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THE SUPREME COURT AND NEW CONSTITUTIONAL ERAS*

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ABSTRACT: Building on Robert McCloskey (1994), we propose a model of the process by which the nation and the Supreme Court move from one constitutional era to the next. This model of transition indicates that new constitutional eras are characterized by fundamental and enduring restructurings of governmental, constitutional, and political power following a convulsive historical event or force of the first magnitude. Applying the model to the contemporary Court, we argue that the civil rights/civil liberties era remains intact because no such transcending event has emerged since the Great Depression. Absent a convulsive historical event or force that ushers in a restructuring of governmental, constitutional, and political power, the Rehnquist Court is only likely to chip away at the civil rights/civil liberties edifice erected by the modern Supreme Court.

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INTRODUCTION

The United States Supreme Court has changed its constitutional doctrines in fundamental ways over the course of American history.[1] The Court's jurisprudence on civil rights and civil liberties, for example, has been very different since the Great Depression than it was in prior decades.[2] Although constitutional scholars analyze vital doctrinal changes that have emerged over the past two hundred years, they may not fully understand why and how these changes occurred. The purpose of this Article is to examine that question by exploring the concept of constitutional eras in the United States and the process by which transitions occur from one constitutional era to another. In pursuing that objective, we stand on the shoulders of an eminent constitutional scholar of the 1950s and 1960s: Robert G. McCloskey of Harvard University.

McCloskey first discussed the notion of constitutional eras in his 1960 classic, *The American Supreme Court*,[3] but he did not fully elaborate on the factors and processes associated with the movement from one constitutional era to the next.[4] We first examine McCloskey's work, filling in gaps in his thinking and drawing generalizations from his observations. Then we

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[1] *See, e.g.*, CARL BRENT SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (1943); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

[2] *See, e.g.*, HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES (7th ed. 1998); GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW (5th ed. 1992).

[3] ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (2d ed. 1994). This Article cites the second edition of McCloskey's book, published in 1994 by the University of Chicago Press, with revisions by Sanford Levinson, Regents Chair at the University of Texas Law School.

[4] McCloskey's concept of constitutional eras, and how the Supreme Court moves from one era to another, has been the subject of surprisingly little scholarly analysis. Some legal scholars and constitutional historians rely on concepts similar to constitutional eras. *See, e.g.*, BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); ARCHIBALD COX, THE COURT AND THE CONSTITUTION (1987); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE (1988). Yet, legal and historical scholars rarely cite McCloskey, and they often adopt different conceptions of what not only have been the great constitutional eras but also the period that each has lasted. Most important, no one has flushed out or extended the theory underlying McCloskey's research. That is our objective. As a consequence, we confine our work to the Supreme Court and constitutional eras, even though it is related to other important bodies of literature. *See, e.g.*, WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS (1988).

press beyond McCloskey, suggesting clarifications, refinements, and additions that lead to a model of the process by which the nation and the Supreme Court move to a new constitutional era. Our model emphasizes that transitions to new constitutional eras are linked to durable restructurings of three kinds of power—governmental, constitutional, and political. Those restructurings typically have followed a convulsive historical event or force. After presenting these concepts, we discuss whether the nation is likely to pass into a new constitutional era during the Rehnquist Court years.

I. MCCLOSKEY REVISITED

McCloskey saw the Supreme Court's history in terms of three constitutional eras, each lasting for decades and each dominated by highly prominent political and judicial themes.[5] He believed that during the first era, spanning the period from the ratification of the Constitution to the Civil War, the United States continually confronted forces that threatened to tear it apart. That condition produced a jurisprudence "shaped with that terrible threat always in mind,"[6] and a Court whose task it was "to champion nationalism against the states' rights movement."[7] As a consequence, during this era the Court sanctioned and expansively construed the powers of the national government under the new Constitution.[8]

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[5] *See* MCCLOSKEY, *supra* note 3, at 15.

[6] *Id.* at 67. More specifically, the first kind of change entails a transformation in the way that power is allocated between the national government and the state governments, producing upheavals in what national and state governments are authorized to do and altering the balance of power between them. It involves the degree to which power is nationalized or centralized. The second type of change has typically altered the scope of power that government is permitted to exercise. By redefining the scope of activities that government may and may not do, such changes alter the relationship between government and the individual, thereby affecting the constitutional rights that people enjoy vis-à-vis government.

While transitions to new constitutional eras in the past have entailed changes in the centralization or scope of governmental power, or both, that does not mean that future transitions must be characterized by these particular kinds of changes. For analytical purposes, however, it is useful to identify the historical patterns that have existed, to understand the nature of the changes that have occurred in new constitutional epochs, and to reflect on what can be learned about contemporary circumstances from past experience.

