, Jodi Dean, Joshua Gamson, Theodore J. Lowi, Joshua D. Rothman, George Shulman, Anna Marie Smith, Jeremy Varon, and Juliet A. Williams.

Justice Thurgood Marshall maintained that if citizens were aware of the injustices in the administration of capital punishment, they would reject it as a violation of "evolving standards of decency." And, indeed, citizens today are being made more aware of capital punishment through popular books and movies. In **Evolving Standards of Decency: Popular Culture and Capital Punishment** (Peter Lang, 2004), **Mary Welek Atwell** (Radford University) argues that the popular portrayals of capital punishment put a human face on the death penalty and raise critical questions about its application. By providing audiences with stories about race, class, and innocence that cast doubt on the administration of the ultimate punishment, popular culture plays a key role in the on-going debate over the death penalty's constitutional status.

David E. Bernstein (George Mason University School of Law) sees a growing tension between antidiscrimination laws and civil liberties. Free expression, privacy, and free exercise of religion are increasingly at odds with hate speech codes and the battle against discrimination. In his book, **You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws** (Cato Institute), he critiques scholars who advocate legal equality at the expense of civil liberties and makes a case for protecting First Amendment freedoms from encroachment by well-intentioned but ultimately dangerous antidiscrimination laws.

In recent years, judicial elections have become increasingly partisan and expensive, significantly departing from the low-key, sleepy affairs of the past. **Kyle Cheek** (University of Texas at Dallas) and **Anthony Champagne** (University of Texas at Dallas) examine the evolution of the new rough and tumble politics of judicial elections in **Judicial Politics in Texas: Partisanship, Money and Politics in State Courts** (Peter Lang). Texas is a bellwether for the new judicial selection politics in America. By focusing on the Texas experience, the authors draw lessons about what can go wrong when judges are elected and suggest reforms to stem the tide of the new politics of judicial elections.

Is the process for confirming Supreme Court nominees in need of repair? Contrary to the many critics of existing system, **Michael Comiskey** (Penn State Fayette) contends that the process works well. In his book, **Seeking Justices: The Judging of Supreme Court Nominees** (University Press of Kansas), he argues that the Senate learns what it needs to know about nominees despite their often unilluminating testimony at confirmation hearings. The Senate may properly evaluate nominees on the basis of ideological criteria without unduly politicizing the process, encouraging presidents to nominate second-rate figures, or undermining the Court's public standing. In fact, **Comiskey** argues that the current confirmation process actually contributes to the Court's independence.

Faye Sanders Martin is a woman of firsts: the first woman attorney in Bulloch County, the first woman appointed to the Georgia Superior Court bench, the first woman chief superior court judge in Georgia, and the first mother to swear in her own daughter as an attorney in Georgia. **Rebecca Shriver Davis** (Georgia Southern University) and **Sandra Peacock** (Georgia Southern University) tell the story of Martin's life in **Judge Faye Sanders Martin: Head Full of Sense, Heart Full of Gold** (Mercer University Press). The authors relate how Martin overcame the initial obstacles of gender and poverty and the later challenges of alcoholism to blaze new trails in the Georgia legal establishment. This biography showcases Martin's belief that "luck may never come to some . . . but it rarely comes to those who fail to hitchhike when they have no money and walk when they can't ride."

With the publication of **Tournament of Appeals: Granting Judicial Review in Canada** (University of British Columbia Press, 2004), **Roy B. Flemming** (Texas A & M University), has produced the first empirical analysis of agenda setting by a high court that relies on the major American accounts of how the US Supreme Court decides to decide. The three accounts **Flemming** employs are the jurisprudential, litigant-centered, and strategic. Canada's Supreme Court offers an excellent opportunity to test these accounts because of the many similarities it shares with its American counterpart while still providing some interesting institutional differences that make the Canadian court more typical of other high courts. Indeed, one of book's major points is that the American accounts are not readily exported to other courts, particularly the litigant-centered account with its emphasis on repeat players and organized interests. The jurisprudential account, **Flemming** finds, provides a satisfactory explanation of how Canada's court selects cases for review. The strategic account, however, supplies a counter-factual explanation for why Canadian justices do not dissent in Canada's agenda setting process. Tournament of Appeals rests on a database of applications for leave to appeal for a three year period plus a survey of attorneys who submitted these applications. Interviews with over thirty lawyers and former clerks supplement the analysis. The concluding chapter reviews how several other high courts pick appeals for review and suggests that the book's findings based on this Canadian case may be applicable to these courts.

