

Hartz, Political Culture, and Supreme Court Decision Making in the 21st Century: Questioning Populist Constitutional Theory

Ronald Kahn
Oberlin College

I. Introduction

The impact of Louis Hartz on understanding constitutional liberalism has been impressive. One of the most subtle reflections on the importance of Hartz is ironically J. David Greenstone's reinterpretation of Hartz. Greenstone agrees with Hartz that the liberal political culture is central to understanding political change in America. However, unlike Hartz, it is the conflictual nature of American liberal culture, not its unitary character, which helps us understand its impact on American politics and society.¹ I will outline Greenstone's vision of the conflictual, non-unitary American political culture, as he applied it through a critique of methods of interpreting court action that rely on unitary visions of American political culture.² I will then explore a few of the implications of the presence of a non-unitary political culture for how we can better explain Supreme Court decision making and the place of the Supreme Court in American political development (APD). In doing so, I draw on work that emphasizes that Supreme Court decision making is bi-directional between internal institutional norms and processes and the political, social, and economic world external to the Court.

II. Greenstone's Non-Unitary, Conflictual Political Culture

Greenstone, a student of Hartz, presents an alternative vision of the constitutional regime.³ This vision contains three conflicting accounts of the liberal regime in America: a *republican* account, in which political events are interpreted in terms of the opposition between citizens who can be trained in civic virtue and concerns about the possible usurpations of power by public officials; a *humanist liberal* account, which emphasizes the tension between the value of autonomous individuals pursuing privately determined goals and the need for effective cooperation in pursuit of broadly shared collective interests; and a *reform liberal* account, which emphasizes the interpretation of constitutional norms in terms of a tension between holding individuals to appropriate moral standards and a social obligation to ensure that every person has an opportunity to develop his or her faculties.⁴

¹ See J. David Greenstone, *The Lincoln Persuasion: Remaking American Liberalism* (Princeton: Princeton University Press, 1993) and David F. Ericson and Louis Bertch Green, eds., *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism* (New York: Routledge Publishers, 1999).

² See J. David Greenstone, "Against Simplicity: The Cultural Dimensions of the Constitution," *University of Chicago Law Review* 55 (1988): 428-449, for a discussion of his theory of the liberal regime with regard the making of constitutional choices in our nation.

³ Ibid.

⁴ See Ronald Kahn, "Liberalism, Political Culture, and the Rights of Subordinated Groups: Constitutional Theory and Practice at the Crossroads," in Ericson and Green, *The Liberal Tradition in American Politics*: 171-187, for an exploration of the implications of the presence of conflicting elements within American political culture for how the rights of subordinated groups are defined within the Supreme Court. Here, I explore the implications of conflicting values within American political culture for how we study the Supreme Court in American political development.

In doing so, Greenstone accepts the Hartzian analysis while transforming Hartz's static unitary model into a dynamic one. Thus, political debate over constitutional principles based on the acceptance or rejection of reform and humanist liberal values is at the core of constitutional change. The lack of organized class antagonisms in the United States commends us to view or conceptualize issues of rights in self-development terms, not in terms of social justice with regard to the fruits of capitalism. Therefore, constitutional issues are critical because we must frame rights not simply in terms of outcomes, but in terms of the delivery of goods and services so that self-development can occur. Framing issues in this way requires us to ask what the individual is doing to "qualify" for government support in terms of his or her own acts of self-development.

The Constitution and the legal norms of our constitutional regime are not self-enforcing; they are played out in the life of legal and political institutions. Greenstone writes, "To talk about operative constitutions is to talk about certain socially accepted and culturally significant rules---whether or not they are formally part of the written document. In the American context, such rules limit political life, and also help pattern both its conflictual and consensual features."⁵ Therefore, within and among legal and political institutions conflicting features of American political culture are meaningful. Moreover, the relationship of history to political culture constitutes a crucial force for change. In the United States, liberalism functions as a boundary condition -- as a set of relatively permanent features in a particular context which informs causal relationships. As a boundary condition it has both behavioral and ideological elements; moreover, it must be explanatory in the sense that it describes those operative rules (standards of correct performance) that define the regime.