[7] *Id.* at 59.

[8] *See also* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORI-

During the second constitutional era, lasting from the end of the Civil War to 1937, the Court's work focused on the "question of whether the government should control capitalism, and how much it should control it."[9] The constitutional and political struggle over the degree of government control of economic activity came to a head as the United States moved from an agrarian to an industrial-mercantile nation. McCloskey concluded that during this era, the Supreme Court focused on "the relationship between government and business; and the major value of the Court . . . was the protection of the business community against government. The nation-state relationship," he wrote, "once salient, was now subordinate; the fear that the states would wound or destroy the nation was replaced by the fear that government, state or national, would unduly hinder business in its mission to make America wealthy and wise."[10] The Court protected business from government regulation by interpreting the Fourteenth Amendment to shelter "economic liberty."[11] This second era ended in the mid-1930s with the Court reversing itself, ultimately permitting wide-ranging government regulation of business activity and the national economy.[12]

In his examination of this second great constitutional era, McCloskey addressed—albeit in an unsystematic way—factors associated with the movement from one constitutional era to another. Noting that the different constitutional epochs represented the Court's attempt to adjust to the "circumstances" of successive periods, one of McCloskey's "main points" was "that the interests and values, and hence the role, of the Court have shifted fundamentally and often in the presence of shifting national conditions."[13] The notion of the Court readjusting its

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GINS AND DEVELOPMENT chs. 8-12 (7th ed. 1991); SWISHER, *supra* note 1, at chs. 4-10.

[9] MCCLOSKEY, *supra* note 3, at 68.

[10] *Id.* at 69.

[11] *See also* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCKNER ERA POLICE POWERS JURISPRUDENCE (1993); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT chs. 6-10 (1993).

[12] *See, e.g.*, WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY OF JUDICIAL POLITICS AND VALUES 1937-1947 (1948).

[13] MCCLOSKEY, *supra* note 3, at 208.

policies and focus in response to changed "national conditions" is reflected in McCloskey's thoughts about the transition, following the Civil War, from the first to the second constitutional era:

> The Court had finally adjusted itself and the Constitution to the altered conditions of the postwar order. Old problems like slavery had been forgotten. The question of Negro rights, and with it the question of civil rights in general, had been relegated to a minor and almost negligible place among the Court's concerns. The once preponderant issue of federalism was now subordinated to the government business preoccupation: the formerly ruling value of nationalism was replaced by a judicial ideal called economic freedom. The process of redefining the Court's role, a process impelled by the transfiguration of the nation itself, was not complete to be sure. But the enabling conditions had been met.[14]

The Court once more adjusted its focus, priorities, and policies in the third constitutional era.[15] It turned from an orientation shielding the rights associated with owning property to one protecting non-property rights. Thus, the modern Supreme Court applied the protections of the Bill of Rights to the states, and expanded First Amendment freedoms, the rights of criminal defendants, and the rights of racial, religious, political, and other minorities.[16] McCloskey called this third period the civil rights era.

According to McCloskey, by the end of the 1930s, the necessary historical conditions existed for the nation and the Court to pass into this third constitutional period. As with the transition after the Civil War, he again discussed anecdotally the factors associated with the transition to the new era. "History . . . had displaced the Court's old ideal of free enterprise,"[17] and the Court "faced a future in which its interests of

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[14] *Id.* at 89-90.

[15] *See id.* at chs. 7-8.

[16] *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968); *see also* Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229 (1965).

[17] MCCLOSKEY, *supra* note 3, at 122.

seventy years past were no longer relevant."[18] The historical circumstance the justices found themselves in was conducive to such transition.

> If they were to play a real part, however, in the modern affairs of the Republic, they needed to evolve a new sphere of interests and a new set of values to guide them within that sphere. The problems of their past—the nation-state problem, the business-government problem—had successively been snatched from their grasp by history.[19]

As a consequence, the Court once more had to "reorient [its] interests, to formulate another system of judicial values, and to develop a role for the Court in these new terms."[20]

With the disappearance of the interests and values that had prevailed since the Civil War, "a new set would arise to replace them."[21] McCloskey maintained that the new focus on civil rights in the United States was "impelled" by the "rise of totalitarianism," by "the police state in Germany and Russia," by the Cold War struggle, and by the nation's needs as leader of the "free world."[22] These events "helped provoke a feeling of dissatisfaction and guilt over America's own pattern of race discrimination" and stimulated greater concern for such values as freedom of expression and the right to a fair trial.[23] According to McCloskey, then, the policy focus of the third constitutional era grew out of a recognition, derived from international events, that there was a need for much greater protection of civil rights and liberties in the United States.