With his book, **Jurors' Stories of Death: How America's Death Penalty Invests in Inequality** (University of Michigan Press), **Benjamin Fleury-Steiner** (University of Delaware) has produced the first systematic survey of how death penalty decisions are made. Drawing on real-life accounts of white and black jurors in capital punishment trials, he finds that race is invariably a factor in the sentencing process, with jurors relying on racial accounts that deny defendants their individuality while reinforcing the jurors' own identities as superior, moral, and law-abiding citizens. **Fleury-Steiner** concludes his book by arguing for the abolition of the death penalty: If America values multiculturalism and cultural diversity, it must do away with institutions such as state-sanctioned capital punishment in order to begin to free itself from the racism and classicism that so insidiously plague social relations today.

In addition to being a teacher and a scholar, **Charles Fried** (Harvard University) has been Associate Justice of the Supreme Judicial Court of Massachusetts and Solicitor General of the United States. Fried draws on his varied experience in **Saying What the Law Is: The Constitution in the Supreme Court** (Harvard University Press). Aiming at a general audience, Fried assesses current cases and the main topics of constitutional law.

Martin Shapiro is one of the great law and courts scholars in the United States. **Institutions and Public Law: Comparative Approaches** (Peter Lang), edited by **Tom Ginsburg** (University of Illinois, Urbana-Champaign) and **Robert Kagan** (University of California Berkeley), gathers together a series of essays celebrating Shapiro's work. The essays represent a variety of institutionalist perspectives on courts in the United States, the European Union, and courts in new democracies, and provides a good overview of recent work on these topics. The volume is part of Peter Lang's series in Teaching Texts in Law and Politics. Contributors to the volume include: Paul Craig, Carol Harlow, Alec Stone Sweet, Martin Shapiro, Howard Gillman, Shep Melnick, Bronwen Morgan and Javier Couso.

Can juries assess damages in a fair and predictable manner? Many advocates of tort reform argue that jurors are capricious, excessively generous, and otherwise hostile to corporate defendants. In **Determining Damages: The Psychology of Jury Awards** (American Psychological Association), **Edie Greene** (University of Colorado-Colorado Springs) and **Brian H. Bornstein** (University of Nebraska-Lincoln) take a different view. Using empirical analysis, **Greene** and **Bornstein** show that jurors charged with the complex task of compensating the injured and punishing wrongdoers actually do a commendable job. Poor jury decisionmaking is often the fault of a difficult decision-making context rather any moral or intellectual failings on the part of individual jurors. Thus, when it comes to considering reform, the authors argue that the legal system itself may contribute more to unpredictable and unfounded decisions than does any given juror's inability to be fair and reasonable.

The story of the Chicano movement in Los Angeles is recounted in **Racism on Trial: The Chicano Fight for Justice** (Harvard University Press) by **Ian Haney-López** (University of California, Berkeley). The author follows two criminal trials. He argues that racial prejudice led to police brutality and judicial discrimination that in turn spurred Chicano militancy and encouraged Chicano activists to use racial ideas to redefine them. By connecting legal racism and racial politics, the author describes how race functions as "common sense," a set of ideas that we take for granted in our daily lives. This racial common sense largely explains why racism and racial affiliation persist today.

