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CONGRESS IN THE "NEW CONSTITUTIONAL ORDER."

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In his new book, Mark Tushnet argues that, through a gradual process of change, a "new constitutional order" has replaced the prior structure of politics extending from the New Deal through the aftermath of the Great Society. The new order is characterized by divided government and a minimalist politics of "chastened aspirations." Tushnet's argument differs from Bruce Ackerman's view of modern constitutional development in at least two important ways. First, Tushnet argues that a new constitutional order began to emerge during the Reagan administration and was "consolidated" under Clinton, whereas Ackerman finds that the most recent constitutional shift took place under the New Deal. Second, Tushnet sees the development of new constitutional orders as a gradual process, whereas Ackerman asserts that rapid constitutional change can occur during relatively short "constitutional moments."

In the course of this exposition, Tushnet draws on a broad array of political science analyses, as well as judicial decisions and commentary. One of the most persistent themes (or sub-themes) of this argument relates to the position of Congress -- both in its constitutionally-authorized role as maker of basic policy on the federal level, as well as its relationship with other branches of government, particularly the judiciary.

Without taking a position on the differences between Tushnet and Ackerman, or on the question of whether it is ultimately preferable to refer to the present situation as involving a "new constitutional order", I would like to direct my comments toward two aspects of the present status of Congress that emerge with some clarity from Tushnet's account. The first is the further decline in the role and effectiveness of Congress in the post-Reagan period. This decline seems to be a continuation of a relatively constant trend since World War II -- broken only by transitory moments of increased congressional assertiveness, for example in the 1970s following Watergate and the Vietnam War. The second development is relatively new

-- involving the Supreme Court's imposition of limitations on congressional authority in a manner that has not been evident since the 1930s.

A. Decline of Congress as an Institution

The illustrations assembled by Tushnet underscore the decline of the representative and deliberative functions of Congress. Indeed the general trend of sharply reduced voter participation underscores the decline in the representative nature of Congress -- creating a further separation of the representatives and their constituents. Relying on financial contributions from a relatively small portion of the population, representatives lose contact with the electorate or the population. Furthermore, in a system in which a reduced electorate participates, the most extreme or "ideological" members of the constituency wield disproportionate electoral control -- thereby skewing the representative function of Congress. The result is that "politics has become dominated by relatively small groups of voters, and not by party organizations." (p. 13). Accordingly, "members of Congress are increasingly unresponsive to the overall views of their constituents." (p. 14). Moreover, the

system of primary elections -- replacing the older party system -- seems to further this trend by often favoring "highly partisan individuals" who "select themselves as potential candidates." (p. 15). An unexpected variation on the theme of non-representation appeared during the Clinton impeachment, when a lame-duck (and "highly partisan") House of Representatives voted to impeach President Clinton even after electoral results indicated popular objection to this process. (pp. 26-27.)

The deliberative quality of legislative work in Congress also seems to suffer. Polarizing mass mailings by well financed interest groups may stiffen resistance to discussion and compromise. (See p. 12, quoting Skocpol). The same result can arise through ideological polarization which has created an "empty" center in Congress (p. 14, quoting Cameron). Moreover, leadership PACs reinforce party discipline through the power of the purse -- presumably overruling constituent's views in at least some circumstances, as well as making serious deliberation and compromise more difficult. Indeed, polarization within Congress leads to filibuster and gridlock. Moreover, the

phenomenon of politics as entertainment may well discourage the serious discussion of issues in numerous instances. (pp. 19-22).

Finally, new techniques may circumvent the need for legislation or congressional supervision in an increased range of circumstances. "Presidential administration" can divert policy-making authority to a partnership of president and administrative agency -- particularly when broad delegations allow a substantial spectrum of permissible choices by the agency. (See pp. 25-26). In a parallel development, the rise of strong, well-financed interest groups furthers a system in which these groups can "bypass congressional parties and deal directly with the bureaucracies." (p. 17). So here again is an alliance that circumvents the policy-making role of Congress. As a result, "national policy-making is a product of 'a fully developed political and policy network outside of the regular political process.'" (p. 18, quoting Miklis).