While McCloskey divided his history of the Court into three great constitutional eras, he did not address what common elements there might be, if any, in the changes in each epoch. Similarly, while he discussed the historical forces that prompted a transition from one constitutional era to another, McCloskey did not examine the common conditions and factors that preceded and facilitated these transitions. These questions are addressed below.

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[18] *Id.* at 119.
[19] *Id.* at 121-22.
[20] *Id.* at 122.
[21] *Id.* at 119.
[22] MCCLOSKEY, *supra* note 3, at 122.
[23] *Id.*

II. RETHINKING CONSTITUTIONAL ERAS AND RESTRUCTURING POWER

Scholars of the Supreme Court perhaps understandably overestimate its independent role in, and impact on, American politics and history. Like all specialists, their scope of vision is often narrow. The concept of constitutional eras can help remedy that shortsightedness because it links change on the Court to broad and enduring transformations in American history.

Specifically, new constitutional eras involve fundamental reconsiderations of the very purposes of government and produce major shifts in the organization and scope of governmental power. Such transformations in the past have taken one of two forms, or a combination of the two: they have either altered the power relationship between the state and national governments, and/or altered the power relationship between the individual and government.[24] To accommodate these transformations, in each constitutional era the Supreme Court has reinterpreted what the Constitution permits or prohibits government to do. These reinterpretations have sometimes legitimated governmental innovations that have already occurred, encouraged further innovation, or done both.

In the past, the movement to a new constitutional era has coincided with, or emerged soon after, a convulsive historical event or force ("CHEF"). Judging by our history, a CHEF is a dramatic, precipitous occurrence that disrupts the political foundations of the nation so deeply that the political system undergoes fundamental and enduring transformations. Changes in the Supreme Court's policies and priorities are a part of these societal transformations.

A CHEF, then, is a discrete political, military, or economic disturbance of the first order and magnitude—a kind of social earthquake that would score high were there a Richter scale for social dislocations. It may be a planned event, as in the case of a calculated decision to engage in war or to adopt a new constitution, or an unplanned event like the Great Depression or some other comparable national emergency that is thrust upon the country. In any case, CHEFs are catalytic agents that unleash the potential energy for acute and lasting

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[24] *See id.* at 117-22.

change that can transmogrify the nation. A CHEF, however, does not cause a new constitutional era. Rather, it facilitates the transition to a new constitutional period. It is a necessary, but not a sufficient, condition for producing that new era.

Each constitutional era has experienced enduring political and constitutional tensions created by the central public policy questions of that epoch.[25] CHEFs resolve them. They provide the opportunity or, in some cases, the need for relatively long-term national resolutions of the hallmark political and constitutional debates of an era. They help produce closure on those controversies. By facilitating such resolutions, CHEFs clear the way for the emergence of new controversies that govern the next constitutional era.

While they may set the stage for movement to a new era, CHEFs do not necessarily control or even influence the issues that emerge and dominate in the new era. Rather, they function to facilitate the transition from the old to the new. New conflicts and tensions, in turn, shape and define the next constitutional era and produce corresponding pressures and dilemmas that also ultimately require enduring resolutions.

All three CHEFs in America's political and constitutional history fit the above model. The first CHEF—the creation of a new constitution—was the result of growing fears and worries that the system of government under the Articles of Confederation was not strong enough to provide economic prosperity, internal order, and protection against external threat.[26] Concerns about the limitations of a weak central government were counterposed against continuing misgivings about the dangers of strong central government. The new Constitution helped reconcile those tensions. It was the first example of how a CHEF can resolve pervasive, ongoing tensions in public life and give rise to or facilitate a new set of powerful, enduring pressures or priorities. Establishing a constitution that granted the national government broadened powers helped to settle old tensions and facilitated the emergence of a new, enduring

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[25] Because McCloskey's concept of a constitutional era has a general meaning that transcends the tenure of a particular chief justice, we avoid using the notion of an era in conjunction with one particular Court, such as the Warren Court.

[26] *See, e.g.*, KELLY ET AL., *supra* note 8, at chs. 4-5; FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985).

constitutional conflict between state and federal power that dominated American politics and constitutional law until the Civil War.