When conservatives took control of the federal judiciary in the 1980s, it was widely assumed that they would reverse the landmark rights-protecting precedents set by the Warren Court and replace them with a broad commitment to judicial restraint. Instead, the Supreme Court under Chief Justice William Rehnquist has reaffirmed most of those liberal decisions while also creating its own brand of conservative judicial activism. **Thomas M. Keck** (Syracuse University) explains this unexpected outcome in **The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism** (University of Chicago Press). Assessing the period from 1937 to the present, **Keck** argues that the tensions within modern conservatism have produced a Court that exercises its own power quite actively, on behalf of both liberal and conservative ends. Despite the long-standing conservative commitment to restraint, the justices of the Rehnquist Court have stepped in to settle divisive political conflicts over abortion, affirmative action, gay rights — even a presidential election. **Keck** focuses in particular on the role of Justices O'Connor and Kennedy, whose deciding votes have shaped this uncharacteristically activist Court.

In **Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law** (Cambridge University Press), **Ken I. Kersch** (Princeton University) argues that the modern jurisprudence of civil liberties and civil rights is best understood not as the outgrowth of an applied philosophical project involving the application of principles to facts, but as a developmental product of diverse, institutionalized currents of reformist political thought. **Kersch** demonstrates that the rights of individuals in the criminal justice system, workplace, and school were the endpoint of a succession of progressive-spirited ideological and political campaigns of state building and reform. In advancing this vision of constitutional development, **Kersch** integrates the developmental paths of civil liberties law into an account of the rise of the modern state and the reformist political and intellectual movements that shaped and sustained it.

Who has the authority to interpret the United States Constitution? Although Americans have come to treat the Constitution as something beyond their competence, something whose meaning should be decided by judges, **Larry D. Kramer** (Stanford University), argues in **The People Themselves: Popular Constitutionalism and Judicial Review** (Oxford University Press) that the first generations of Americans exercised active control over their Constitution. **Kramer** attempts to rekindle the original spark of "We, the People," inviting citizens to join him in reclaiming the Constitution's legacy as, in Franklin D. Roosevelt's words, "a layman's instrument of government" and not "a lawyer's contract."

In **Women and the Law: Leaders, Cases, and Documents** (ABC-CLIO), **Ashlyn K. Kuersten** (Western Michigan University) gives a broad overview of the legal rights of women from the Revolutionary War to the present day and

analyzes various court decisions and legislative battles. The author explores both state and federal court cases on reproductive rights and gender discrimination, as well as the movements that led to passage of the Nineteenth Amendment (1920), the Equal Pay Act (1963), the Civil Rights Act (1964), Title IX of the Education Amendments (1972), and the Violence Against Women Act (1994). **Kuersten** also examines various pioneers in the women's movement including Susan B. Anthony, Betty Friedan, and Ruth Bader Ginsburg.

Torture is perhaps the most unequivocally banned practice in the world today. Yet within six weeks after September 11, articles began appearing suggesting that torture might be "required" in order to interrogate suspected terrorists about future possibilities of violence. **Torture: A Collection** (Oxford, 2004), edited by **Sanford Levinson** (University of Texas, Austin), brings together lawyers (from the United States and abroad), political theorists, and social scientists to explore a range of pressing questions: Are "cruel and inhumane" practices that result in profound physical or mental discomfort tolerable so long as they do not meet some definition of "torture"? And how much "transparency" do we really want with regard to interrogation practices? Is "don't ask, don't tell" an acceptable response to those who concern themselves about these practices? Contributors include: Ariel Dorfman, Elaine Scarry, Alan Dershowitz, Judge Richard Posner, Michael Walzer, and Jean Bethke Elshtain.

When Michael Hardt's and Antonio Negri's book **Empire** was published in 2000, it became academia's version of a "blockbuster," and gained yet more attention in the wake of 9/11. **Empire's New Clothes: Reading Hardt and Negri** (Routledge), edited by **Paul A. Passavant (**Hobart-William Smith Colleges) and **Jodi Dean (**Hobart-William Smith Colleges), assembles a number of essays responding to Hardt's and Negri's views of law, globalization, and the fate of the sovereign national state. Contributors include Ruth Buchanan, Malcolm Bull, William Chaloupka, Jodi Dean, Thomas Dumm, Kevin Dunn, Peter Fitzpatrick, Michael Hardt, Ernesto Laclau, Mark Laffey, Bill Maurer, Sundhya Pahuja, Paul A. Passavant, Lee Quinby, Saskia Sassen, Kam Shapiro, Jutta Weldes, and Slavoj Zizek.

