Michigan Law Review

Volume 89 | Issue 4

1991

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Recommended Citation

Peter M. Shane, *Structure, Relationship, Ideology, or, How Would We Know a "New Public Law" If We Saw It?*, 89 MICH. L. REV. 837 (1991).

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STRUCTURE, RELATIONSHIP, IDEOLOGY, OR, HOW WOULD WE KNOW A "NEW PUBLIC LAW" IF WE SAW IT?

Peter M. Shane*

Academic writings and judicial opinions are the research materials most accessible to legal academics. It is thus unsurprising that, when asked to discuss "New Public Law," professors of administrative law, constitutional law, and legislation focus chiefly on emerging scholarship¹ and judicial output.² This tendency illustrates the general and quite understandable phenomenon that people, including law professors, do most whatever they can do most readily.

Nevertheless, however elegantly and provocatively we analyze each other's work and the labor of judges, discerning whether a new public law exists ought to involve a broader inquiry. In this essay I explore the complexity of the inquiry. Although I seek to provide some reasons for thinking that, in various respects, we may or may not have a New Public Law, my purpose is not to answer that inquiry definitively but rather to provide a sharpened awareness of the breadth of issues that the inquiry poses.

In what follows, I suggest the range of activities that count as "law" is so great, and the ideological as well as material aspects of those activities are so important, that assessing change involves deeply contestable matters of interpretation. Whether we diagnose change depends not only on the data on which we focus, but on the questions we pose to the data. We would use the appellation "New Public Law" most reasonably if we interpret our legal culture as manifesting some strong and likely enduring changes in direction. I do not. My own

* Professor of Law, University of Iowa. A.B. 1974, Harvard; J.D. 1977, Yale. — Ed. I would like to thank the symposium participants for their helpful comments on an earlier draft of this paper, as well as those of my Iowa colleagues who participated in a discussion of an earlier draft during our Works-in-Progress lunch series. I benefited also from the help of research assistants Paul Goddard, Iowa 1992, and Angela Washington, Iowa 1993.

1. Eskridge & Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991); Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792 (1991); Strauss, *Review Essay: Sunstein, Statutes, and the Common Law—Reconciling Markets, The Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907 (1991). Including Professor Strauss' work here may be somewhat inapt because he uses his review more as a vehicle to express his own interpretation of certain aspects of regulatory and judicial activity rather than to comment on the state of scholarship.

2. Farber & Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875 (1991).

interpretation bears witness to a great deal of activity, even innovation, but not to new ways of thinking about the administrative state, its relationship to the people, or the relationship of government organs to one another.

I. INTERPRETING CHANGE

To identify the New Public Law is to assess change, a quintessentially interpretive task. After all, however we define our subject, some change always takes place from one day to the next. Some of those who made, implemented, or interpreted law yesterday are missing from the stage today. New actors have appeared. The opinions courts and agencies write today have different names, paragraphs, and page lengths from those of yesterday. Policymakers will be influenced by last night's news, which, to some degree, differed from that of the night before. To ask if we have a New Public Law is thus not to ask whether change has occurred; it has. The question is whether the change that has occurred is worth noting. That question cannot be answered without interpretation and theory.

A. *What Is "New"?*

To start most obviously, if we are to search for a New Public Law, we must have some way of deciding what is "New." In our society, which has not recently undergone any revolutionary experience comparable, say, to the fall of Stalinist governments in Eastern Europe, the proper way to approach this issue is not obvious. Any ascription of "newness" necessarily involves at least three large and difficult issues.

First, to characterize a public law as new, we must identify some past moment in time as an appropriate baseline for comparison, and somehow construct a portrait of public law as it then existed. This task itself involves complex interpretation. Rather than catalogue all the possibilities, however, I will simply designate as my "baseline moment" the last occasion when someone made a widely accepted case for the existence of a New Public Law. That baseline is 1975, when Richard Stewart published his article on "The Reformation of American Administrative Law."³

A portrait of public law at that time might refer to:

1. the great broadening of public law concerns at the federal level throughout the 1960s and early 1970s;⁴

3. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

4. See Browning, *Presidents, Congress and Policy Outcomes: U.S. Social Welfare Expenditures, 1949-77*, 29 AM. J. POL. SCI. 197, 209 (1985).

2. the flowering of the "new property" and its implications for due process;⁵
3. the displacement of adjudication by informal rulemaking as the primary procedural mode for agency decisionmaking;⁶
4. the evolution of judicial concern from an exclusive focus on relieving unjustified administrative intrusions into private activity to a focus that encompassed administrative failure to implement legislative programs with sufficient vigor or comprehensiveness;⁷
5. the revolution worked by Watergate in executive legal accountability;⁸ and
6. judicial efforts to promote within the administrative system "a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."⁹

After choosing a mid-1970s baseline and drawing this portrait of public law reality, the natural inclination is to construct a portrait of similar dimensions for 1991 and to quasi-quantify the distance traversed for each of these elements. For example, an analysis might try to show how much more or less "new property" the law of 1991 protects as compared to the law of 1975.

Merely to state the project this way, however, is to suggest much of its problematic character. The half-dozen features of reality I have attributed to 1975 form an incomplete list, did not appear at the same moment, did not necessarily represent the culmination of preceding linear trends, and did not stand in equally low or high relief in mid-1970s reality. Moreover, features of our public law that were technically decades old in the mid-1970s are easily left out of the mid-1970s portrait, although their full implications are still being worked out in new ways and with new self-consciousness today. Like the performer who becomes an overnight success after decades in regional theater, those phenomena which should now count as critical to a New Public Law might be phenomena long practiced, but little noticed until recently.

Matters grow yet more complex. Even if we spot distinctions between the data of today and the data of yesteryear, we must decide

5. Reich, *The New Property*, 73 YALE L.J. 733 (1964). For a bibliography of "new property" cases, see Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223, 242 (1990).

6. J. MASHAW & D. HARST, *THE STRUGGLE FOR AUTO SAFETY* 5-6 (1990).

7. See generally Stewart, *supra* note 3.

8. For post-Watergate Supreme Court decisions expanding executive accountability to Congress and the Courts, see *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (upholding the Presidential Recordings and Materials Preservation Act); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (declining to afford absolute immunity in personal damages actions against high presidential advisers); and *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (extending *Harlow* rule of qualified immunity to the Attorney General).

9. Stewart, *supra* note 3, at 1670.

what to make of the differences we identify. For example, does more or less adjudicative policymaking today suggest a New Public Law? Arriving at standards for judging whether what is new is really important enough to count as "New" is as problematic as choosing and portraying the baseline.

One attractive standard, however contestable, is easily stated. Our public law is "New" if the features we identify imply a theory of the state different from the theory of the state most plausibly attributed to the public law of our baseline time. By "theory of the state," I mean a widespread understanding of the relationship of the state to its citizens, of official institutions to one another, or of the core purposes of government activity.

This standard is demanding. Because changes in prevailing understandings of the state and of its role and operations are presumably rare, the approach is biased against the diagnosis that new policy developments are worthy of the title "revolution," "paradigm shift," "sea change," and the like. The appropriateness of this bias is, of course, debatable. The standard may be commendable, however, in that it guards against treating as a New Public Law what may better be characterized as short-term shifts in the political landscape that are unlikely to have enduring impact.

The third profoundly difficult threshold issue in assessing "what's new" is that of perspective. To disabled Americans, the enactment of the Americans with Disabilities Act¹⁰ may be an event revolutionary enough by itself to mark the advent of New Public Law. To prison inmates familiar with habeas corpus jurisprudence, the Burger Court's retrenchment on prisoner rights may have been a similarly profound development.¹¹ As legal academics, we are presumably susceptible to the same temptation felt in any self-identified subpopulation to give most weight to that which most directly affects us or the people whose lives we encounter. These observations do not suggest that any of the above perspectives is right or wrong. Rather, the point is that all such perspectives are partial, even if well-rooted in our particular experience and observation. We should therefore resist the temptation to regard the incomplete academic perspective as neutral and universal. Instead we must maintain a concentrated awareness of the multiplicity

10. Pub. L. No. 101-336, 104 Stat. 327 (1990).

11. See Comment, *Lundy, Isaac and Frady: A Trilogy of Habeas Corpus Restraint*, 32 CATH. U. L. REV. 169 (1982).

of existing perspectives and remember that the assessment of "Newness" depends upon one's situated point of view.¹²

B. What Is "Public Law"?

Deciding what should count as "New" is clearly not the only preliminary challenge in the search for a New Public Law. We must also determine what counts as Public Law.

Consider *law* first. Most commonly, we regard as law those formal operations through which the coercive power of the state is brought to bear on individuals. Statutes and their enactment are law. Judgments and the adjudications that produce them are law. To limit law to what is contained in West Reporters and statutory codes, however, is like treating as religion only what appears in holy or otherwise authoritative texts. It is more profitable to regard law or religion in a more encompassing cultural sense, namely, as webs of institutions and practices through which a society represents to itself its shared understandings of right and wrong — or, to use more legalistic language, the legitimacy or illegitimacy of individual or governmental activity.¹³ What makes law different from religion and art is itself a shared cultural understanding¹⁴ that particular varieties of rhetoric (briefs, for example, in contrast to prayer), action (judgment, in contrast to prophesy), and authority (the Constitution, in contrast to scripture) are legal and not chiefly something else. Law thus extends beyond authoritative texts and includes public expectations of law, informal bargaining between political institutions, and even the writings of legal academics.

A final uncertainty is how much of this "law" counts as "public law." No participant in this symposium was surprised when those invited turned out to be professors of administrative law, constitutional law, and legislation. Legal academics habitually associate the public law label with cases in which the government is a party or with certain categories of work product from certain institutions. The three subjects just identified are the umbrella areas most conventionally associated with that workproduct and those institutions, at least on the civil

12. See Minow, *On Neutrality, Equality, & Tolerance: New Norms for a Decade of Distinction*, CHANGE, Jan/Feb. 1990, at 17.

13. See Merryman, *The Convergence (and Divergence) of the Civil Law and the Common Law*, reprinted in J. BARTON, J. GIBBS, V. LI & J. MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* 1-4 (1983); see also C. GEERTZ, *Blurred Genres: The Refiguration of Social Thought*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 19 (1983) [hereinafter LOCAL KNOWLEDGE].