Once the Civil War resolved the accumulated pressures about the nation-state relationship, a new enduring conflict prompted by massive industrialization began to drive national politics and constitutional discourse.[27] That, too, is in keeping with the theory of CHEFs. Resolving pressures that have built up over decades and that have ruled constitutional eras, CHEFs permit the emergence of new central questions and their attendant pressures. By creating the conditions and the opportunity to clear the air, so to speak, on a persistent national controversy, CHEFs permit other long-term conflicts and controversies to rise to center stage.

The Great Depression also fits the concept of CHEFs outlined above. Before the stock market crash of October 1929, the contentious political and legal controversy over government's authority to regulate the economy had been simmering for more than a half century.[28] The Depression brought that issue to a head—making it possible to achieve a historic resolution of the controversy during the New Deal. The resolution of that tension, in turn, made it possible for other issues and questions to arise and dominate the next era.

We argue that three kinds of fundamental changes have occurred in the wake of a CHEF and in the transition to new constitutional eras. What we call governmental, constitutional, and political power must be restructured after a CHEF. The distinction between governmental, constitutional, and political restructuring identifies the component elements of change that have arisen when the nation has moved from one constitutional era to another.

The process model in Figure 1, which appears on the next page, breaks down the transformation to a new constitutional era into six stages. It is presented not because all transformations to new eras must, in a mechanistic way, follow the process depicted, but rather because the model has heuristic val-

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[27] *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1992); CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY ch. 38 (1928).

[28] *See, e.g.*, ABRAHAM & PERRY, *supra* note 2, at ch. 2; SWISHER, *supra* note 1, at ch. 33.

ue. It separates out conceptually the component elements of change that have been associated with transformations in the past and presents a dynamic that advances our understanding of what has happened—and perhaps what needs to happen—during these critical transformations.

Figure 1
Stages of Transition
to New Constitutional Eras

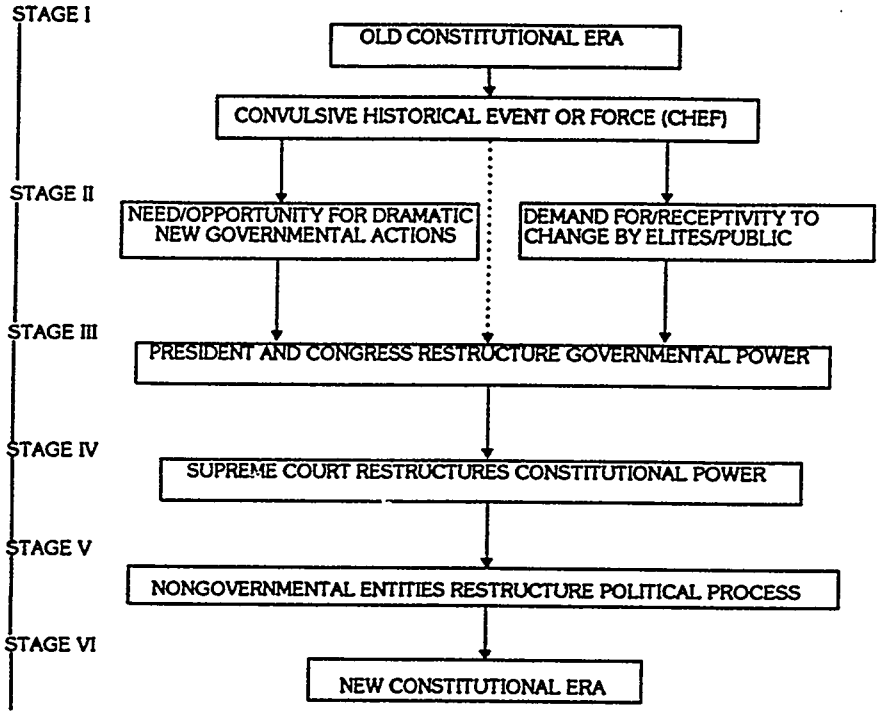

Figure 1 posits that a CHEF takes place in Stage I of the transformation process, creating the conditions that facilitate the movement from one constitutional era to the next. Afterwards, in Stage II, a CHEF leads to the need or opportunity for the political branches—the President and Congress—to take pioneering governmental actions that depart radically from previous approaches and policies. Although a CHEF helps to make momentous policy departures possible, or even encourages them, as noted above, it is not likely to influence in a significant way the specific nature or substantive orientation of new policies. Instead, it is likely to produce a demand for or receptivity to unprecedented governmental actions among elites and/or the mass electorate, who view such actions as essential to adjust to, or overcome the ill effects of, the convulsions caused by a CHEF.