Of the three conflicting accounts of the liberal regime, republican, humanist liberal, and reform liberal, republicanism has gained a renewed influence among constitutional scholars. It argues for an independent, virtuous, and participatory citizenry uplifted by labor, virtue, and a devotion to the general good of the community. In the founding period, holders of landed property and those working the soil were viewed as more virtuous than holders of financial wealth created by economic manipulation. Republicans feared standing armies, and favored citizen leaders elected for short terms in office and institutional checks and balances. The framers, as republicans, remained supportive of a liberal creed, but had no comprehensive vision of human well-being. Questions of individual and social good were left to the citizens themselves. Republican public-spiritedness solved the liberal problem of coordinating autonomous, even warring, individuals. Republicanism trusted political institutions to create a situation where individual virtue could flourish. For Greenstone, republicanism became a liberal vaccine against a liberal disease.

Republican views of citizen vigilance against government remain today. Republican norms reject the political analogue to market relationships in which individuals simply seek personal advantage. Republicanism tells citizens to sacrifice their own interests to preserve a liberal regime. There is a collective quality of representation without a notion of collective will. Greenstone argues that "ideas of limited government, virtue, corruption, separation of powers, and, of course, individual rights" are aspects of "a real American liberal consensus."⁶ In the American context, republicanism was one member of a family of liberal beliefs, all devoted to the ideal of individual liberation.⁷ What remains in dispute are broader social and philosophical

⁵ Greenstone, "Against Simplicity," p. 436.

⁶ Ibid., 442.

⁷ Ibid., 439.

questions, as well as the nature of human personality and the good of society, which are addressed in more comprehensive liberal theories.

Humanist liberalism accords the high value to the welfare of the individual and to the liberty of an individual to define his or her own welfare. A good society satisfies individual desires and preferences in an equitable way, as citizens define their own goals with a minimum of external constraint from government. Liberty is not an affirmative right to resources from government; it is a right not to be infringed upon by government. Because politics is not economics, the role of politics is not to satisfy a complex set of preferences that require government action. Government, instead, must keep citizens from infringing on the freedom of each another and must deal with the effects of collective-action problems. It must deal with market failure when private exchanges among rational self-regarding individuals are not sufficient. For humanist liberals, the "tension between the preferences of autonomous individuals and the need for government intervention creates a concern for constitutional rules."⁸ Thus, humanist liberalism says that individuals should choose goals as well as means, provided the freedom of others to do likewise is respected.

Reform liberals draw on Kant and the Puritans to argue that human beings have an obligation to develop their physical, intellectual, and aesthetic faculties.⁹ Reform liberals argue for the development of language, mathematics, and the practical and moral knowledge vital to daily living, with the criteria for individual competence established by the community or culture. There is a collective sense of responsibility for creating a society in which individuals can develop their faculties, with those faculties that encourage human development being more valid than those that do not. Constitutional principles that transcend equal access draw on reform liberal values.¹⁰

Reform liberals are liberals, like humanist liberals, because the individual is still the primary unit of action. However, standards of evaluation for what these individuals' faculties should be and how government is to help secure them dominate only reform liberal thinking. Therefore, humanist and reform liberals hold very different pictures of our constitutional regime.¹¹ Humanist and reform liberals share a cultural commitment to implementing private preferences and to the maintenance of a good society, defined as supporting liberty and fair procedure.¹² However, the difference between humanist and reform liberalism reflects a deep

⁸ Ibid., 443.

⁹ Ibid., 444-445.

¹⁰ We see this in the area of the Supreme Court's definition of fundamental rights and interests. For example, in *Plyler v. Doe* (1982) 457 U.S. 202 (1982), the Supreme Court refused to allow Texas to charge tuition for public schools to children of illegal aliens. Doing so would have impeded these children from developing the knowledge, education, and personal faculties necessary to fulfill their roles as citizens. The court would not permit the state to aid in the process of creating such a class of citizens.

¹¹ See Greenstone, "Against Simplicity" at 447, for the argument that values of reform liberals gained strength from the Civil War and women's suffrage amendments, which were products of the antislavery and feminist movements that espoused reform liberal values. Because distinctions of race and gender were merely physical, they were not constitutionally acceptable. Blacks and women were human beings with distinctively human capacities of self-development. Therefore, the Civil War and women's suffrage amendments identify polity principles, such as the power and responsibility of Congress to enforce equal protection of the law under the Fourteenth Amendment and to prevent racial and gender discrimination in the exercise of voting rights under the Fifteenth and Nineteenth Amendments.