In **Constitutional Deliberation in Congress** (Duke University Press), **J. Mitchell Pickerill** (Washington State University) analyzes the impact of the Supreme Court's constitutional decisions on Congressional debates and statutory language. **Pickerill** draws on legislative history, interviews, and empirical findings. He not only examines data related to all of the federal legislation struck down by the Supreme Court from 1953 through 1997, but also considers congressional legislation that invoked the Commerce Clause and presented Tenth Amendment conflicts, including the Child Labor Act (1916), the Civil Rights Act (1965), the Gun-Free School Zones Act (1990), and the Brady Bill (1994). Overall, he finds that judicial review — or the possibility of it — encourages congressional attention to constitutional issues. With his emphasis on how law is made and refined within a separated system of government, **Pickerill** speaks directly to the current "constitutionalism outside the courts" debate.

Law is taught in law schools, but it is not only taught in law schools. Many undergraduates will learn about law in the history, political science, philosophy, literature, and sociology courses that form part of their liberal arts education. Is there anything distinctive about the study of law in the liberal arts? If there is something distinctive, what is it and why is it valuable? In **Law in the Liberal Arts** (Cornell University Press, 2004), edited by **Austin Sarat** (Amherst College) scholars consider these questions and argue that the study of law is not only present in the liberal arts, but also central to the liberal arts enterprise. Contributors: Jeffery Abramson, Keith J. Bybee, Marianne Constable, Douglas J. Goodman, Hendrik Hartog, Susan Sage Heinzelman, Austin Sarat, Susan S. Silbey, and James Boyd White.

Should a military academy exclude women because, on average, women are more sensitive to hazing than men? Should government and law enforcement use racial and ethnic profiling as a tool to fight crime and terrorism? **Frederick Schauer** (Harvard University) examines the legal use generalizations in **Profiles, Probabilities, and Stereotypes** (Harvard University Press). When the law makes decisions about groups based on averages the public benefit can be enormous. But profiling and stereotyping may also lead to injustice. The task, **Schauer** argues, is to identify those stereotypes that can be applied fairly and which will not result in unfair stigmatization. Broad judgments are not always or even usually immoral, and we should not always dismiss them because of an instinctive aversion to stereotypes.

If you have a question about American civil liberties, but are unsure where to look for an answer, help is on the way. The three volume **Encyclopedia of Civil Liberties**, edited by **David Schultz** (Hamline University) and **John Vile** (Middle Tennessee State University) will be published in December, 2004 by M.E. Sharpe. The **Encyclopedia** examines the history and hotly contested debates surrounding the concept and practice of civil liberties. It provides a detailed history of rights, court cases, historical events, constitutional amendments, personalities, and themes that have had an impact

on freedom in the United States. The **Encyclopedia** also appraises the state of civil liberties in America today, and examines growing concerns over the limiting of personal freedoms for the common good.

With several US Supreme Court Justices likely to retire in the coming years, President Bush will have an opportunity to exert significant influence over the composition of the high court – an influence that will added to the impact his appointments have had (and will have) on the lower federal courts. Herman Schwartz (Washington College of Law, American University), in Right Wing Justice: The Conservative Campaign to Take Over the Courts (Nation Books, 2004), reviews conservative efforts to influence the judiciary through appointments. From the strategy sessions of conservative activists in the 1960s, though the Reagan Revolution and subsequent Republican administrations, Schwartz charts the long conservative campaign to staff the courts with judges likely to overturn or erode Supreme Court rulings on abortion, school prayer, civil rights, criminal justice, and economic regulation.