Stages III, IV, and V delineate the categories of change associated with the movement to a new era. Stage III entails a restructuring of governmental power. Here we find landmark initiatives by Congress and/or the President emerge that reorganize and alter in an enduring manner the way in which governmental power is exercised. Historically, these initiatives have either altered the degree of power that the federal government exercises, thereby changing the relationship between the nation and the states, or altered the permissible scope of governmental power generally, thereby changing the relationship between the individual and government.[29] While future restructurings need not necessarily entail changes in the centralization or scope of governmental power, these two types of change are suggestive of the fundamental kinds of restructurings that occur during this phase.

The Supreme Court makes its contribution to the transition to a new constitutional era in Stage IV in two ways. It may legitimate the decisions made by the political branches in Stage III, and/or advance its own initiatives that affect the restructuring of governmental power that has already been set in motion by the President and Congress. In the first instance, the Court legitimates, as constitutional, the initiatives taken by the other branches in their efforts to respond to or cope with a CHEF. Here the Court is in a reactive mode. What it

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[29] *See* MCCLOSKEY, *supra* note 3, at chs. 2-3, 6, 8.

does, of course, is to rule that the restructuring of governmental power inaugurated by the President and Congress in Stage III is constitutionally permissible. In the second instance, the Court does not respond to the restructurings instigated by the other branches, but itself advances constitutional doctrines that change what government is permitted to do or is prohibited from doing. In the final analysis, the Court and the political branches must be in sync, reinforcing one another on the vital political and constitutional directions of the new era.[30]

In Stage V of our transition model, we envision a restructuring of the national political process involving nongovernmental entities. That change produces significant and enduring shifts in three respects: in the power and philosophies of political parties; in the role and work of interest groups; and in public attitudes toward government. This restructuring in the political process both reflects and further facilitates governmental and constitutional restructurings.

Once the governmental, constitutional, and political restructurings are complete, all the elements for the closure of one constitutional era and the transition to another are in place. However, the three types of restructurings that are shown as the components of change in transitions to new constitutional eras need not occur in the temporal or chronological order represented in Figure 1. Contemporaneous interaction among these forces may occur over time.[31]

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[30] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[31] To some, there may appear to be a heavy dose of historicism in this analysis. Lest there be any mistake, we are not advancing a historicism of the Court that theorizes that its history is determined by immutable laws, rather than human agency. Convulsive historical forces that facilitate the transition to new constitutional eras are caused by human actions or inactions. People were responsible for the new constitution, the Civil War, and the Great Depression. We emphasize historical forces, instead, to underscore our belief that the Court has been more acted upon by the nation and forces outside of the Court than it has acted on and shaped those forces. The Court has been moved more by the current of history than it has generated that current itself or determined its magnitude or direction. This is not to say that the Court is entirely a captive of historical forces. As McCloskey and others have recognized, the Court can and does exercise independent power at the margins of national politics. Just how independent the Court can be of the forces that dominate national politics is a fascinating question, but one beyond the scope of the present effort. This Article focuses on a different question—the factors that determine when and how new constitutional epochs emerge. On that issue, the answers are somewhat clearer.

The kind of restructuring of power depicted in Figure 1 is well illustrated by the events leading to the transition to the second and third great constitutional eras. The Civil War was a CHEF. It created the need and opportunity for dramatic new governmental actions and the demand for and receptivity to fundamental change. Once the North's victory resolved the long-standing dispute between the national and state governments in favor of the former, the political branches contributed to the transition to a new era by using the most powerful and striking method available to them to restructure governmental power—they amended the Constitution itself. The addition of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution profoundly enhanced national power relative to the states.[32]

The Civil War and the post-War amendments, in turn, changed the way Americans conceived of the Union and the relationship between the states and the central government. It is true that states' rights remained a rallying cry for another full century or more. Yet, it was a far different cry than certain other divisive and potentially crippling theories of states' rights advanced by Madison and Jefferson in 1789 in the Virginia and Kentucky Resolutions in opposition to the Alien and Sedition Acts and by Calhoun in his "Exposition and Protest" in opposition to the tariff of 1828.[33] Consequently, the Civil War, the post-War Amendments, and changes in the way people thought about the character of the Union placed a certain closure on the states' rights issue. The War also produced a lasting restructuring of political power throughout the South, insuring a solid Democratic South for generations to come.