14. See C. GEERTZ, *Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE, *supra* note 13, at 167.

side of the law. The conventional view, however, produces some anomalous results. For example, bankruptcy law, which is largely statutory, is private law, while wholly judicial interpretations of the Constitution are public. The enforcement of statutes by administrative agencies would seem perforce to be public, even though some such enforcement may be the adjudication of traditionally private law claims.¹⁵

As Professors Farber and Frickey demonstrate, the formal distinction between "private law" and "public law" may no longer be useful.¹⁶ We may be wise to regard as public law all aspects of law which have a major impact on the implementation of public policy or collective interests. This might suggest that all law is public law because public policy is implicated, however tenuously, even in contract disputes in small claims courts. Yet, if we are to investigate the reality of public law, we should be less concerned about wasting our attention on areas of private law that turn out to be marginally related to our theoretical interests than about ignoring categories of historically private law, such as products liability, bankruptcy, or employment law that have become powerful tools for the implementation of social policy.

II. RELATIONSHIPS AMONG SOCIAL DECISIONMAKERS

By some measures of public law innovation, it is clear that our current public law is at least decades old. For example, the mix of institutions for establishing and implementing public law has not markedly changed over the past three decades. Nor has the scope of public law concerns at the federal level significantly expanded or contracted since the Johnson and Nixon presidencies.¹⁷ Public law, however, may also be assessed by how it embodies and seeks to implement some theory of the relationships among different levels and branches of government. In this latter context, changes have taken place; what to make of these changes is less clear.

United States law allocates socially significant decisionmaking authority along three divides: private/public, state/federal, and executive/legislative/judicial. If our public law is changing, one would

15. See *Commodity Futures Trading Commn. v. Schor*, 478 U.S. 833, 852-53 (1986).

16. Farber & Frickey, *supra* note 2, at 884-88.

17. A comparison of the tables of contents of federal government manuals from 1973 and 1990 reveals some reorganization and shifting of responsibilities, but little addition to the scope of those responsibilities. Compare OFFICE OF THE FEDERAL REGISTER, UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1972/73, at v-viii with OFFICE OF THE FEDERAL REGISTER, UNITED STATES GOVERNMENT MANUAL 1989/90, at v-vii.

expect to see shifts along these axes. At a formal level, we would expect changes in the rules governing the assignment of certain functions to particular decisionmakers and in the discretion that governments have to rearrange the distribution of power. At the level of practice, we would anticipate changes in the actual locus of important decision-making activity. The picture that emerges in these respects is decidedly mixed. In terms of formal doctrine there is great debate, even ferment, but little actual change. Genuine changes are, however, taking place at the level of practice, although whether or not they amount to a New Public Law is uncertain.

A. *The Public/Private Divide*

Consider first the public/private front. The past fifteen years have witnessed increasing policy interest in privatization, whether in the form of deregulation or in the turnover of public enterprises to private ownership and control.¹⁸ In the world of practice, this interest has produced some change. Most notably, transportation¹⁹ and telecommunications²⁰ have been deeply deregulated in ways likely to endure. Legislators also appear to be more willing to respond to social needs by creating incentives for private business to provide solutions to particular problems, for example, in child care.²¹

Yet, it would seem to be an exaggeration to suggest that the private sector is somehow displacing the public sector as a source of public policy or governing norms. In some deregulated fields, such as financial services²² and broadcast communications,²³ reregulation seems

18. See Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 507-09 (1985) (noting the theoretical and political origins of the movement toward deregulation). On the federal level, discussion of privatization seems to be limited to contracting for prisons, see Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989). One author, however, has identified 180 local services which cities and counties have contracted out to private firms. E. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 73-74 (1987).

19. For critical reviews, see Dempsey, *Robber Barons in the Cockpit: The Airline Industry in Turbulent Skies*, 18 TRANSP. L.J. 133, 135-40 (1990) (describing the effects of deregulation on the airline industry), and Dempsey, *The Interstate Commerce Commission: Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1 (1984) (discussing the legality of the rush by the ICC to deregulate the trucking industry).

20. See Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59 (1987) (discussing the rejection of the Fairness Doctrine by the FCC).

21. *Congress Remembers the Children — Finally*, Wash. Post, Nov. 2, 1990, at D3.

22. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, codified in scattered sections of 12 U.S.C.

23. See, e.g., Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1991) (authorizing limited reregulation of televised advertising for children); 136 CONG. REC. H8536-41 (daily ed. Oct. 1, 1990). The second session of the 101st Congress will likely involve significant efforts to regulate cable television. 48 CONG. Q. WEEKLY REP. 3694 (1990).

the likeliest short-term direction. The privatization of education, a movement with a substantial academic as well as political pedigree, has proceeded by inches.²⁴ Further, even as large corporations take on greater roles as innovators in the provision of social services, the governing norms they are expected to observe in terms of access, standards, and fair administration may well be drawn from government.

Even more fundamentally, no apparent change has occurred in legal understanding of the scope of either mandatory or permissible private decisionmaking. Despite its apparent political conservatism, for example, the post-1980 Supreme Court has not sought to insulate private decisionmaking from economic regulation by imposing a more exacting constitutional scrutiny.²⁵ Conversely, there is no reason to suppose the Court would be less alarmed now than it was during the New Deal if the government purported to vest in private decisionmakers the capacity to wield coercive governance power over other private actors.²⁶

B. *The State/Federal Divide*

As with the public/private sphere, no change has taken place in the conventional understanding of formal principles of constitutional federalism. States have become dramatically more important centers for government innovation, whether in regulation or in the delivery of services.²⁷ Cutbacks in federal programs during the 1980s, coupled with occasionally increased federal tolerance for the exercise of state discretion in allocating federal aid, helped fuel these changes. So did

24. For a still relatively rare example of the privatization of public schooling, see Innerst, *Public Schools Let Private Initiative Take Over*, Wash. Times, Nov. 19, 1990, at A1.

25. Even University of Chicago faculty alumnus Justice Scalia would appear to be opposed to any such move. See Scalia, *On the Merits of the Frying Pan*, REGULATION, Jan./Feb. 1985, at 10.

26. *Schechter*-like challenges might arise in connection with decisionmaking under the recently enacted Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), and Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990). Under the Administrative Dispute Resolution Act, the parties to a dispute resolution proceeding involving a federal agency may select a private arbitrator to assist in the resolution of the dispute. Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 583, 104 Stat. 2736 (1990). Because, however, the agency retains plenary authority to terminate an arbitration proceeding or to vacate any award before it becomes final, the government may be sufficiently implicated in the exercise of the arbitral authority to avoid the problem of excessive delegation to nongovernment actors. The Negotiated Rulemaking Act authorizes agencies to involve private parties in negotiating certain proposed rules. Negotiated Rulemaking Act, Pub. L. No. 101-648, § 586(a), 104 Stat. 4969 (1990). Because the product of such private influence, however, is only a proposed rule that must still proceed through notice-and-comment rulemaking and receive the agency's imprimatur, the government likewise remains implicated in the exercise of policymaking power and avoids excessive delegation to nongovernment negotiators.

27. Bernstein, *The New Federalism Hasn't Meant Less Government*, BUS. WK., May 2, 1988, at 110.

improvements in the regularity of state government — for example, as of 1985, forty-three state legislatures met annually, compared to eighteen in 1960.²⁸ In addition, state administration is better funded and more highly professionalized than ever before.

The formal constitutional allocation of decisionmaking authority between state and federal governments remains, however, what it was in the late 1940s. The federal government retains power to displace much state authority, and there is little that Congress may not order the states to do.

For a moment, things appeared to be evolving differently. In *National League of Cities v. Usery*,²⁹ the Supreme Court invented a tenth amendment limitation on Congress' authority to command the states directly in the implementation of national policy. Between that case and its overruling in *San Antonio Metropolitan Transit Authority v. Garcia*,³⁰ however, the Supreme Court did not overturn any other direct federal command to the states.

Indeed, the Public Utility Regulatory Policies Act of 1978 (PURPA)³¹ was among the statutes upheld during the 1980s. The Act is in some respects a wholesale federal redirection of state regulation concerning public utilities, an area of traditional state dominance. The Court's willingness to uphold such a statute, even while *National League of Cities* was "good law," testifies to just how little difference that earlier case made. Moreover, Justice O'Connor's strenuous dissent³² foreshadowed her position in *Garcia* that the ubiquity of interstate markets, interstate transit, and electronic communications would give Congress power under the commerce clause to obliterate any original aspiration to preserve states as autonomous policymakers unless the Court developed some workable tenth amendment constraints.³³ Nonetheless, a majority in both the PURPA case and in *Garcia* rejected any creative judicial effort to preserve state autonomy. The *Garcia* Court reverted, instead, to the stance expressed as early as *Gibbons v. Ogden*³⁴ that the protections for constitutional principles of federalism are entirely political.³⁵

28. Doyle & Hartle, *A Funny Thing Happened on the Way to the New Federalism . . .*, Wash. Post Natl. Weekly Ed., Dec. 2, 1985, at 23.

29. 426 U.S. 833, 840-52 (1976).

30. 469 U.S. 528 (1985).

31. Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 16 U.S.C.). The Act was upheld in *FERC v. Mississippi*, 456 U.S. 742, 745 (1982).

32. 456 U.S. 742, 775-97 (O'Connor, J., concurring and dissenting).

33. 469 U.S. 528, 580-88 (O'Connor, J., dissenting).

34. 22 U.S. 1 (1824).

35. The *Garcia* majority of five has since lost one member, Justice Brennan, but the dissent-

C. *The Separation of Powers Divide*

The one decisionmaking axis that has produced the most strident contests over formal principle on the federal level involves the separation of powers. If one attends to the dissents of Justice Scalia, one might conclude that the Supreme Court's decisions in *Morrison v. Olson*³⁶ and *Mistretta v. United States*³⁷ marked a revolution in constitutional understanding, and that the enactments upheld in those two cases portend a drastic shift in the intended distribution of national governmental power.³⁸ The better view, however, is that *Mistretta* is of limited practical significance and *Morrison* was entirely predictable and well founded on prior constitutional interpretation. It is Justice Scalia's view in *Morrison* that, if adopted, would count as a significant departure.³⁹

Morrison is best understood against the backdrop of recent "presidentialism," in particular, the increased vigor with which Presidents over the past quarter century have asserted inherent authority to supervise the policy content of all domestic administration.⁴⁰ Presidentialism, and presidential arguments for more control over the bureaucracy, are themselves not new. Alarm over the "headless fourth branch" and concern that the President have sufficient staff and authority to coordinate the evolving administrative apparatus of government were no less concerns of Franklin Roosevelt than of Ronald Reagan.⁴¹

Even the most recent presidential initiatives in regulatory oversight, however, have not produced any change in conventional legal understanding of the locus of decisionmaking authority with respect to domestic policy. Defenders of recent presidential initiatives, including some legal scholars, have gone beyond arguing that the oversight executive orders are permissible exercises of presidential power, particularly in light of Congress' forbearance. They have argued that the

ers have lost two, Justice Powell and Chief Justice Burger. There is no firm basis for supposing that Justices Scalia, Kennedy, and Souter will provide the two votes required in order to revert to *National League of Cities*.