The 14th edition of **American Constitutional Law: Introductory Essays and Selected Cases** has been published by Prentice Hall. Authored by the late **Alpheus Thomas Mason** (Princeton University) and **Donald Grier Stephenson, Jr.** (Franklin and Marshall College), the 14th edition includes two dozen new cases and a new chapter entitled "Security and Freedom in Wartime," focusing on the post-9/11war on terrorism. The web site for the book (http://www.prenhall.com/mason) has also been updated.

The Right to Vote: Rights and Liberties Under the Law by **Donald Grier Stephenson, Jr**. (Franklin and Marshall College) was published by ABC-CLIO this fall. An addition to the America's Freedoms series, the volume traces voting rights in the United States from their roots in England to the present day, charting their evolution, expansions, and contractions. The picture that emerges is complex, reflecting the reality that, from the beginning, voting and elections in the United States have largely been in the care and keeping of state and local governments, subject to intrusions by federal statutes and constitutional amendments. **The Right to Vote** opens with a case study illustrating the importance of ballot access, and then examines pivotal points in American political history including the demise of property qualifications, the hard-fought struggle for women's suffrage, and the long battle for a race-neutral franchise. **Stephenson** concludes with a survey of 21st-century voting rights disputes ranging from majority-minority districts and other representational matters, to the contested presidential election of 2000, the Help America Vote Act, the incomplete franchise for the District of Columbia, and criminal disfranchisement.

Right to Counsel and Privilege against Self-Incrimination: Rights and Liberties under the Law, by **John B. Taylor** (Washington College), was published in late October by ABC-CLIO Press as part of its America's Freedoms Series. The introductory chapter explores the nature of the two rights, presents case studies of *Powell v. Alabama* and *Brown v. Mississippi*, and discusses incorporation of provisions of the Bill of Rights and the expansion of due process. Chapter 2 reviews the European, English, and colonial background of these two complementary rights, their rather casual inclusion in the Bill of Rights, and the few significant Supreme Court decisions of the nineteenth century. Three chapters then provide an extensive analysis of the twentieth-century elaboration of each of these rights by the Supreme Court, their convergence in *Miranda v. Arizona*, and their subsequent, interrelated development. A final chapter examines continuing legal issues, discusses policy problems such as the inadequate provision of competent counsel for the indigent and the debate over *Miranda's* impact on law enforcement and criminal suspects, and explores issues of these rights in the context of the war on terror, including the case of John Walker Lindh and the *Hamdi*, *Padilla*, and *Rasul* decisions of June, 2004.

What drives decisionmaking on the Rehnquist Court? **Mark Tushnet** (Georgetown University) takes up this question in **A Court Divided: The Rehnquist Court and the Future of Constitutional Law** (to be published by W.W. Norton in January 2005). Although many think that the Rehnquist Court's most important division is between its liberals and its conservatives, **Tushnet** argues that the more important division lies between two types of Republican conservatives. Some justices (Rehnquist, Scalia, and Thomas) are in tune with the modern post-Reagan Republican Party, while other justices (Kennedy and O'Connor) represent an older Republican tradition. As a result, the Court has modestly promoted the economic agenda of today's conservatives but has regularly defeated the conservatives' agenda of social issues. **Tushnet** not only analyzes personal and political dynamics on the Rehnquist Court, but also assesses its most important decisions.

Section News & Awards

C. Herman Pritchett Award Committee

The C. Herman Pritchett award is given annually for the best book on law and courts written by a political scientist and published the previous year. Casebooks and edited books are not eligible. Books may be nominated by publishers or by members of the Section. The award carries a cash prize of $250. To be considered for this year's competition, a copy of the nominated book must be submitted to each member of the awards committee. The deadline for nominations for the award is February 15, 2005.

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Lifetime Achievement Award Committee

The Lifetime Achievement Award honors a distinguished career of scholarly achievement and service to the Law and Courts field. Nominees must be political scientists who are at least 65 years of age or who have been active in the field for at least 25 years. Nominations from previous competitions will be carried forward to the current year's competition. The committee will retain nominations for 3 years, but one may re-nominate an individual and renew the materials in the file.