In the new constitutional era following the Civil War, the political branches of the federal government functioned largely to serve the needs of powerful, emerging entrepreneurs who sought public policies to facilitate national industrial economic development. As noted, by advancing constitutional policies that limited public regulation of the entrepreneurs' property rights and freedom to contract, the Court played a central role

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[32] *See, e.g.*, ABRAHAM & PERRY, *supra* note 2, at ch. 7; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

[33] *See, e.g.*, KELLY ET AL., *supra* note 8, at ch. 8; SWISHER, *supra* note 1, at ch. 5.

in that new era. This second constitutional era also produced a notable political restructuring, ushering in a period of extended Republican party rule in national politics and the emergence of big business as the most powerful political interest in the country. Here, again, is a suggestive connection between political realignment and the emergence of a new constitutional era.

Similarly, the Great Depression was a convulsive historical event that created conditions forcing elites and the general public to recognize the need for basic change—in this case to alleviate the devastating effects of an unprecedented economic collapse. Together with a responsive Congress, Franklin Roosevelt charted a new course for government, expanding in previously unthinkable ways the power of the federal government to regulate the economy. Like the period after the Civil War, the New Deal expanded the authority of the federal government vis-à-vis the states. It also expanded the power of government generally to regulate what were formerly constitutionally protected individual property rights. The electoral successes of Roosevelt and the Democratic party demonstrated public acceptance of these changes and of the restructuring of governmental power that they required.

Following a period of resistance, the Supreme Court eventually upheld New Deal reforms and legitimated the restructuring of governmental power that produced them.[34] This restructuring of governmental and constitutional power led, as well, to a restructuring of the national political process along the lines seen in Stage V. First, the restructuring of governmental and constitutional power gave rise to a Democratic coalition that controlled national politics for nearly two generations. Second, it facilitated the emergence of a wide array of interest groups which sought to gain favorable treatment from government at all levels. The country discovered that as government did more to and for people than ever before, there was a corresponding expansion in the number and variety of private voluntary associations whose efforts and interests paralleled those of the state itself. Third, also in keeping with the process we describe, this restructuring produced abiding changes in public opinion—in the way the American citizenry

[34] *See, e.g.*, LEUCHTENBURG, *supra* note 12; PRITCHETT, *supra* note 12.

viewed what was permissible and necessary for government to do. Thus, the transitions to the second and third constitutional eras provide examples of how the restructuring of governmental, constitutional, and political power occurred, facilitating transitions to a new era.

Based upon the foregoing, our model presumes that such transitions are not a function simply of changes in Supreme Court personnel, or of the mere passage of time, or of accumulated incremental adjustments in constitutional policy. Transitions to new constitutional eras grow, instead, out of uncommonly powerful historical events—political, military, or economic in nature—that facilitate major shifts in what government does and that dominate national life for decades. These events produce—or in a sense, almost require—new constitutional policies to cope with, accommodate, and adjust to the upheavals that they cause.

III. THE REHNQUIST COURT: A NEW CONSTITUTIONAL ERA?

Emphasizing constitutional eras and transitions to new epochs is important because these concepts relate the Supreme Court's work to other political institutions, to the political system generally, and to watershed historical and political developments in America. Like other perspectives, the concept of constitutional eras enriches our understanding of the Court by forcing us to view its work not in isolation, but in the context of the larger political and historical evolution of the nation.[35] Moreover, in the contemporary context, it permits us to suggest whether, given the model proposed here, the Rehnquist Court is moving the nation toward a new constitutional era.

A host of scholars have assessed the extent to which the Supreme Court has retreated from the Warren Court's commitment to civil rights and liberties.[36] With the departure of Jus-

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[35] *See, e.g.*, Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987); Robert Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

[36] *See, e.g.*, BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990); THE BURGER COURT: THE COUNTER-REVOLUTION THAT

tices Brennan, Marshall, and Blackmun, the Court's most liberal members, some scholars have indicated that Rehnquist Court decision-making has grown more conservative—and may become even more so in the future.[37] At least one commentator has even claimed that, with its new appointees, the Court's "old agenda has been pronounced dead. The transformed Court no longer sees itself as the special protector of individual liberties and civil rights for minorities."[38]

Notwithstanding these assessments, Rehnquist Court policy has not been dominated by any consistent, overarching themes, and there is little indication that such themes will likely emerge in the future. While the Rehnquist Court has been indisputably conservative on some issues, on others it has been decidedly less so. It has delivered a mixture of conservative and liberal decisions, as did the Burger Court, and has not brought the civil rights/civil liberties era of the modern Court to a close. Indeed, several notable Rehnquist Court decisions have been quite consistent with the modern Supreme Court's favorable orientation toward civil rights and civil liberties.[39]

As of the 1993-94 Term, when Justices Blackmun and Stevens were joined by Justices O'Connor, Kennedy, and Souter, the Court's past support of civil rights and liberties stood a reasonable chance of being reaffirmed, if only by a narrow margin. Since then, with the addition of Justices Ginsburg and Breyer, an enduring conservative counterrevolution seems even more remote. Nevertheless, the Rehnquist Court has announced decisions that cut in a conservative direction, especially those dealing with affirmative action, abortion, and criminal procedure.[40]

WASN'T (Vincent Blasi ed., 1983); THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986 (Herman Schwartz ed., 1988).