¹² While the humanist liberal's faith in political and economic structures means that she is antagonistic to a powerful government that could potentially stifle the market system, even reform liberals might oppose some government programs that undermine individual initiative or the right of a citizen to be left alone. Opposition to state power

ambiguity in liberal thought over the scope of individual autonomy.¹³ Should individuals, or the broader society, judge the basic goals they ought to pursue? Thus, reform liberalism has a critique of bourgeois society, a critique that is internal to the liberal enterprise. It flows from the debates between humanist and reform liberals, and others, who emphasize different strands of our political culture.¹⁴

Historically, reform liberals have sought to use the courts to support the development of human faculties when political institutions have failed to do so, frequently arguing that such faculties are linked to changing definitions of the requirements of engaged citizenship. Thus, the difference between the reform and humanist sides of liberalism has less to do with concepts of class or group interests than with vastly different cultural and philosophical commitments. For reform liberalism, the question of when courts should intervene is a question not simply of equal access and lack of prejudice, but of whether courts should require the state to intervene so that self-development as a right is facilitated. Thus, when the *Plyler* Court guaranteed illegal Mexican immigrant children the opportunity, through education, to ensure their self-development as future United States citizens, it followed reform liberal principles by taking an active role in limiting disabilities imposed on immigrant children. It implicitly stated that proactive legal measures were indeed necessary in order to ensure equal rights under the Constitution. We see similar sentiments in *Brown v. Board of Education* (1954).

Humanist and reform liberals both accept the values of representation, individual rights, and polity principles such as the separation of powers and federalism, but they are divided on the fundamental philosophical and cultural question of whether the state should be in the business of actively promoting individual self-development. Therefore, in the American context, the conflict over what the Constitution means is not simply a question of applying precedent and formulating a decision that fits existing precedents to the facts in a case. Conflicts over what the Constitution means involve complex matters of political culture and social practice, including whether one sees American political culture through the eyes of a humanist liberal or those of a reform liberal.

In a sense, conclusions about political culture made in “red” and “blue” states involve different choices along the conflicting elements of the American political culture. Similar conflicts exist in Supreme Court decision making. How they are resolved and the staying power of the conclusions that are made by the Supreme Court are not similar, temporally or substantively, as those found in political institutions. Thus choices of methods of inquiry and explanations of decision making by the Supreme Court and of the place of the Supreme Court in American political development are central to whether the impact of the conflicting elements of the American political culture make it into contemporary constitutional theories and studies of constitutional change.

weakens support of the welfare state; many fear that a state so empowered might go beyond fostering self-development and move toward making citizens wards of the state.

¹³ Ibid., 444.

¹⁴ The radical critique of liberalism may emphasize, as does the reform liberal, the impact of poverty or hopelessness on the opportunity for self-development. At other times, the conflict may essentially be a conflict over what the Constitution means, in doctrinal terms, as those who hold the prevailing doctrinal view emphasize. As I discuss below, the doctrinal and radical accounts overlook the basic division within the American constitutional regime between humanist and reform liberals; that is, the division between those who have faith in the constitutional regime as a set of fair procedures for citizens with different personal faculties (the humanist liberals) and those who argue that society-fostered self-development is a necessary ingredient for social change (the reform liberals). Thus, the conflict between humanist and reform liberals is fundamentally a conflict over which cultural norms should prevail.

Greenstone argues that change is negotiated in our nation though appeals to the republican, humanist liberal, and reform liberal accounts of American political culture. Constitutions have three types of rules: constitutive provisions, precepts, and norms.¹⁵ *Constitutive provisions* specify the members of the body politic; identify key political institutions and assign them particular powers and responsibilities; and establish the rights and obligations of citizens and public officials. Examples are rules regarding the presidential veto and congressional override. Constitutive rules most fully resist deconstruction. "Without settled meanings, these provisions could not establish the framework essential for a complex political life."¹⁶

Precepts advise actors about their most effective courses of action. In democratic politics, precepts informally shape the constitutional order by giving cues as to when to act and when not to act. Precepts must be open to revision as new ideas and developments offer better prospects for success. For example, Greenstone notes that precepts surround members of the American legislature and executive with regard to using the mass media in appealing to the public and to using technical experts in the budgetary process. For example, one might see Greenstone's formulation of precepts in action by examining appeals to and uses of independent prosecutors.