Nominations may be made by any member of the Section and should consist of a statement outlining the contributions of the nominee and, if possible, the nominee's vitae. Nomination materials should be sent to the Chair of the Committee who will forward them to other members. Committee members may not make nominations for this award. Previous winners of the award are Henry Abraham, Walter Murphy, Harold Spaeth, Sam Krislov, Glendon Schubert, Beverly Blair Cook, Martin Shapiro, Walter Berns, Sidney Ulmer, and Stuart Scheingold. Deadline for submission of nominations is February 15, 2005.

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Law and Courts Section Nominating Committee

Please send nominations for Chair-Elect and THREE Executive Committee members to Richard Pacelle, the chair of the Nominating Committee, who will forward them to the committee members. The Nominating Committee's recommendations for 2004-2005 officers will be submitted for election at the 2004 business meeting of the section at the APSA meeting. The deadline for submitting nominations is February 15, 2004.

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Committee Members:
Kirk Randazzo, University of Kentucky
Susan Haire, Univeristy of Georgia
Timothy Johnson, Univeristy of Minnesota
Judy Failer, Indiana University

Wadsworth Publishing Award Committee

The Wadsworth Publishing Award is given annually for a book or journal article, 10 years or older, that has made a lasting impression on the field of law and courts. Only books and articles written by political scientists are eligible; single-authored works produced by winners of the Lifetime Achievement Award are not eligible. The award carries a cash prize of $250. Any member of the Section may submit a nomination. The nomination should include a statement outlining the nature of the contribution of the nominated work. To be considered for this year's competition, nomination statements should be submitted to each member of the award committee. The deadline for nominations is February 15, 2005.

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McGraw Hill Award Committee

The McGraw Hill Award recognizes the best journal article on law and courts written by a political scientist and published during the previous calendar year. Articles published in all refereed journals and in law reviews are eligible, but book reviews, review essays, and chapters published in edited volumes are not eligible. Journal editors and members of the section may nominate articles. To be considered for this year's competition, a copy of the nominated paper should be submitted to each member of the award committee (e-mail attachments, in the form of .pdf files, are acceptable). The deadline for nominations is February 15, 2005.

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CQ Press Award Committee

The CQ Press Award is given annually for the best paper on law and courts written by a graduate student. To be eligible the nominated paper must have been written by a full-time graduate student. Single- and co-authored papers are eligible. In the case of co-authored papers, each author must have been a full-time graduate student at the time the paper was written. Papers may have been written for any purpose (e.g., seminars, scholarly meetings, potential publication in scholarly journals). This is not a thesis or dissertation competition. Papers may be nominated by faculty members or by the students themselves. The papers must have been written during the twelve months previous to the nomination deadline. The award carries a cash prize of $200. To be considered for this year's competition, a copy of the nominated paper should be submitted to each member of the award committee (e-mail attachments, in the form of .pdf files, are acceptable). The nomination deadline is June 1, 2005.

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Teaching and Mentoring Committee

This Committee selects the winner of the Teaching and Mentoring Award, which recognizes innovative teaching and instructional methods and materials in law and courts. Examples of innovations that might be recognized by this award include (but are not limited to) outstanding textbooks, web sites, classroom exercises, syllabi, or other devices designed to enhance the transmission of knowledge about law and courts to undergraduate or graduate students. The Teaching and Mentoring Award is supported by a contribution from the Division for Public Education of the American Bar Association.

Any member of the section may make a nomination for the Teaching and Mentoring Award by submitting to each member of the award committee a statement identifying the nominee and outlining the nature of the nominee's innovation and the contribution it makes to achieving the purposes of the award (e-mail attachments, in the form of .pdf files, are acceptable). The deadline for nominations is February 15, 2005.

The Teaching and Mentoring Committee also advises the Organized Section on matters related to teaching and mentoring of students and colleagues.