[37] *See, e.g.*, BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES (1996); JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995).

[38] DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 453 (1992).

[39] *See* SHELDON GOLDMAN, CONSTITUTIONAL LAW: CASES AND ESSAYS (3d ed. forthcoming 1999); THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES (Charles M. Lamb & Stephen C. Halpern eds., 1991).

[40] *See* sources cited *supra* note 36; *see also* CHRISTOPHER E. SMITH, THE REHNQUIST COURT AND CRIMINAL PUNISHMENT (1997); D.F.B. TUCKER, THE

Our purpose here is not to provide a detailed examination of leading constitutional decisions by the Rehnquist Court. Rather, it is to search for evidence of sharp breaks with a long line of constitutional policy—breaks paralleling the reversal of the 1930s, or the new set of constitutional priorities following the Civil War, or the changes emerging after the ratification of the Constitution. Nothing approaching those kind of departures has emerged in the Rehnquist Court's jurisprudence thus far. Even though it has been more conservative than the Burger Court on issues like affirmative action and abortion, the Rehnquist Court has neither overruled any cornerstone precedent of the civil rights/civil liberties era, nor advanced a new set of constitutional priorities. Through the 1998 Term, while the Rehnquist Court had marched slowly to the right, like its predecessor, it had not launched a new constitutional era.

This is not to say, of course, that civil libertarians have nothing to fear from the Rehnquist Court. Something very important in Supreme Court policymaking may indeed be occurring. But civil libertarians' ultimate fear—the abandonment of the policy foundations of the civil rights/civil liberties era—is probably unjustified, given the historical and theoretical context of this study, unless changes of the first magnitude materialize in America akin to those identified in Figure 1. Just as some scholars too hastily declared that a new constitutional era was in the offing in the 1970s,[41] scholars and public alike must again be wary of prematurely sealing the tomb of the civil rights/civil liberties era. That era will pass, someday, but the historical and political preconditions that are required to make that necessary or possible have yet to be seen.

If a transition to a new constitutional era occurs during the Rehnquist Court years, it could happen in two ways. The Rehnquist Court, like the Roosevelt Court, could repudiate and reverse central aspects of the jurisprudence of the previous era. By holding that abortion is not a fundamental constitutional right, and by overruling leading cases in criminal procedure, racial discrimination, affirmative action, and First Amendment rights, the Rehnquist Court would reverse cornerstone policies of the civil rights/civil liberties epoch. That increasingly ap-

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[41] *See, e.g.*, GLENDON SCHUBERT, JUDICIAL POLICY MAKING 198 (1974).

pears to be an unlikely, if not remote, possibility. Alternatively, the Rehnquist Court could retain the civil rights/civil liberties jurisprudence of the past fifty years and proceed to focus on new constitutional priorities that reflect the dominant issues and concerns of America in the 1990s and beyond. That scenario is unlikely to transpire unless it is accompanied by the kinds of broad political changes that are envisioned in Stages II, III, and V of Figure 1. In short, dramatic and enduring constitutional change is part and parcel, perhaps necessarily, of larger political change, and that change in turn seems to be associated with a convulsive historical event or force.

McCloskey emphasized that the nation was poised at a critical juncture when it moved into its second great constitutional era. At that time, as he viewed it, certain "enabling conditions" were in place which facilitated the emergence of a new constitutional era. Elaborating on the idea of enabling conditions, he observed that the process of redefining the Court's role in new eras is "a process impelled by the transfiguration of the nation itself."[42]

Figure 1 represents one effort to dissect basic upheaval on the Court and to situate that change in the context of the larger dislocation of which it is a part. By identifying and describing the specific stages and kinds of change that seem to accompany the movement from one constitutional era to another, we have tried to understand and clarify the major, discrete components of change associated with pivotal constitutional transformations. What is seen is that change in the themes and priorities that dominate on the Court is part of a larger, more complex societal dislocation and restructuring.