This evident further decline in the authority of Congress -- and the quality of its representative and deliberative functions -- will be disturbing for those

who think that, with all of its historical flaws, action by Congress is the most democratically legitimate (and ultimately effective) form of national policy-making.

B. Congress and the Supreme Court

In the last decade or so, the Supreme Court has embarked on a course of invalidating congressional statutes that is -- in terms of numbers, at least -- unprecedented in American history. This shift in the Court's doctrine may also seem to reflect a devaluation and impairment of the role of Congress.

Yet there is considerable debate on the question of exactly how important these decisions are as a practical matter. It is not entirely clear, moreover, whether the Court's new cases actually withdraw congressional power already acknowledged in principle, or whether they merely refuse to recognize an extension of authority. For example, several of the statutes at issue could be viewed as relatively adventurous new congressional initiatives to regulate the state governments themselves, in addition to private actors. In such cases, the Court's "activism" may represent a refusal to accord new congressional

power, rather than a limitation of congressional authority already approved.

Instead of attempting to canvass the entire range of these developments, I would like to comment on two of the best known of the recent decisions, United States v. Lopez (1995), and Morrison v. United States (2000).

Tushnet suggests that the practical effect of Lopez may not be extraordinarily great -- and, indeed, it appears that Congress may have successfully circumvented the effect of the decision by a simple statutory amendment. It is now illegal to possess a gun within a "school zone", if that gun "has moved in or... otherwise affects interstate or foreign commerce." This is a requirement that would doubtless be satisfied by the vast majority (if not all) of the guns present within the United States. At least one Court of Appeals has upheld this provision,¹ and it would be surprising if the Supreme Court struck down the amended statute, given its remarks about congressional authority to regulate the "channels" of interstate commerce.

¹ United States v. Danks, 221 F.3d 1037 (8 Cir. 1999).

Yet the disturbing aspect of the Lopez decision lies more in the nature of the technique applied by the Court, than in the result achieved. As Justices Souter and Breyer argued in dissent, the technique employed by Chief Justice Rehnquist for the majority is reminiscent of the pre-New Deal court in its method of dealing with commerce clause issues. Moreover, it seems to devalue the principles of two central cases of the early Court, Gibbons v. Ogden (1824) and McCulloch v. Maryland (1819).

In Gibbons, Chief Justice Marshall set forth a broad view of Congress's power under the Commerce Clause. This view should be read together with Marshall's more general proposition -- set forth in McCulloch -- that Congress possesses a broad choice of means to achieve the ends of congressional authority set forth in Article 1 Section 8. Indeed, in McCulloch, the Court had upheld Congress's choice of a means (the Bank of the United States) that seemed rather remote from the various possible congressional ends mentioned by Marshall in his opinion (and a means that came into sharp conflict with state-chartered banks, to boot).

When Congress began to engage in significant economic regulation in the last decade of the Nineteenth Century, the Court cut back on Marshall's capacious approach by finding that "manufacture" was not "commerce" and that any "effect" that manufacture might have on commerce was an "indirect" and not a "direct" effect -- no matter how significant that effect might be in fact. The result was that, in the view of the court, the regulation was unconstitutional. The ex cathedra assertion of this position without any real underlying justification or argument was characteristic of this line of cases. It was not until the mid 20th Century that this entire apparatus was swept away in cases like Jones & Laughlin (1937) -- and most notably in Wickard v. Filburn (1942), which delivered the coup de grâce.