Norms or *ethical ideals* express enduring cultural and philosophical commitments. They are "authoritatively asserted by public officials, enshrined in a polity's basic charter, and rooted in practices of long standing." For example, First Amendment liberties and egalitarian values from the Civil War and women's suffrage amendments are obvious examples of norms or ethical ideals.¹⁷

Because ideals and commitments are often not fully realized, they identify projects that a regime continues to pursue. They invite reformulation and revision and thus include elements of permanence and change. Indeed, when they are wholly accepted and come to define existing practices, they become constitutive provisions. For example, minorities now have a right to vote, so this norm has become a constitutive provision. But the larger goal of racial equality is a norm because it has yet to be realized. Disputes over interpretations of the meaning of "equality" may readily emerge with regard to this norm. To understand the process through which constitutional law redefines the rights of groups, who have been subordinated by the political, economic and social system, we need to explore how these three types of rules interact with the republican, humanist liberal, and reform liberal accounts of American political culture, and how the Supreme Court negotiates with the external world outside the Court.

Moreover, in the republican, humanist liberal, and reform liberal accounts, the place of constitutive provisions, precepts and ethical ideals differs. Republicanism emphasizes constitutive provisions in the Constitution. Political events are interpreted in terms of opposition between the good of citizen virtue and the evil of usurpation of power by government officials, such as with regard to questions of impeachment. In many instances, the language of constitutive provisions is that citizens are good and public officials are bad. This language determines how the government is molded. There is a normative statement in republicanism: structures of citizen power and of weak officials will produce adherence to the Constitution.

Humanist liberals, with an eye to preserving a viable political market, are concerned with precepts that specify key actors, procedures, and institutions to deal with market failure. Directions on maneuvering in such well-defined situations provide a very thin cultural dimension

¹⁵ Ibid., 436.

¹⁶ Ibid., 437.

¹⁷ Ibid.

to humanist liberalism. Thus, in the humanist liberal case, the emphasis is on precepts that facilitate effective action to secure individual liberty. Events are interpreted in terms of the tension between the value of autonomous individuals pursuing privately determined goals and the need for effective cooperation in pursuit of broadly shared objectives. Precepts are developed to preserve a viable political market; they specify key actors, procedures, and institutions to deal with market failure.

Reform liberalism emphasizes the importance of constitutional norms. These norms are interpreted in terms of a tension between holding individuals to appropriate moral standards and an obligation to see that every person has the opportunity to develop his or her faculties. The nation asks whether we trust moral rules to keep citizens in line or whether government must support opportunities for citizens to develop their faculties. Thus, Greenstone emphasizes that simplicity is not basic to our constitutional order. A charter or constitution that includes both norms and precepts, which by definition are in a continual or permanent state of becoming, will not function smoothly on behalf of any single project or goal. Norms and precepts are in a state of constant revision; constitutive rules, precepts, and norms vary in prominence depending on the problems facing the nation.¹⁸

III. The Conflict-Full American Political Culture and the Study of the Supreme Court in American Political Development

A. The “*Doctrinal View*” and its “*Radical Critique*” --- As Unitary Theories

Greenstone criticizes models of politics, political change, and court decision making that view cultural values as consensual. They fail to provide an adequate understanding of the relationship between political thought and action because they do not respect the frequently dialectical fabric of American thought and politics which is caused by a non-unitary political culture. To demonstrate this, he focuses his attention the “*prevailing doctrinal view*,” which treats the Constitution as “the ultimately authoritative text for adjudicating legal disputes,” and on its “*radical critique*,” which sees the Constitution as “a weapon wielded by one economic interest or another.”¹⁹ The doctrinal account is flawed because it assumes that the regime's fundamental premises require a basically impartial polity and judicial system, while strict impartiality is simply not possible. It thus incorrectly assumes that the Constitution consists of neutral principles and that the courts and other agencies that interpret the Constitution are devoted to the dispassionate adjudication of these essentially neutral principles.²⁰ Judges do not interpret law merely on the basis of neutral principles, nor is the Constitution composed of neutral principles. The doctrinal account also ignores the Constitution's social bases and biases. Procedures that are neutral on their face may promote inequalities in practice. In the United States, the effects of liberal politics reinforce the effects of liberal economics.