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American Judicature Society Award

The American Judicature Society Award is given annually for the best paper on law and courts presented at the pervious year's annual meetings of the American, Midwest, Northeastern, Southern, Southwestern or Western Political Science Associations. Single and co-authored papers, written by political scientists, are eligible. Papers may be nominated by any member of the Section. The award carries a cash prize of $100. To be considered for this year's competition, a copy of the nominated paper shold be submitted to each member of the awared committee (e-mail attachments, in the form of .pdf files, are acceptable). The nomination deadline is Febraury 15, 2005.

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Announcements

APSA Centennial Center for Political Science & Public Affairs
Visiting Scholar Program

The American Political Science Association recently opened the Centennial Center for Political Science & Public Affirs in its headquarters building in Washington D.C. As part of its programs, the Centennial Center assists scholars from the United States and abroad whose reserach and teaching would benefit from a stay in and access to the incomparable resources available in the nation's capital. The Center provides Visitng Scholars the infrastructure needed to conduct their work, including furnished work space with computer, phone, fax, conference space and library access.

The Center has space to host 10 scholars for extended periods of time, ranging from weeks to months. Space for shorter "drop-in" stays is also available. Scholars are expectred to pursue their own reserarch and teaching projects and contribute to the intellectual like of the residential community by sharing their work with Center colleagues in occassional informal seminars.

Eligiblity is limited to APSA members. Senior or junior faculty members, post-doctial fellows and advanced graduate students are strongly encouraged to apply. A short application form is required and submissions will be reviewed on a rolling basis. Positions are awarded based on space availability and relevant Center Programming.

For more information and an application please visit the Centennial Center website at: http://www.apsanet.org/centennialcenter or call Sean Twombley at 202 483 2512.

Announcing the S. Sidney Ulmer Project
www.as.uky.edu/polisci/ulmerproject

In collaboration with Michigan State University, the University of Kentucky announces the development of the S. Sidney Ulmer Project for Research in Law and Judicial Politics. Named after UK Professor Emeritus S. Sidney Ulmer (2003 Law and Courts Lifetime Achievement Award recipient), this program aims to promote quality research in law and judicial politics - a goal to which Professor Ulmer devoted his esteemed career. As such, the new research project will assume responsibility for electronically distributing databases on judicial politics (formerly performed by the Michigan State Program for Law and Judicial Politics) and offers an archive of working papers for research on law and judicial politics.

Kirk A. Randazzo, Assistant Professor at the University of Kentucky, will maintain the website and ensure the following datasets remain accessible in a variety of formats: the U.S. Supreme Court Databases (compiled by Harold J. Spaeth), the U.S. Appeals Court Database (compiled by Donald R. Songer), the Attributes of U.S. Appeals Court Judges (compiled by Gary Zuk, Deborah J. Barrow and Gerard S. Gryski), and the Lower Federal Court Confirmation Database (compiled by Wendy L. Martinek). Scholars interested in storing their databases at the S. Sidney Ulmer Project may contact Kirk Randazzo for more information.

It is our hope that you all will join UK and MSU in supporting this endeavor and will adjust your web browser bookmarks to the new S. Sidney Ulmer Project for Research in Law and Judicial Politics (www.as.uky.edu/polisci/ulmerproject).

Conferences & Events

APSA Teaching & Learning Conference
Feb. 19-21, 2005 Washington D.C.
Questions? contact: teaching@apsanet.org

Western Political Science Assoc. (http://www.csus.edu/org/wpsa/callpapers.stm)
Mar 17-19, 2005 Oakland, CA
Judicial Politics & Public Law: Renee Cramer rcramer@csulb.edu

Southwest Political Science Assoc. (http://www.swpsa.org/)
Mar 23-26, 2005 New Orleans, LA
Judicial Politics: Roger Hartley rhartley@eller.arizona.edu

Midwest Political Science Assoc. (http://www.mwpsa.org/)
April 7-10, 2005 Chicago, IL
Public Law: Kevin McGuire kmcguire@unc.edu
Judicial Politics: Jeffrey Lax jrl2124@columbia.edu

Law & Society Annual Meeting (http://www.lawandsociety.org)
June 2-5, 2005 Las Vegas, NV