Justice Rehnquist in Lopez, however, resuscitates this form of argument. In effect, he seems to impose a double commerce clause requirement. First, Rehnquist's opinion asserts that the regulation must have a "substantial effect" on commerce. But that is apparently not enough. The second requirement is that the subject being directly regulated by the statute

must itself be "commercial" or "economic" in nature (both terms are used at different points of the opinion). Yet there is some confusion on the nature of this limitation. Rehnquist really never explains whether the absence of a "commercial" or "economic" aspect of the regulation itself somehow prevents the regulation from having a "substantial effect" on commerce -- or whether the requirement that the regulation be "commercial" or "economic" constitutes an independent limitation of its own. As in the pre-New Deal cases, there is no clear argument justifying the imposition of this particular limitation. Rehnquist's main concern seems to be that without a limitation of some sort, Congress could regulate matters -- such as education and family law -- that ordinarily fall within the ambit of the states' authority.

One might imagine a less old fashioned (or more "realistic") path to Rehnquist's result. Indeed, Justice Kennedy in his opinion suggests this possibility, when he seems to indicate that a process of balancing should be undertaken -- in which the state's interest in preserving exclusive control over

a matter of traditional state interest is weighed against the federal interest in regulating commerce.

But there are a couple of difficulties with this approach. First, it is obviously open-ended, and does not yield the (spurious?) certainty of the supposed hard-line test set forth by Rehnquist. Second -- as Justice Souter notes in Morrison -- it seems to require the resuscitation of the concept of "traditional state concern" -- a general concept that had already suffered its justified demise, on the grounds that it was totally unmanageable, in the emphatic opinion of Justice Blackmun in Garcia (1985) (overruling Usery (1976)).² Yet -- especially in light of Rehnquist's apprehension that a statute of this kind could open the way to a major congressional regulation of local school decisions on curricula and so on -- the approach suggested by Kennedy may well be the more intelligible description of what is actually going on in this case.

² Indeed there are further echoes of Usery in the passages in Kennedy's opinion (as well as that of Rehnquist) which claim that the Lopez statute would "displace" state choices in the relevant area. The language of Kennedy's concurrence also seems to reveal considerable anxiety that the Court as an institution not cede to Congress its last foothold in this area of constitutional turf.

On the other hand, balancing formulas often tend to favor Congress -- especially because they emphasize the difficult assessments of social and economic fact, depending on unruly data, which go into this sort of judgment. That may be another reason why the Court ultimately soft-pedaled Kennedy's approach.

But perhaps the most disturbing of the opinions in this line of cases is Chief Justice Rehnquist's opinion for the Court in United States v. Morrison (2000). Here, I am referring not to the Court's commerce clause argument (which seems to follow from Rehnquist's opinion in Lopez), but to the argument based on Section 5 of the Fourteenth Amendment. (I do not believe that Tushnet discusses this portion of the opinion, but it might well be worthy of some attention.)

In Morrison the Supreme Court struck down a section of the Violence Against Women Act of 1994, which allowed certain tort claims based on discriminatory violence against women to be tried in federal courts. Tushnet points out that certain other sections of the Act -- not threatened by the Court's decision in Morrison -- may constitute more important

aspects of the statute. But even if there are more important sections, I would say that the Court's technique in this case furnishes serious cause for concern.

The Fourteenth Amendment argument was based to a significant extent on a series of studies undertaken in a number of states, showing that women often faced serious forms of discrimination in state courts. One of these studies, the Maryland Study on Gender Bias in the Courts (1989), was written principally by a colleague at the University of Maryland, Karen Czapanskiy. This study presents, in my opinion, a devastating and utterly convincing case for the presence of this type of discrimination. It may be that, in some parts of Maryland, as in other parts of the country, the situation has changed somewhat since the study was written. But this sort of question is certainly an issue that should be open to the assessment of Congress, and not the judiciary itself.

In its Fourteenth Amendment argument, the Court turned its back on the judgment of Congress. The Court first engaged in what was to my mind a largely irrelevant discussion of the state action requirement

in Fourteenth Amendment doctrine. In order to uphold this statute there was no need to dispute the well-established proposition that the Fourteenth Amendment prohibits actions by the State only. Rather, the proponents of the statute could rest on findings that the State judges, and the State courts as governmental institutions, fostered an atmosphere of discrimination against women which resulted in unduly unfavorable results (as well as humiliation) on the basis of gender -- particularly in cases, like the assault claims in Morrison, that themselves evoked issues of gender.