36. 487 U.S. 654, 685-96 (1988) (upholding independent counsel provisions of Ethics in Government Act of 1978 against separation of powers challenges).

37. 488 U.S. 361 (1989) (upholding structure and governmental laws of United States Sentencing Commission against separation of powers challenges).

38. *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting); *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting).

39. See generally Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596 (1989).

40. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546-52 (1989).

41. See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1:7, at 22-23 (1978).

vesting of executive power in a unitary presidency signals an exclusive presidential power of administrative supervision. This power supports the oversight orders and is not subject to congressional supervision.⁴² The targets of this line of argument are the so-called "independent" agencies, and the supposed immunity from removal of any heads of such agencies who refuse to follow the policy directives of the President. Although these independent administrators are typically subject to discharge for cause, it is conventionally understood that no cause for removal would exist merely because an administrator declined to follow the President's policy preferences in favor of policy initiatives that the administrator preferred and which were also within the administrator's lawful discretion.

The Supreme Court has not expressly decided whether the President has constitutional authority to give binding orders to administrators regarding the exercise of their administrative discretion. The case law prior to *Morrison* sends murky signals at best. The Court had held, for example, that Congress would be aggrandizing its administrative role impermissibly if it (a) insisted that the President get congressional approval before firing an administrator,⁴³ (b) vested in itself the power to appoint administrators,⁴⁴ or (c) reserved to itself the power to remove administrators by means other than impeachment.⁴⁵ The holdings of these cases do not make clear, however, the extent to which these formal limits on Congress' power to take over administration also imply that the President has supervisory authority that Congress may not limit in other ways.

The constitutional debate is yet murkier because of *Humphrey's Executor v. United States*,⁴⁶ the leading pre-*Morrison* case upholding congressional power to structure administrative relationships. In *Humphrey's Executor*, the Court upheld Congress' authority to limit the removability of Federal Trade Commissioners to removal "for cause." In explaining its holding, however, the Court described the commissioners as occupying "no place in the executive department"⁴⁷ and exercising "no part of the executive power vested by the Constitution in the President."⁴⁸ Read in a formalistic way, the characterization of the FTC as outside the executive department leaves the

42. See, e.g., Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

43. Myers v. United States, 272 U.S. 52 (1926).

44. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

45. Bowsher v. Synar, 478 U.S. 714 (1986).

46. 295 U.S. 602 (1935).

47. 295 U.S. at 628.

48. 295 U.S. at 628.

Commission in organization-chart limbo, and renders the Court's decisions limiting congressional power over administration more difficult to understand.

Morrison irons out much of the doctrinal difficulty, leaving the separation of powers landscape basically untouched. *Morrison* involved portions of the Ethics in Government Act of 1978, as amended,⁴⁹ which (a) permit a judicial panel to appoint special prosecutors in a limited class of criminal cases,⁵⁰ and (b) limit the Attorney General's (and, indirectly, the President's) power to remove such counsel to removal for cause.⁵¹

Because Congress had not attempted to expand its role in the appointment or removal of independent counsel, the precise issues presented in the pre-*Morrison* cases did not arise. Instead, following the express constitutional provision for the appointment of "inferior officers" by "courts of law,"⁵² the Court inquired first whether an independent counsel was an "inferior officer" and, if so, whether the judicial appointment of such an officer would be incongruous with the powers vested in courts by article III. Finding both "inferiorness" of office⁵³ and no incongruity in the judicial appointment of a prosecuting attorney,⁵⁴ the Court upheld Congress' prescription for the appointment of these officers.

With respect to the "for cause" removal provision, the Court explicitly rejected a formalistic reading of *Humphrey's Executor* in favor of a more functional reading. According to the Court, the issue with respect to removability was not the branch with which an individual was traditionally affiliated. Rather, the question was whether limited removability would compromise the President's capacity to discharge particular functions vested in the President by the Constitution.⁵⁵ Implicitly determining that the Constitution does not vest in the President the power of criminal prosecution, a proposition well supported by history,⁵⁶ the Court concluded that limited removability had no disabling effect on the President.

Two features of the majority opinion are especially notable. First,

49. Pub. L. No. 95-521, 92 Stat. 1867 (codified in scattered sections of 28 U.S.C.).

50. 28 U.S.C. § 592 (1988).

51. 28 U.S.C. § 596(a) (1988).

52. U.S. CONST. art. II, § 2, cl. 2.

53. 487 U.S. 654, 670-73 (1988).

54. 487 U.S. at 673-77.

55. 487 U.S. at 685-97.

56. See Shane, *supra* note 39, at 603-06; Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484-94 (1989).

the Court implies that, despite the permissibility of "for cause" limitations on removability, the President must have direct or indirect authority to discharge administrators who are guilty of malfeasance of office. Even if the Constitution does not guarantee the President plenary supervision of administration in the area of domestic policy, the Constitution does charge the President to "take Care that the Laws be faithfully executed."⁵⁷ The Court might well read the faithful execution clause as mandating some presidential removal authority with respect to all officers of the United States.

Second, the Court fails to employ a narrower and equally conventional course of reasoning. In *Nixon v. Administrator of General Services*,⁵⁸ the Court had earlier articulated a balancing approach to separation of powers challenges, under which the Court poses two issues in the case of an asserted separation of powers violation: Does the challenged initiative of one branch threaten to undermine the constitutional responsibilities or prerogatives of another branch? If so, is the initiative nonetheless justified because of an overbalancing interest that is within the initiating branch's authority to pursue?⁵⁹

The *Morrison* Court could have avoided deciding whether limiting the President's policy control over criminal prosecution intrudes on his constitutional authority. The Court could have simply assumed such an intrusion, but nonetheless upheld the Act because it serves an overbalancing interest in criminal law enforcement in a narrow class of cases in which the executive's conflict of interest in self-policing is quite conspicuous.⁶⁰

Because the Court could have but did not adopt such a narrow rationale it appears that the Court is unpersuaded by Justice Department attacks on independent agencies and by executive insistence on exclusive presidential authority to supervise administrative policymaking with respect to domestic affairs. This fact is confirmed by *Mistretta v. United States*,⁶¹ which upheld the placement under judicial administrative supervision of the United States Sentencing Commission — again, under the necessary premise that the Constitution does not vest in the President the particular function that the commission performs. Similar reasoning would presumably support new legislative limits, should Congress choose to impose them, on presidential influence in such areas as environmental policymaking, workplace

57. U.S. CONST. art. II, § 3.

58. 433 U.S. 425 (1977).

59. 433 U.S. at 443.

60. 28 U.S.C. § 591(b), (c) (1988).

61. 488 U.S. 361 (1989).

safety regulation, and food and drug control because the Constitution does not grant the President inherent power to act in any of these areas.

If the Supreme Court were to adopt the theory that the unitary presidency implies exclusive presidential policy control over all discretionary domestic policymaking vested in administrative agencies, the Court would depart from our public law tradition. Traditionally, Congress has primary responsibility for domestic policymaking, and the President has whatever supervisory leeway Congress permits. Statutory codification of presidential regulatory oversight,⁶² or congressional decisions granting the President policy control over independent agencies, might also reflect a substantial change in the prevailing sense of the appropriate distribution of policymaking authority. So far, however, neither change seems likely.

D. *Stability in Theory, Change in Practice?*

The analysis thus far, which has sought out formal change in the legal principles governing the distribution of decisionmaking power along the public/private, state/federal, and executive/legislative/judicial divides, suggests continuity in U.S. public law. Regarding formal principles, there is little new. The world of practice, however, yields some contrary evidence.

For example, although the formal scope of decisionmaking authority may not have increased in the 1980s for the private sector or for state governments, the public increasingly viewed the private sector and state government as more likely sources of solutions to social problems than the federal government. One indication of the growing role of the private sector was the dramatic increase throughout the 1980s in charitable donations, despite a decrease in tax rates that made such contributions more expensive for many donors.⁶³ On the federalism side, the Reagan Administration's determination to "devolve" governmental authority back to state and local levels resulted in a profound increase in regulatory and social service initiatives in the states.⁶⁴

62. For discussion of Congress' deliberations on codifying Presidential oversight, see J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 160-63 (2d ed. 1985).

63. See Wilson, *Charitable Contributions by Americans; Costs of Giving*, NAT'L. L.J., Nov. 3, 1990, at 2680 (reporting increases in per household charitable giving in 1989); *Volunteering, Giving on the Rise*, Wash. Times, Nov. 27, 1990, at E2 (citing statistics showing a 23% increase in the number of people making charitable contributions, between 1987 and 1989); Meyerson, *One Hundred Conservative Victories in America*, POLY. REV., Summer 1987, at 72, 76 (asserting a 50% increase in the dollar amount of charitable contributions between 1980 and 1985).

64. Bernstein, *supra* note 27, at 110.

Whether these events mark changes in our legal culture significant enough to constitute a New Public Law is questionable. The impulses and concerns leading to a rise in charitable giving might well, over time, translate into support for new government programs concerning health, safety, and social welfare. The magnitude of many problems, both geographic and economic, may defy state and local remedy. The preference of interstate business for uniform systems of regulation may result in a return of federal regulatory initiatives. Though both the right and left appear discontented with large government institutions, and technocratic, top-down solutions to social ills, there simply may be insurmountable obstacles to what localism can achieve. We are more likely, I suspect, to see the development of sensitivity to local concerns within large, centralized government agencies than the displacement of large agencies and centralized programs with grass roots controls.

Separation of powers practice has also evolved notably since 1977. The Office of Management and Budget's (OMB) more systematic attention, especially under Presidents Carter⁶⁵ and Reagan,⁶⁶ to the routinization of presidential oversight of regulatory policymaking has been a major innovation.⁶⁷ These presidential oversight initiatives signal the advent of a centralized micromanagement of administration that represents a probable increase in presidential power.