Will the necessary enabling conditions, springing from a convulsive historical event, arise in the early twenty-first century, permitting the Rehnquist Court to usher in a new set of dominant constitutional priorities and policies? If the orientation of each Court era is, as McCloskey suggested, "less a matter of deliberate choice than of predictable response to the wave of history,"[43] can one foresee a transcending political event that may permit or require a dramatic break with fundamental Court policies?

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[42] MCCLOSKEY, *supra* note 3, at 90.

[43] *Id.* at 210.

Of the current problems that confront the nation, perhaps the environmental crisis, more than any other, has the potential to transform and dominate national life so as to move the nation into a new constitutional epoch. If the worst fears about global warming or ozone depletion were to come true, then that kind of cataclysmic disruption might require a rethinking of the proper role and limits of governmental power. If, in order to cope with an environmental disaster, the nation is forced to alter the way in which it structures governmental power and conceives of government's proper role, that might require a restructuring of constitutional power and novel constitutional policies legitimating such actions. However, if the nation does not experience an event of transcending historical importance, under what circumstances might personnel changes on the Court produce a new constitutional era? In our judgment, it is doubtful that they would, for history teaches us that the Court, of its own volition and power, cannot move the nation into a new constitutional epoch.

CONCLUSION

This Article presses beyond McCloskey to explore the concept of constitutional eras, as well as the process that the nation and the Supreme Court encounter as they move, on rare and dramatic occasions, from one constitutional era to the next. Factors associated with transitions to new constitutional eras have been highlighted, and a heuristic model identifying the sequence of events associated with constitutional transformations has been advanced.

The process model, shown in Figure 1, underscores how the transition to a new constitutional era is facilitated by a CHEF—a discrete political, military, or economic event or force of the highest order, which helps facilitate the movement to a new era. Following the CHEF is a fundamental and durable restructuring of governmental power that occurs at multiple levels. Accompanying the restructuring of governmental power in the aftermath of a CHEF, the Supreme Court provides constitutional restructuring by reinterpreting the Constitution to legitimate changes in the exercise of governmental power. These restructurings of governmental and constitutional power produce a third restructuring—one of political power. That

involves fundamental changes in the orientation and power of the political parties, in the existence, activities, and influence of interest groups, and ultimately in the attitudes of the American public about government and its power.

Our model links the Supreme Court not only to other governing institutions and actors, but also to enduring historical transformations. It presumes that transformations to new constitutional eras are not merely the result of the passage of time, changes in Court personnel, or incremental political and constitutional changes in the United States. Transitions to new constitutional eras grow, instead, out of uncommonly powerful historical events that facilitate fundamental changes in the nature of governmental, constitutional, and political power.

Viewed from the parameters of the model proposed here, one fact becomes readily apparent: While national politics over the past thirty years has scarcely been dull, it has not been characterized by anything similar to the transcending events and sweeping social transformations that produced new constitutional eras in the past. Unlike the conditions that prevailed before past transitions to new constitutional epochs, since the Great Depression the United States has experienced neither a CHEF nor fundamental departures in the way that governmental, constitutional, and political power are structured. The nation-state relationship, and hence the degree of centralization of power, has not been altered dramatically since the Great Depression, nor have the most essential individual rights and liberties. Despite all the successes of the Republican party between the late 1960s and the early 1990s, then, the landscape of domestic politics has not been redrawn. While international politics have undergone highly significant changes recently, no parallel changes of similar magnitude have arisen in domestic politics, where the Supreme Court's power is exercised.

As a result, the constitutional change thus far experienced under the Rehnquist Court does not rise to the level of the dramatic and enduring shifts historically associated with new constitutional epochs. Recent scholarly research reveals little or no evidence of the kind of wholesale change in constitutional policies and priorities that in the past has occurred at major constitutional crossroads. Nor does there appear to be any profound historic development of the kind that has previously

marked and prompted the movement from one constitutional era to another. America is not experiencing anything akin to the struggle over the national government's power after the ratification of the Constitution, or the struggle to use public power to regulate business during the second constitutional era, or the struggle to establish the social welfare state and to protect non-economic individual rights in the third constitutional epoch.

If it was wrong to think that the Burger Court would undo the landmark policies of the Warren Court, short of a convulsive historical event and subsequent restructurings of power, then the Rehnquist Court will need the same preconditions before it can move the nation into a new constitutional era. At the present time, the nation is primarily witnessing shifts in emphasis and orientation on the Court that reflect different voting patterns due to membership changes. While noteworthy, such alterations in voting behavior do not necessarily lead to enduring shifts in national constitutional orientations and do not mean that the nation has moved into a new constitutional era.