It seems, therefore, that the State action discussion in Morrison is a red herring. As Justice Breyer suggests in Morrison, the real question is the question of permissible remedy: what is the extent of Congress's discretion in selecting a remedy to redress a massively proven violation of the Equal Protection Clause.

On this point the Court found that in order to justify congressional action under Section 5 of the Fourteenth Amendment, Congress's remedy must be directed in some way against a discriminatory state

officer. It goes beyond the authority conferred by Section 5, according to the Court, for the remedy to take the form of a shifting of jurisdiction from the state to the federal courts, in order to provide an alternative forum in which Congress believes that the risk of gender discrimination will be reduced.

This result again reflects the drawing of a conceptual line without much theoretical basis. In the seminal cases of South Carolina v. Katzenbach (1966) and Katzenbach v. Morgan (1966), the Court held that the enforcement clauses of the Fourteenth and Fifteenth Amendments grant power to Congress that is analogous to the authority conferred by the necessary and proper clause, or by the doctrine of implied powers of McCulloch. In effect, the teaching of those cases is that the enforcement clauses of the post-Civil War amendments should be viewed for all practical purposes as though they were additional heads of congressional power under Article 1 Section 8.

In the 1997 Flores case, of course, the Court found that Congress did not have the power to redefine the scope of a constitutional right contained in

Section 1 of the Fourteenth Amendment -- at least where the Court had recently set forth its own clear understanding on that question. Flores also perhaps limited the scope of congressional authority by imposing a requirement of "proportionality" and "congruence" with respect to its choice of means to achieve a constitutionally authorized end.³ (But, in the context of Flores at least, this limitation seems to reflect the point in Marshall's opinion in McCulloch that Congress would not be authorized to act on a "pretext.") In any case, the record available to Congress in Morrison showed that the fears of gender discrimination in the State courts were justified and substantial.

Indeed, I would say that, if anything, the statute struck down in Morrison more closely resembled, in all respects relevant here, the suspension of literacy tests which was unanimously upheld in South Carolina v. Katzenbach. The suspension of literacy tests was of course not directed against any discriminatory state officer -- the requirement

³ In reality this test may be similar to Kennedy's test in Lopez. To say that a federal remedy is "disproportionate" may be little more than to say that the State's interest outweighs the federal interest in a particular situation.

that Rehnquist seems to impose in Morrison. Rather, the remedy pursued another tack entirely, in order to achieve the enforcement of the substantive constitutional right in the manner thought most effective by Congress. As Breyer indicates in his dissent, Rehnquist's remarks to the contrary in Morrison do not seem convincing.

Indeed, the Fourteenth Amendment argument in Morrison has, in my opinion, an intuitive validity that seems considerably stronger than the commerce clause argument in Morrison or in Lopez. These commerce clause arguments are a bit of a stretch (even though ultimately probably justified), whereas the Fourteenth Amendment justification in Morrison seems unanswerable.⁴

⁴ The Court seeks to draw a comparison between the record available to Congress and the Courts in Morrison and statements on the floor of Congress in the Civil Rights Cases (1883) that suggested that there was racial discrimination in the state courts that gave rise to a similar cause of action in the Civil Rights Act of 1875. This point, however, is only obliquely acknowledged in Bradley's opinion in the Civil Rights Cases. Moreover, while the general "state action" principles of the Civil Rights Cases are still firmly anchored in American constitutional law, it does not seem to me that any sort of argument can properly be based on supposed details of the holding of the Civil Rights Cases, which was abandoned (on

The Court's refusal to give weight to Congress's findings of fact here (supported by extraordinarily powerful empirical research), as well as the Court's willingness to draw new conceptual distinctions -- more or less out of nowhere -- in order to justify its limitations, suggests that the road for Congress may well continue to be a tough one in the "new constitutional order."

commerce clause grounds) in cases considering Title 2 of the Civil Rights Act of 1964.