Again, however, what these changes mean socially is ambiguous. Congress can check presidential power by narrowing the discretion vested in those administrators whom the President supervises, by exempting particular categories of regulation from OMB review, by promulgating alternative or additional procedures that limit the impact of presidential oversight, or by simply turning up countervailing congressional pressure on agencies — through oversight and appropriations hearings — not to submit to OMB's policy preferences. Such developments have already occurred to some degree.⁶⁸ Moreover, two administrative law scholars have called Congress' tendency in the 1980s to tighten up its delegations of administrative authority to executive agencies a "quiet revolution" in administrative law, a revolution

65. See Exec. Order No. 12,044, 3 C.F.R. 152 (1978), *revoked by* Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

66. Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,498, 3 C.F.R. 323 (1985).

67. See generally Bruff, *supra* note 40.

68. For example, Congress expressly exempted from OMB review regulations to be promulgated under the Marine Mammals Protection Act of 1972 Amendments, § 4(d)(2), Pub. L. No. 97-58, 95 Stat. 979 (1981). Ultimate passage of an act reauthorizing the Paperwork Reduction Act of 1980 appears to be dependent on President Bush's acceptance of certain statutory guarantees of openness in the regulatory review process. 48 CONG. Q. WEEKLY REP. 3699 (1990).

that greatly reduces the potential policy impact of presidential oversight.⁶⁹

III. RELATIONSHIPS BETWEEN GOVERNMENT AND "THE PEOPLE"

In addition to embodying a theory of institutional relationships, public law also manifests the legal system's prevailing assumptions about the relationship of government to the people. At least two aspects of this relationship are worth highlighting. The first is the nature of government accountability. The second is the degree to which public law manifests a conventional view of public welfare programs as obligatory or discretionary. Under an obligatory view, law is interpreted and government behaves as if government owes individuals certain affirmative duties. We might expect, for example, that citizens under such a government would enjoy some form of Franklin Roosevelt's second Bill of Rights. Conversely, under a discretionary view of government, law is interpreted and government behaves as if the services that government provides are mere privileges, and as if private, rather than public, institutions are the ordinary and most important sources of moral and material support for individual sustenance.

A. *Accountability to the People and Its Implementation*

In terms of notable innovations, our public law arguably is "newest" with regard to the appropriate enforcement of official accountability. Although the substantive impact of recent changes is not yet clear, we appear to be moving increasingly in the direction of legal and bureaucratic accountability for government decisionmakers and, in some notable respects, away from direct democratic accountability. At some point, the changes in degree may be significant enough to regard as changes in kind.

A series of cases in which the Supreme Court has rendered unconstitutional most forms of patronage hiring and firing illustrates the recent movement. Beginning with *Elrod v. Burns*⁷⁰ in 1976, the Court has evolved a constitutional doctrine that the first amendment precludes both discharges and refusals to hire⁷¹ on a partisan basis unless

69. See Shapiro & Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819.

70. 427 U.S. 347 (1976) (invalidating patronage-based discharges of sheriff's office employees).

71. *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729 (1990) (invalidating patronage-based promotions, transfers, recalls, and hiring of low-level civil service employees).

the position involved is one for which partisan affiliation can reasonably be regarded as a job-related qualification. The mere fact that the position involves discretionary decisionmaking or even the possession of confidential information is not enough to satisfy this test. If a position is subjected to partisan control, it must involve the making or implementing of policy of a kind and at a level to which partisanship is relevant.⁷²

It would take extensive and sophisticated research to know how many jobs are likely affected by this legal change, and what the real-world impact of the change will be. Analytically, however, it seems all but certain that these cases will further the general breakdown of party discipline as a source of official accountability and increase the significance of other accountability measures, such as bureaucratic performance evaluation and judicial review.

These cases further a trend in which legal and bureaucratic accountability rhetoric is elevated on all fronts, with an ever more obvious blurring of the line between legal and political accountability. Not surprisingly, because of the breadth of much statutory delegation, agencies are necessarily called upon to function conspicuously as policymakers in the implementation of statutes. Their policy choices, whether embodied in the reading of a statute or in its direct implementation, are reviewable on explicitly political grounds by both Congress and OMB. Agencies also face judicial review to assure their nonarbitrariness under the Administrative Procedure Act.⁷³ Notwithstanding occasional judicial protestations to the contrary, this form of accountability enables courts to second-guess agency policy choices significantly and to call such supervision "law."⁷⁴

72. *Branti v. Finkel*, 445 U.S. 507 (1980) (invalidating patronage-based discharge of assistant public defender).

73. 5 U.S.C. § 706(2)(a) (1988).

74. Reports that *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), would mark the death of traditional judicial oversight of agency legal interpretation have proven premature. In *Chevron*, the Court stated that reasonable agency interpretations of law are entitled to judicial deference unless "Congress has directly spoken to the precise question at issue" in a manner contrary to the agency. 467 U.S. at 842. Such a command, if read literally, would augur extraordinary deference to agency policymaking in the form of statutory interpretation because Congress so often speaks with ambiguity on important questions.

Yet, the Court has not foresworn its authority to resort to the full panoply of "traditional tools of statutory construction" for determining an agency's correctness. *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). The Court still overturns agency legal interpretations regularly, and cannot be counted on even to discuss the *Chevron* framework as it assesses an agency's legal interpretation. See *Mississippi Power & Light v. Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988) (never mentioning *Chevron* while upholding FERC's interpretation of its regulatory authority as preemptive of state authority on the prudence of certain utility management decisions); *Board of Governors of the Federal Reserve Board v. Dimension Financial Corp.*, 474 U.S. 361 (1986) (rebuffing the Board's attempt to regulate under the Bank Holding Company Act all institutions which use NOW accounts); *Maislin Industries, U.S., v.*

What seems new, however, is that the elevation of law over politics has affected congressional oversight as well. The events collectively called "Watergate" precipitated a sharp turn to formal law as a source of control over executive officials.⁷⁵ Although too much should not be made of a few examples, it is remarkable that Congress used the special prosecutor mechanism, rather than appropriations, as the vehicle for retaliating against the Reagan Administration for refusing to share environmental regulation information with Congress.⁷⁶ The key oversight issue in the Iran-Contra episode was whether anyone broke the law, and "what did the President know and when did he know it?"⁷⁷ The key congressional response on accountability, so far, for the savings-and-loan debacle has been the "Keating Five" ethics proceeding.⁷⁸ During fall 1990, when President Bush commenced deploying military personnel to Saudi Arabia to mount offensive operations against Iraq, the dominant issue in interbranch debates over the deployment was whether the President complied with the War Powers Resolution.⁷⁹ In these various episodes of possible political malfunc-

Primary Steel Inc., 110 S. Ct. 2759 (1990) (rejecting an ICC interpretation of the Interstate Commerce Act under which, contrary to an 80-year-old Supreme Court decision, it would be an "unreasonable practice" for a carrier to seek enforcement of a high rate filed with the ICC after negotiating a lower rate with a particular shipper); *Sullivan v. Stroop*, 110 S. Ct. 2499 (1990) (upholding, without reference to *Chevron*, an interpretation of the AFDC Act that excludes "child insurance benefits" received through Social Security from the category of "child support payments" calculated with respect to Aid to Families with Dependent Children); *Dole v. United Steelworkers*, 110 S. Ct. 929 (1990) (rejecting OMB claim of authority under Paperwork Reduction Act of 1980 to review agency regulations requiring employers to publish to employees certain information on hazardous substances in the workplace).

75. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (codified in scattered sections of 28 U.S.C.).

76. See *Morrison v. Olson*, 487 U.S. 654 (1988). See generally HOUSE COMM. ON THE JUDICIARY, INVESTIGATION OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. NO. 435, 99th Cong., 1st Sess. (1985) (4 vols.).

77. See generally H.R. REP. NO. 433, 100th Cong., 1st Sess. (1987); S. REP. NO. 216, 100th Cong., 1st Sess. (1987).

78. See *Keating Five are in the Dock, But Congress Is Being Judged*, N.Y. Times, Dec. 16, 1990, § 4, at 6, col. 1.

79. See *Sorting Out Legal War Concerning Real War*, N.Y. Times, Nov. 15, 1990, § A, at 18, col. 1 (summarizing arguments between Congress and President over War Powers Resolution application to U.S. military operations in the Persian Gulf and alluding to similar tensions surrounding the U.S. invasions of Grenada and Panama). When the 102d Congress convened in January, 1991, it did turn to political debate concerning the deployment of troops in the Persian Gulf, ultimately enacting authority for the President to use the armed forces offensively. S.J. Res. No. 2, 102d Cong., 1st Sess. (1991), reprinted in 137 CONG. REC. S403 (daily ed. Jan. 12, 1991); H.J. Res. No. 77, 102 Cong., 1st Sess. (1991), reprinted in 137 CONG. REC. H443 (daily ed. Jan. 12, 1991). At least some observers contend, however, that Congress abdicated its responsibilities in failing to turn to a political discussion until presidential initiatives rendered it politically impossible for Congress to dissent from a strategy of offensive military action. See Rowan, *A Majority of One*, Wash. Post Natl. Weekly Ed., Jan. 28-Feb. 3, 1991, at 5.

tion, Congress has invoked the rhetoric of law more prominently than the rhetoric of democratic accountability.

The rhetoric of law has distinct advantages when different political parties control the legislative and executive branches. If Congress retaliates politically for executive missteps, those missteps take on the appearance of mere partisan differences. Conversely, the executive encounters more difficulty defending what can plausibly be characterized as illegality. Yet, whether the sharpened post-Watergate focus on the legal accountability of even our highest executive policymakers has done anything to conform their behavior with greater certainty to the views of the electorate remains unclear. Legal accountability is a "good," but it is not all that accountability has to offer.

Congress' turn toward legality as the rubric for accountability also coincides with an institutional development worthy of intensive study — the advent of inspectors general.⁸⁰ Since the mid-1970s, Congress has turned increasingly to this mechanism both to help assure congressional access to information about agency operations and to help monitor agency compliance with law. The most dramatic extension of the inspector general concept is its inception in the Central Intelligence Agency,⁸¹ an organization that was barely under any system of accountability outside the executive branch until reforms inspired by the Church Committee report of 1976.⁸²

Yet another indicator of the increasing tendency of law to structure politics is the explosion of litigation during the 1970s concerning separation of powers issues. To cite one crude, but revealing statistic, the phrase "separation of powers" appeared in federal court of appeals opinions 185 times between 1960 and 1969, 559 times between 1970 and 1979, and 1273 times between 1980 and 1988.⁸³ The increase in separation of powers litigation is consistent with other evidence that interbranch conflicts are escalating and are more frequently being debated, if not always resolved, in legalistic terms. Among the conflict's innovative forms is the debate over the juridical significance of presi-

80. Inspector General Act of 1978, 5 U.S.C. app. §§ 1-9 (1988). The act is summarized in Muellenburg & Volzer, *Inspector General Act of 1978*, 53 TEMP. L.Q. 1049 (1980), and its legality is analyzed in Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59 (1983).

81. Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, 103 Stat. 1701, 1711-15 (to be codified at 50 U.S.C. § 403(q)).

82. See FINAL REPORT OF THE SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 755, 94th Cong., 2d Sess. (1976) (6 vols.).

83. See Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 402-04 (1989).

dential signing statements in delimiting the meaning of statutes.⁸⁴

Although these developments suggest an increasing turn to formal legal mechanisms and formal legal rhetoric as instruments of accountability in our political life, this is not the whole story. There is an important push within government for moving beyond what are often decried as the excessively costly and excessively adversarial common modes of major policymaking.⁸⁵ In its most recent session, Congress authorized both agency arbitration⁸⁶ and negotiated rulemaking⁸⁷ as mechanisms for streamlining both formal adjudication and informal rulemaking. Whether these authorizations will promote substantially innovative activity is unclear. A significant turn in their direction, however, could result in a changed understanding of the relationship of administration to "the people."

A new relationship is perhaps easiest to see in the case of negotiated rulemaking. Under the new Negotiated Rulemaking Act, agencies are authorized to formulate proposed rules through a process of negotiation with those interests most significantly affected. This procedure does not involve the sort of wholesale investment of government power in private decisionmakers overturned in *Schechter Poultry*.⁸⁸ The formulation of a negotiated rulemaking committee is itself subject to public notice and comment.⁸⁹ In addition, the committee produces a proposed rule, which, to become effective, must be adopted by an authorized administrator following notice and comment.⁹⁰ Any final rule is subject to judicial review to the same extent

84. For contrasting views on this issue, see Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209 (1988), and Garber & Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. LEGIS. 363 (1987).

85. For example, the Administrative Conference of the United States has recently recommended that federal agencies study the potential of an agency "ombudsman" as an effective, informal mechanism for enhancing agency responsiveness to the public. 55 Fed. Reg. 13,279 (1990) (to be codified at 1 C.F.R. pt. 305) (proposed Apr. 10, 1990). Although this mechanism is more widely utilized by state and local governments, it is not unknown at the federal level. Major agencies that use ombudsmen include the Internal Revenue Service, the Environmental Protection Agency, the Interstate Commerce Commission, and the Department of Commerce. Anderson & Stockton, *Ombudsmen in Federal Agencies: The Theory and the Practice 1* (Report to the Administrative Conference of the United States May, 1990).

86. See Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

87. Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990).

88. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (asserting that Congress could not "delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries.").

89. Negotiated Rulemaking Act, *supra* note 87, at § 584(a).

90. The anticipated product of a negotiated rulemaking committee is described as a "proposed rule." Negotiated Rulemaking Act, *supra* note 87, at § 586(f). Nothing in the Act exempts the proposal, once offered, from the otherwise applicable rulemaking provisions of 5 U.S.C. § 553.

that it would have been had the agency not engaged in negotiated rulemaking.⁹¹ Although the Act thus preserves the formalities of official government responsibility for decisionmaking and unfettered opportunities for public input, in operation it could quite easily result in changes in the nature of private interest representation in policymaking. This process is thus worthy of extensive empirical and theoretical study.

The past quarter century of administrative law can be assessed in light of our foundational administrative law case, *Marbury v. Madison*.⁹² John Marshall, of course, constitutionalized the distinction between judicially reviewable ministerial obligations of public officials and their political acts, for which an official is "accountable only to his country in his political character, and to his own conscience."⁹³ The substantial innovations of the past twenty-five years effectively have reduced the scope of the latter category. Yet, while law's jurisdiction over politics expands, unease remains over the formalizing or judicializing of administration, and innovations have appeared in the mechanisms by which administrative discretion is respected, even advanced. It is still too early to discern whether this constellation of activity will give rise over time to new understandings of the nature of accountability.

B. *Government Obligation and Discretion*

Locating a governmental system along the "obligatory-discretionary" axis is a daunting interpretive task. First, even under a view of government as discretionary, certain legal principles, such as the non-discrimination principle, may operate to ensure some significant substantive benefits for great numbers of people. Moreover, as always, legal theory and political practice may not coincide. A government that expressly disavows any obligations to the citizenry may decide, as a matter of discretion, to provide a substantial array of welfare benefits for all citizens. A government, the constitution of which guarantees all sorts of minimum benefits, may implement those guarantees in a more or less meaningless way.

In the United States, both the New Deal and the Great Society marked significant moves in ideology and practice towards an obligatory view of government. The shift in practice came first. Total public welfare expenditures by federal, state, and local governments more

91. Negotiated Rulemaking Act, *supra* note 87, at § 590.

92. 5 U.S. (1 Cranch) 137 (1803).

93. 5 U.S. (1 Cranch) at 166.

than doubled in the two years between 1932 and 1934.⁹⁴ The sixty percent increase between 1966 and 1968 marked the next greatest two-year jump.⁹⁵

By 1970, the shift in legal interpretation was evidenced by judicial acceptance of key aspects of Charles Reich's "new property" thesis of 1964,⁹⁶ most markedly the disavowal of the "right - privilege distinction" in the administration of public benefits. Legislative decisions during the 1960s substantially increased the variety of social benefits distributed on an entitlements basis. Because of judicial decisions, most importantly *Goldberg v. Kelly*,⁹⁷ the confined discretion under which social benefits were distributed resulted in an elaborate system of procedural protections against the loss of those benefits.

From these developments alone, one might safely conclude that the period of 1930 to 1970 marked a real change in public law. One might also safely say that the period from 1975 to 1985 did not advance the trend toward obligatory government. Between 1975 and 1984, total government spending as a share of gross national product grew from 33.1 to 33.6%.⁹⁸ During that same period, however, means-tested transfer payments and targeted spending for education and training each declined a tenth of a percentage point.⁹⁹ The growth that did occur in poverty spending's share of GNP resulted from increased social insurance payments, most notably health and unemployment insurance.¹⁰⁰ This picture does not reveal whether we have actually moved back toward a pre-New Deal vision of government or have simply failed to advance as far in the direction of government obligation as seemed plausible in the late 1960s. Indications for the future are likewise mixed.

In terms of federal public law, the Burger and Rehnquist Court has shored up the discretionary theory at nearly every turn. The Court declined to afford special constitutional protection to poor people, or to discern a fundamental right to education.¹⁰¹ It exempted "innocent" wealthy suburbs from the school desegregation obligations

94. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 pt. II, at 1120 (bicentennial ed. 1975).

95. *Id.*

96. Reich, *The New Property*, *supra* note 5.

97. 397 U.S. 254 (1970).

98. Burtless, *Public Spending for the Poor: Trends, Prospects, and Economic Limits*, in S. DANZIGER & D. WEINBERG, *FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T* 40 (1986).

99. *Id.*

100. *Id.*

101. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1972).

of overburdened and racially isolated cities.¹⁰² It created both substantive and procedural obstacles to litigative attempts to place low-income housing in wealthy neighborhoods.¹⁰³ It also held that states have no obligation to subsidize abortions for poor women, whether or not therapeutically indicated and whether or not the states fund health care related to childbirth.¹⁰⁴

The Court has implemented the state action doctrine to immunize from constitutional review publicly licensed private institutions, even if they rely on public funding.¹⁰⁵ It has erected procedural barriers to private lawsuits seeking relief from government delay or inaction in the implementation of administrative programs.¹⁰⁶ It has declined to provide procedural protections against government decisions that, however serious for individuals, do not deprive anyone of what the Court formally defines as "liberty" or "property."¹⁰⁷ When it does recognize the applicability of procedural due process, the Court assesses the plaintiff's procedural entitlements through a highly instrumental calculus that takes no express account of any inherent value in giving government beneficiaries some control over decisions affecting them.¹⁰⁸

*DeShaney v. Winnebago County Department of Social Services*¹⁰⁹ is the Court's most recent statement on the precise issue of affirmative government obligations. The *DeShaney* majority refused to impose any liability on state officials who repeatedly declined to remove from paternal custody a boy who was, to the knowledge of the state agency, almost certainly the repeat victim of his father's physical abuse and who ultimately suffered brain damage from a brutal beating inflicted by his father. The majority reasoned that, because the state was not initially responsible for the child and father living together, the state had no affirmative duty to protect the child.¹¹⁰

This array of decisions implicitly and sometimes explicitly conveys the Supreme Court's discretionary vision of government. This vision, however, may be less a reversal in course than a failure to move as far in the direction of obligatory government as the Warren Court might

102. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

103. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975).

104. *Harris v. McRae*, 448 U.S. 297 (1980).

105. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

106. *Lujan v. National Wildlife Fedn.*, 110 S. Ct. 3177 (1990).

107. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

108. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976).

109. 489 U.S. 189 (1989).

110. 489 U.S. at 194-203.

have moved had it endured another decade. At least some Warren Court precedents provided substantial arguments for the dissents in the various cases just discussed, but none of the "anti-obligatory-government" decisions from the early 1970s onward required the overruling of any prior case. The Warren Court had not identified a fundamental right to education, health care, minimum income assistance, or housing. Nor had it overturned the *Civil Rights Cases*.¹¹¹ Its furthest step in the direction of obligatory government occurred in *Shapiro v. Thompson*,¹¹² where the Court prohibited discrimination in state welfare assistance against recent state residents. Even the Burger Court, however, did not retreat from this particular rule of nondiscrimination.¹¹³ That Court also left intact the due process protections erected for government entitlements and licenses.¹¹⁴ At the level of legal interpretation, we can thus confidently discern in the past two decades a failure to create a new public law along a direction hinted at, but not yet fully developed, in Supreme Court jurisprudence. It is harder to call this stalled realignment an actual counterrevolution.

The interesting developments in this area are not entirely federal. After the Supreme Court declined to protect poor people against discriminatory school financing in *San Antonio Independent School District v. Rodriguez*,¹¹⁵ at least seven state Supreme Courts, including the Texas Supreme Court, found just such protection under the constitutions of their respective states.¹¹⁶ If such decisions become common enough, and are successfully implemented, the country might ultimately witness significant moves in the direction of obligatory government at the state law level. Indeed, although this development may be a generation away, increased consensus among the states about individual entitlements to certain minimum benefits could significantly strengthen the position of those who argue that these same rights are fundamental under the federal Constitution.¹¹⁷

111. 109 U.S. 3 (1883).

112. 394 U.S. 618 (1969).

113. See *Zobel v. Williams*, 457 U.S. 55 (1982).

114. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

115. 411 U.S. 1 (1972).

116. *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1976); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 63, 769 P.2d 684 (1989), modified, 784 P.2d 412 (1990); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo.), cert. denied, 449 U.S. 824 (1980).

117. State judicial and legislative developments might have a similar effect in precipitating a reversal of *Bowers v. Hardwick*, 478 U.S. 186 (1986), which refused to afford fundamental rights

Public law has changed course during the past two decades not so much at the level of legal interpretation. Rather, one might more easily locate change at the level of political discourse and government finance. Many federal programs providing health care, housing assistance, employment training, student aid, and various forms of social insurance were cut or eliminated between 1979 and 1985.¹¹⁸ The increases that did occur in dollar outlays for the poor during this period represented chiefly the increased use of medical services by Medicare and Medicaid enrollees and the impact of inflation in the health care field, which generally outstrips general price inflation.¹¹⁹ In 1985, the Urban Institute conducted a study in four cities of federal, state, and local assistance programs directed at abused, neglected, and dependent children, the chronically mentally ill, and low-income elderly people.¹²⁰ That study concluded that the federal government had substantially cut back its efforts for each of these populations, and that state, local, and private efforts did not fill the resulting gap.¹²¹ The effect of federal cutbacks was especially profound on black families, many thousands of which fell below the poverty line as a result. The national poverty rate worsened between 1980 and 1983, although, by 1987, it returned to the 1980 level.¹²²

The official ideology of the Reagan administration was one of government minimalism. The shift in presidential imagery from "Great Society" to "safety net" is itself telling. The book of the decade for Reagan ideologists was Charles Murray's *Losing Ground*,¹²³ which argued that increased public spending for the poor actually increased the poverty rate. The book's academic and general popularity is not simple to explain. Murray systematically ignored available evidence of successful government programs to improve employment, education, health care, and income.¹²⁴ Demographic trends that Murray linked

protection to intimate homosexual relationships. See London, *Gay Groups Turn to State Courts to Win Rights*, N.Y. Times, Dec. 21, 1990, at B10, col. 3.

118. Burtless, *supra* note 98, at 18.

119. *Id.* at 32, 37, 40.

120. M. BURT & K. PITTMAN, TESTING THE SOCIAL SAFETY NET: THE IMPACT OF CHANGES IN SUPPORT PROGRAMS DURING THE REAGAN ADMINISTRATION (1985).

121. *Id.* at 174-80.

122. Wilson, *Poverty in the United States: Down but Not Out*, 19 NATL. J., 1380, 1380 (1987); Kosterlitz, *Measuring Misery*, 22 NATL. J., 1892, 1893 (1990).

123. C. MURRAY, LOSING GROUND (1984).

124. Muzzio, Book Review, 79 AM. POL. SCI. REV. 1198, 1199 (1985). See generally S. DANZIGER & D. WEINBERG, *supra* note 98 (articles by Starr on health care programs; Bassi & Ashenfelter on Supported Work Demonstration, Job Corps, and Youth Incentive Entitlement Pilot Project; Glazer on Head Start and compensatory elementary education); L. SCHORR, WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE (1988) (discussing successful programs of prenatal and child health care); J. SCHWARZ, AMERICA'S HIDDEN SUCCESS: A

to Great Society programs were often in place long before those programs.¹²⁵ Murray argued (on dubious data) that increased welfare spending during the 1960s created disincentives to work, but failed to explain why decreases in Aid to Families with Dependent Children spending during the 1970s had no positive impact on employment.¹²⁶ It is hard to avoid the conclusion that the adulation heaped on the book was partly connected to an official desire to believe a thesis that was unrelated to the merits of the argument.

The durability of the Reagan Administration's domestic agenda is, however, far from certain. During the 1980s, many state and local governments simply did not follow the Reagan Administration's lead in abandoning "Great Society thinking." The response of the states was uneven, but even economically troubled states sometimes manifested a value commitment to protecting the poor that was entirely consistent with public law values of the 1960s.¹²⁷

Moreover, at the moment Congress appears intent on renewing its commitment to social welfare legislation. The Americans With Disabilities Act of 1990¹²⁸ is the most dramatic example. Although technically an antidiscrimination law,¹²⁹ the Act's operation in service areas that government quite certainly will not abandon, such as transportation, renders the Act an effective guarantee of increased support for its beneficiaries.

Presently, the federal deficit poses the main political obstacle to major innovations in child and health care. Even so, in its last session, Congress voted to guarantee Medicaid coverage to all poor children through age eighteen,¹³⁰ to establish tax credits for the purchase of child health insurance,¹³¹ to increase funds for childhood immuniza-

REASSESSMENT OF TWENTY YEARS OF PUBLIC POLICY (1983) (discussing Aid to Families with Dependent Children, the Comprehensive Education and Training Act, and other antipoverty programs).

125. Greenstein, *Losing Faith in "Losing Ground,"* NEW REPUBLIC, Mar. 25, 1985, at 12, 16 (black youth participation in workforce in decline in 1950s at greater rate than during War on Poverty).

126. *Id.* at 13.

127. *Cf.* Bernstein, *supra* note 27, at 110.

128. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C.A. §§ 12101-12231, 29 U.S.C.A. § 706, and scattered sections of 47 U.S.C.A. (West Supp. 1990)).

129. Thus, for example, Congress does not actually require local governments to support public transportation. It only proscribes discrimination in whatever is provided.

130. Rovner, *Families Gain Help from Hill on Child Care, Medicaid*, 48 CONG. Q. WEEKLY REP. 3721 (1990) (citing Sen. Christopher Dodd's assertion that in terms of congressional action, "[t]his has probably been as good a year for children as any since 1965").

131. *Id.* at 3722.

tion,¹³² to increase Head Start appropriations substantially,¹³³ and to help finance state efforts to subsidize child care services.¹³⁴ Congress additionally authorized over \$57 billion over the next two years for the first major overhaul of federal housing programs since 1974.¹³⁵

What if Congress did legislate the Reagan Revolution out of existence by enacting such programs as universal health insurance, increased social welfare spending, and a guaranteed minimum income? Would such developments mark the advent of a "new" public law? The answer to that question must be "not necessarily." Whether improved programs of social welfare would actually mark another shift in governmental policy away from the pole of discretion and toward the pole of obligation would depend on prevailing understandings about the social and cultural significance of such programs. As Charles Reich emphasized in a recent essay, the objective of a "new property" legal system is to provide individuals with the sort of material support that would shore up individual autonomy and personal liberty against the state.¹³⁶ The deployment of new social programs, accompanied by conditions for participation that dictate how beneficiaries conduct their lives, however, would run in direct opposition to Reich's vision.¹³⁷

A dramatic example of this phenomenon is recent legislation that permits, and in some cases mandates, the disqualification of medically identified drug addicts from certain federal programs, including Aid to Families with Dependent Children.¹³⁸ We would not have a new obligatory form of government if government may deprive persons of even their most basic social benefits because of antisocial behavior, especially if that behavior is unrelated to the need for benefits in the first place.

C. *The Penetration of Public Law*

Whether the objectives that professors and bureaucrats discern in our public law have life outside the academy and government offices is yet another dimension of the relationship between government and the people that may be relevant to the assessment of a New Public Law. It

132. *A Huge Gain in the Poverty War*, N.Y. Times, Oct. 31, 1990, at A18, col. 1.

133. *Id.*

134. Rovner, *supra* note 130, at 3722.

135. Hook, *101st Congress Leaves Behind Plenty of Laws, Criticism*, 48 CONG. Q. WEEKLY REP. 3683, 3705 (1990).

136. Reich, *The New Property After 25 Years*, *supra* note 5, at 224-28.

137. *See id.* at 224-25.

138. 42 U.S.C. § 1382(e)(3)(A) (1988).

would be fascinating to know more about what legal anthropologists call the penetration of our public law system, to determine to what degree it realizes its ambitions for the regulation of day-to-day conduct.¹³⁹

There are a number of reasons for thinking that change might be occurring on this front, although the extent of this change is exceedingly hard to measure. The upswing in state and local administrative activity, in part a consequence of Reagan federalism, increases the likelihood that individuals and small businesses, too small to attract the attention of federal administrators, will find themselves more deeply enmeshed in administrative activity. Furthermore, many corporations and private businesses have only recently institutionalized in a truly comprehensive way certain public law norms that the federal government articulated during the 1970s. Consider, for example, the administration of equal employment opportunity. Even if the years between 1965 and 1980 witnessed a sharper rate of reduction in some overtly discriminatory business activity,¹⁴⁰ it is likely that improved personnel training, access to more sophisticated research, and the simple acquisition of experience have resulted in greater professionalism since 1980 in the EEO offices of corporations, universities, and other large organizations. These offices probably communicate more today with their organizations on the requirements and expectations of federal and state civil rights agencies.

If, over time, Americans become more deeply immersed in public law and government bureaucracy, such experience may erode the sense of government as both exceptional and intrusive that has long been a key to U.S. political ideology. Such change, however, is likely beyond ready observation. Perhaps some revolutions creep in upon the citizenry unnoticed.

IV. THE IDEOLOGY OF PUBLIC LAW

A third, even more elusive variable through which to assess change in public law is the nature of the ideological commitments it embodies. What do key public law actors think they are doing? What purposes do they seek to fulfill? Such questions, of course, do not exist independently from those discussed above concerning the prevailing

139. For a summary of research on involvement with the legal process by individuals in the U.S., see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

140. For example, see the data on the narrowing of the wage differential for black and white workers, in NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 297-301 (G. Jaynes & R. Williams eds. 1989).

theories of institutional interrelationship and the obligations of government to the people. Yet, the questions of ideological commitment do pose distinct issues, and analysis of public law from this perspective may yield clues about legal change that are not evident from other variables.

The past twenty years have witnessed significant changes in congressional and administrative policymaking activity that may reflect or facilitate ideological change. One such change is the central prominence the federal budget has assumed for policymaking activity. Whether the cause is the breakdown in party discipline, the differential partisan control over the two elected branches, public ambivalence over basic legislative goals, the decentralization of congressional power, or something else, appropriations measures are just about the only legislation upon which members of Congress are confident that they will have to act. The fall 1990 budget deal was featured more prominently in the media than virtually any other legislative activity, including major social and environmental initiatives in the 101st Congress. The economic shock of the Arab oil embargo, the inflationary spiral in the late 1970s, and the ballooning deficits of the 1980s have helped to shift government attention away from a Kennedy-Johnson agenda of civil rights and social welfare to a conservative agenda of achieving growth and preserving economic order.

Such a pattern, of course, may change — and change may be well augured by the sorts of recent legislative initiatives catalogued in the previous discussion. Yet, the displacement of the Great Society and populist concerns by a more elite, economics-driven agenda may be reinforced by other institutional developments. The past twenty years have witnessed an extraordinary bureaucratization of Congress¹⁴¹ and an institutionalization within the executive branch of a culture of policy analysis that favors cost/benefit analysis over “simple justice.”¹⁴² Franklin Roosevelt said it was better for government to fall short in the struggle for social justice than to abandon the struggle;¹⁴³ modern

141. Broder, *Who Took the Fun Out of Congress?*, Wash. Post (weekly ed.), Feb. 17, 1986, at 9, col. 1.

142. The major current executive order on regulatory analysis requires agencies to follow cost/benefit analysis to the extent permitted by law; it makes no reference to distributive justice concerns. Exec. Order No. 12,291, § 2, 3 C.F.R. 127 (1981). A recent analysis of the Reagan oversight program observed: “The presence of OMB’s review program has led to the formation of ‘mini-OMBs’ in the agencies to mimic [Office of Information and Regulatory Affairs] review. . . .” Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 559 (1989). This institutional development would seem to have the necessary consequence of proliferating cost/benefit approaches to regulatory analysis.

143. Address at Ogelthorpe University, Atlanta, Georgia (May 22, 1932), reprinted in J. BARTLETT, *FAMILIAR QUOTATIONS* 779 (1980) (“The country needs and, unless I mistake its

government has tended to ask whether we can afford nobility.

As a constitutional lawyer, I naturally seek the government's ideological pulse in one of the most conspicuously ideological components of public law, the rhetoric of the Supreme Court. That focus has its problems: just as one encounters difficulty divining an ideology shared by all of Congress, one faces obstacles attributing a common vision to a court that is not only multimembered, but also varying in its membership, even within time periods customarily denoted as "the Warren Court" or "the Burger Court." Moreover, the immediate impact of the Court's vision on other institutions or on the lives of individual people is not obvious; legislatures and state courts are also rhetorical and citizens may be more aware of and attentive to those institutions.

Yet, some focus on the Supreme Court is defensible. More than other public law institutions, the Supreme Court is pressed to explain itself — at what seems to be increasing length — and its explanations, as well as its results, are widely publicized. The Court's rhetoric is a model for other institutions, sometimes shaping, for example, the rhetoric of legislation as well as the opinions of other courts.¹⁴⁴

Just as it is common to speak of the Marshall Court as having a nationalist vision or of the late nineteenth-century Court as having a laissez-faire capitalist vision, it is possible to ascribe a common vision to the Warren and Burger Courts. The most familiar label for this vision is perhaps "integrationist," although "inclusionist," though a neologism, might be more accurate. Despite the variety of authors, the wide range of particularist doctrinal concerns, and some obvious differences in normative perspective, the Court's opinions from 1954 to 1980 systematically presume that a guiding purpose of constitutional interpretation should be the inclusion of historically disempowered groups within the U.S. "mainstream."¹⁴⁵

The paradigm example of this commitment is, of course, race. The central insight of *Brown v. Board of Education*¹⁴⁶ was the insufficiency

temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something.").

144. Compare, e.g., *Lau v. Nichols*, 414 U.S. 563, 568 (1974) ("It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies [the minority] a meaningful opportunity to participate in the educational program . . .") with the Equal Opportunity Act of 1974, § 204, 20 U.S.C. § 1703 (1988) ("No State shall deny equal educational opportunity . . . by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional program.").

145. For an analysis that both recognizes inclusionist elements in the Warren Court's decision making and criticizes the Supreme Court for not pursuing that vision more comprehensively, see K. KARST, *BELONGING TO AMERICA* (1989).

146. 347 U.S. 483 (1954).

of formal models of equality to capture the powerlessness historically enforced on black Americans. "Separateness," the Court said, was "inherently unequal."¹⁴⁷ This statement would be incomprehensible without a cultural interpretation that assigned different meaning to white and black experiences during segregation.¹⁴⁸

Over the next twenty years the Court likewise rejected successive state attempts to achieve "desegregation" without actually ensuring the inclusion of black public school students into all-white institutions. One Virginia county reasoned that, if the problem was state-sponsored segregated public schools, then it would eliminate all public schooling. Another Virginia county asserted that it would eliminate formal barriers to integration by giving everyone "freedom of choice," but reassigning no one attending an all-black or all-white school. The Court responded negatively in both instances.¹⁴⁹ The Court similarly rejected the argument that all observable racial imbalances should not have to be redressed because some of it would have occurred even absent *de jure* segregation.¹⁵⁰ The Court thus required states to eliminate dual school systems "root and branch." The Court was not satisfied with meager attempts to eradicate formal barriers to integration.

The Court's commitment to racial inclusion during the 1950s and 1960s was evident in other cases, as well. The Court substantially eviscerated the public/private distinction, without actually overturning the state action doctrine, to prevent Texas' successive attempts to disenfranchise black voters.¹⁵¹ The Court, typically through per curiam opinions, also extended the "separate is inherently unequal" doctrine to every other segregated public facility brought to its attention.¹⁵² The disproportionate number of blacks among arrestees, death row inmates, and poor people was a likely factor in the Court's treatment of criminal suspects, capital punishment, and due process protections for welfare beneficiaries.

147. 347 U.S. at 495.

148. See Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1077-87 (1984).

149. Griffin v. School Bd., 377 U.S. 218, 229-32 (1964); Green v. School Bd., 391 U.S. 430, 441-42 (1968).

150. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, *rehg. denied*, 444 U.S. 887 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

151. Terry v. Adams, 345 U.S. 461 (1953). Terry was the furthest extension of a series of cases that included Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); and Nixon v. Herndon, 273 U.S. 536 (1927).

152. E.g., Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom); Peterson v. Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963) (restaurants); Wright v. Georgia, 373 U.S. 284 (1963); and Watson v. Memphis, 373 U.S. 526 (1963) (parks).

Perhaps most remarkably, the moral imperative of the race cases spilled over, chiefly during the Burger era, to the protection of other historically disempowered groups. The Burger Court crystallized a more effective constitutional stance on behalf of women,¹⁵³ aliens,¹⁵⁴ and children of unmarried parents,¹⁵⁵ sometimes through the reworking of equal protection doctrine, sometimes through the reinvigoration of substantive due process. Lower courts, following the Court's lead, were often expansive in redressing the complaints of prisoners, mental patients, and the disabled.¹⁵⁶

In general, this body of jurisprudence deployed three inclusionary strategies. The first was, of course, an increasingly generous interpretation of constitutional rights that could be invoked in litigation even by the politically unpopular. Inequality often appears as a group problem, and constitutional rights inhere in individuals, not groups. Yet, any resulting awkwardness in the Court's doctrinal discussions of social reality did not deter the Court's innovation. The most obvious example of this phenomenon is the reapportionment cases, which revolutionized state politics, but discussed political power with a seemingly deliberate obliviousness to the role of group effort in achieving political success.¹⁵⁷

The second strategy was the licensing of ambitious equitable remedies, aimed at restructuring institutions to assure greater responsiveness to those formerly excluded.¹⁵⁸ Finally, the third strategy, closely related to the other two, was placing tradition in a disfavored position as a source of constitutional understanding. A particularized understanding of some constitutional phrase rooted in eighteenth- or nineteenth-century history is likely to take no cognizance of a late twentieth-century integrationist understanding of social reality. Hence, one finds fewer Supreme Court adjudications of rights during the 1970s that are dependent on early legal understandings.¹⁵⁹

Of course, even if it is plausible to ascribe an integrationist vision to the Court, it would be incorrect to regard the vision of either the Warren or Burger periods as one of comprehensive inclusion. Anyone

153. See *Craig v. Boren*, 429 U.S. 190 (1976).

154. See *Graham v. Richardson*, 403 U.S. 365 (1971); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). Cf. *Plyler v. Doe*, 457 U.S. 202 (1982).

155. *Mills v. Habluetzel*, 456 U.S. 91 (1982).

156. Cf. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 692-97 (1982).

157. See *Reynolds v. Sims*, 377 U.S. 533, 589-625 (1964) (Harlan, J., dissenting).

158. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 433 U.S. 267 (1977).

159. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

who thinks, for example, that *Bowers v. Hardwick*¹⁶⁰ is the high water mark of Supreme Court homophobia should read *Boutilier v. Immigration and Naturalization Service*,¹⁶¹ the Warren Court's decision upholding the exclusion from the United States of gay or lesbian aliens. Still, ascribing an integrationist vision to both the Warren and Burger courts yields a more plausible interpretation of the elements of continuity and discontinuity between the two periods. The Burger Court was the more innovative in extending the inclusionary perspective to new groups, even though it was not as prepared as the Warren Court to implement the protections of this perspective. For example, the Burger Court appeared to regard criminal suspects as having presumptively opted out of any claim to inclusion in community norms. Even in this regard, however, one may easily overemphasize the degree to which the Burger Court criminal procedure opinions amounted to a doctrinal counterrevolution.¹⁶² Further, although the Burger Court expanded the understanding of rights, it stringently construed the procedural barriers to invoking those rights in court. In particular, the Court's hostility toward generalized grievances, coupled with its insistence on a showing of injury particularized to individual plaintiffs, made it more and more difficult to use federal litigation as a weapon against government delay or inaction in the implementation of social programs.¹⁶³

Perhaps the most serious limitation of the Burger Court's vision, however, was its unwillingness to consider government indifference to poverty as a constitutionally redressable problem. The three cases most destructive of the possibility of a genuinely egalitarian program of constitutional litigation are *San Antonio Independent School District v. Rodriguez*,¹⁶⁴ *Milliken v. Bradley*,¹⁶⁵ and *Harris v. McRae*.¹⁶⁶ In

160. 478 U.S. 186 (1986).

161. 387 U.S. 118 (1967).

162. Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. REV. 185, 186 (1983); Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in V. BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 91 (1983).

163. See, e.g. *Allen v. Wright*, 468 U.S. 737, 740 (1984) (parents of black public school children lacked standing to sue IRS for its failure to adopt sufficient standards and procedures to deny tax-exempt status to racially discriminatory private schools); *Valley Forge Christian College v. Americans United for a Separation of Church and State*, 454 U.S. 464, 489 (1982) (respondents lacked standing to challenge on first amendment grounds the conveyance of government property to church); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (low income residents of neighboring city lacked standing to challenge suburb's zoning ordinance).

164. 411 U.S. 1, 15, 18 (1972).

165. 418 U.S. 717, 744-45 (1974).

166. 448 U.S. 297, 326-27 (1980).

Rodriguez, the Court refused to find a denial of equal protection even when state funding formulas meant that poor school districts, that taxed themselves at a higher level of effort than wealthy districts, could not obtain anywhere near the same per capita student expenditure as in wealthy districts. *Milliken* barred judges from including suburban districts in metropolitan desegregation remedies absent proof that those districts were culpable through official acts for segregation in the core urban area. *Harris* relieved the state of any obligation to fund poor women in the exercise of their constitutional right to choose abortion, even when (a) the abortion was therapeutically indicated, (b) the lack of funding rendered the abortion unavailable, and (c) the state was unable to provide any alternative to abortion that would respect a poor woman's decision to terminate her pregnancy. These cases necessarily result in the insulation of relatively more affluent persons from any constitutional obligation to support poor people through public funding or shared public services.

These cases may typically be regarded as breaks with the Warren Court, although they may more accurately be viewed as failures to advance in the direction of the Warren Court. Because the Warren Court did not overrule the state action doctrine, the Burger Court was able to portray its allegiance to a vigorous public/private distinction as a continuation of doctrine. Although the Warren Court did decide some cases of special benefit to poor people, such as *Shapiro v. Thompson*,¹⁶⁷ it did not articulate any general principle of protection for the poor. A history of the Burger Court would more aptly be titled *Promises Unfulfilled* than *Paradise Lost*.

The elevation of William Rehnquist to Chief Justice, coupled with the ascension to the Supreme Court of Justices Scalia and Kennedy, and to a more limited extent, O'Connor and Souter, casts obvious doubt on the durability of the integrationist vision. Justice Scalia, in his self-professed formalism, comes closest to a candid expression of a substitute vision, a vision in which the Court's guiding objective would not be including the disempowered, but empowering majorities — or more accurately, groups powerful enough to produce results — to work their will through legislatures.¹⁶⁸ The conspicuous exception to this deference is Justice Scalia's hostility to politically adopted affirmative action,¹⁶⁹ a hostility that evokes some unease regarding the neu-

167. 394 U.S. 618 (1969).

168. *E.g.*, *Employment Division v. Smith*, 110 S. Ct. 1595 (1990).

169. *See Johnson v. Transportation Agency*, 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting).

trality of his vision. With that glaring exception, however, majority empowerment seems the order of the day.

Does the ascendancy of this vision mark the advent of a new public law? Although I find it hard here to discipline wishful thinking, the answer is, not yet, probably not ever. A combination of reasons leads to this result. First, only Scalia and Rehnquist seem systematically enamored of the majority empowerment view. Justice O'Connor and Justice Kennedy, who embraces Scalia's formalism in some respects, have sought to distance themselves from Scalia's historical particularism.¹⁷⁰ In *Employment Division v. Smith*,¹⁷¹ Justice O'Connor, while concurring in Justice Scalia's holding, seemed positively frightened by his unwillingness even to consider whether a minority church was entitled to a free exercise exemption from an Oregon law against peyote use.¹⁷²

Second, the rejection of Robert Bork's nomination to the Court was an emphatic political rejection of the Scalia vision.¹⁷³ In most respects, Justice Scalia regularly echoes, in a more affable way, Bork's view of constitutional interpretation. Although only time will reveal the operational philosophy of Justice David Souter, his confirmation hearings were extraordinary. One could only watch awestruck as this so-called conservative Republican from one of the Union's most conservative states delivered answer after answer to senatorial questions in a manner surely more reminiscent of Justice Brennan than of Judge Souter's supposed jurisprudential camp.¹⁷⁴

Third, neither Justice Scalia nor his ideological allies has been able or willing to operationalize their philosophy in a coherent or consistent way. The distrust of ahistorical principle as a source of individual rights adjudication evaporates when Justice Scalia begins to speak of the structural side of the Constitution.¹⁷⁵ On the individual rights

170. See *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2346-47 (1989) (O'Connor, J., concurring, joined by Kennedy, J.).

171. 110 S. Ct. 1595 (1990).

172. 110 S. Ct. at 1606-10 (O'Connor, J., concurring).

173. Cf. M. PERTSCHUK & W. SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 14-18 (1989) (describing the facets of Judge Bork's ideology and jurisprudence, dubbed by Pertschuk the "Book of Bork," which motivated his opponents).

174. See *ADDITIONAL VIEWS OF CHAIRMAN BIDEN, NOMINATION OF DAVID H. SOUTER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT*, S. EXEC. REP. NO. 101-32, 101st Cong., 2d Sess. 6-7 (1990) (discussing several "reassuring" aspects of Souter's testimony, especially his statement that "original intent . . . is not . . . the appropriate criterion of constitutional meaning.").

175. For example, Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting), accuses the majority of ignoring the separation of powers "principle," 487 U.S. at 703-04, but makes no mention of late eighteenth-century practice regarding the implementation of that supposed principle as a means of shedding light on its meaning.

front, Justice Scalia appears to approve of historical concern regarding the establishment clause,¹⁷⁶ but advocates equal protection as "color-blindness" without any serious historical analysis.¹⁷⁷ His insistence on bright-line, highly particularized rules that judges may impose without any conscious exercise of discretion is totally at odds with the way judges always have judged. For example, he has repeatedly challenged *Roe v. Wade*¹⁷⁸ on the ground that it requires judges actually to decide between competing values.¹⁷⁹ That objection rings hollow against a multicentury history of judges applying innumerable doctrinal standards in just that way.¹⁸⁰

Fourth, the formalism of Justices Scalia and Kennedy, most notably, conflicts with interpretive theory as currently practiced in just about every other human discipline. The various strains of postmodernism — poststructuralism, feminism, deconstructionism, critical theory — increasingly preoccupy our political and social theorists, literary critics, sociologists, anthropologists, historians, artists, and theologians. Against their rich debates, an unadorned call to "just" read the text, and "nothing but the text," seems to ask either an impossibility or a tautology. Reading the Constitution without any culturally laden filter is impossible. On the other hand, interpreting society is still reading a "text."

Finally, the majoritarian vision lacks a compelling moral justification. This vision is difficult to link with our antimajoritarian Constitution.¹⁸¹ It is out of step with the country's current social predicaments. While the Rehnquist-Scalia wing worries about activism in the pursuit of integration, our other political elites — including corporations, universities, and, of course, legislatures — seem increasingly preoccupied with the threat posed to U.S. economic primacy and social stability by our failure to encompass larger numbers of our citizens into our educational, political, social, and economic mainstream. We are living in a time in which we cannot easily disentangle the civil

176. In *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989), Justice Scalia joins the historically-minded opinion by Justice Kennedy concluding that the establishment clause permits the erection of holiday-time religious displays on public property. 109 S. Ct. at 3134.

177. Compare *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting) with *Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

178. 410 U.S. 113 (1973).

179. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3066 (1989) (Scalia, J., concurring in part and concurring in the judgment).

180. *Webster*, 109 S. Ct. at 3073-75 (Blackmun, J., concurring in part and dissenting in part) (arguing that judgments implicit in post-*Roe* abortion decisions are no more intricate or subjective than judgments inherent in numerous other branches of constitutional law).

181. *Shane, Rights, Remedies, and Restraint*, 64 CHI.-KENT L. REV. 531, 539-41 (1988).

rights agenda from the agenda of enlightened economic self-interest for the country.

The most obvious discontinuity between the integrationist vision and the politics of the Rehnquist Court is the Court's hostility to politically voluntary programs of affirmative action. How this hostility will translate into actual differences in the allocation of government benefits is hard to assess, especially because the Court's divisions on the issue make it difficult to anticipate even the adjudication of particular cases. Whether more inclusive programs of social reform would have a lesser impact in combating poverty and discrimination is also not clear. To argue that the affirmative action cases will ultimately produce an abandonment of the integrationist judicial vision seems premature.

CONCLUSION

Analyzing the structures, relationships, and ideologies characteristic of our public law yields a mixed picture regarding whether that public law is significantly changing. The Reagan period did witness both new public law rhetoric and increased presidential oversight of administrative policymaking. Congress did approve real cutbacks in those programs that come closest to manifesting a public philosophy of community obligation to the poor and to historically disadvantaged groups. Yet, much of the rhetoric has been ineffective. Presidential intervention can work in liberal, as well as conservative directions. The direction of public support for social programs is upward. Although agencies have innovated in decisionmaking procedure, no major change in conventional legal understanding of the powers of significant social decisionmakers or of the constitutional relationship of government to the people has taken place. The post-1980 Supreme Court has shown itself less explicitly committed to the integrationist visions of the Burger and Warren years primarily with regard to affirmative action. The long-term operational impact of the Court's suspicions of affirmative action is, however, uncertain.

Having said all this, I nonetheless confess to anxiety that I am missing something. Something about public law does feel new. The question is what. My sense is that what is new since 1970 has chiefly been the volume of the right-wing voice. This voice may not have achieved much in concrete terms, but those of us whose allegiance is to a different vision have, nonetheless, had to argue with it more. The right-wing voice — whether of a law-and-economics sort or of just a traditionalist sort — has been insistent enough to put the integrationist, communitarian, checks and balances voice on the defensive against

the voice of laissez-faire, individualism, and presidentialism. The left-liberal voice, perhaps lulled into false confidence by the absence of effective right-wing challenge during the 1960s, has not been as aggressive as it should be in articulating the positive moral vision that animates it and the historical narrative that supports it. That, too, seems to be changing if the efflorescence of new journals is a guide.¹⁸²

This hypothesis suggests a possibility implied in the opening section of this essay — the possibility that change is not something that “happens” and that we “notice,” but that it is an ever-present interpretive possibility to which we are sometimes drawn, and sometimes not. Looking at numbers and cataloguing programs does not much support the case for an immanent new theory of the state. A potential, even if incomplete case for newness is stronger when we talk about rhetoric, ideology, and commitment. To paraphrase Justice Stewart’s stance on pornography, we know change when we interpret it.

The reading of reality that this essay offers perceives more continuity than innovation in the public law of the past fifteen years. What it also implies, however, is a surprising dynamism in the process of remaining stable.

182. Perhaps most prominent among the new journals seeking to bridge the genres of popular and intellectual journals are *Tikkun*, which commenced publishing in 1986, and *The American Prospect*, which premiered in 1990.