The radical critique of the doctrinal approach is flawed because it incorrectly assumes that courts regularly sanction outcomes that have a pronounced class bias or other type of social

¹⁸ That Greenstone has outlined the full complexity of our nation's constitutional regime in terms of republican, humanist liberal, and reform liberal constitutionalism is less important than his having disclosed many of the value conflicts that inform the regime.

¹⁹ *Ibid.*, 438.

²⁰ See *Ibid.*, 430, where Greenstone criticizes Herbert Wechsler and Robert Bork for assuming that “the Constitution expresses and implements a consensual political logic that precludes conflict over fundamental issues within the American legal system.”

bias and that law is simply an instrument for achieving partisan objectives, typically those of the socially and economically privileged. The problem with radical critics is that they "ignore the fact that the United States does have a constitutional regime... [and that] the American Constitution imposes a range of real restraints on political actors that the free market does not impose on buyers and sellers." In the United States, the Constitution and constitutional rules are regarded as final and determinative. "As a text," Greenstone argues, "the Constitution is not indefinitely deconstructable American constitutional practice exacts obedience from all comers."²¹

Greenstone finds that the two approaches share several areas of agreement that oversimplify the place of law and the courts as forums for social change. First, each approach emphasizes the role of political interests. For holders of the doctrinal approach, it is the view that there is an impartial adjudication among political interests; for their radical critics, it is the dominance of a single faction. Second, the two sides agree that "the Constitution specifies the rules of the game, fair or unfair, within which the clash among economic groups or particular litigants takes place." Third, each approach agrees that "the constitutional order has legitimated some modes of conflicts while proscribing others, such as the open resort to violence by private parties." The fourth area of agreement is that "certain substantive constitutional issues are no longer matters of active dispute."²²

Therefore, the problem with both accounts of the role of law and courts in our society is that they "treat political issues as conflicts of interest. Neither account ... views the Constitution primarily as a cultural system that helps Americans understand and cope with intrinsically puzzling or ambiguous events." Both approaches are buying into a consensus perspective on American political culture, one based on the premise that "clashes over cultural matters can be ignored because American political culture as a whole is so powerfully, uniformly liberal."²³ This agreement on the consensual nature of American political culture obscures for both groups the relevance of culture to politics. Each view agrees on the existence of a fundamental consensus in the American political order, acknowledging our polity's "thoroughly liberal character, but neither view takes into account the complexity of that liberal character."²⁴ In addition to accepting American political culture is consensual, they also agree on a narrow definition of interests, the manner in which the struggle is conducted, and even who wins and loses. From the doctrinal perspective, Greenstone argues, "[t]he Constitution is the liberal framework that all politically active groups accept. For the radical critics, a dominant liberal culture has systematically, via the Constitution, excluded all significant alternatives to a liberal, capitalist society." In either case, Greenstone argues, "political conflict is restricted in the economic sphere to the clash of specific interests.... Both the doctrinal and radical views implicitly adopt a consensual view of American political culture as the point of departure, however much they differ on the normative merit of the consensus."²⁵ Moreover, through the acceptance of the consensual nature of our nation's culture, each group of scholars "obscures the possibility that a culture can be pervasively liberal without being *consensually so*."²⁶ By focusing on specific conflicts of interest, they fail to sufficiently emphasize that the citizens of a liberal

²¹ Ibid., 431-432.

²² Ibid., 432.

²³ Ibid.

²⁴ Ibid, 434.

²⁵ Ibid., 435.

²⁶ Ibid.

polity must reconcile the value of liberal autonomy with the need for political authority and the overall needs of society.

B. The Conflict-Full American Political Culture and Bi-Directional Supreme Court Decision making Process

I want to refocus Greenstone's argument about the problematic nature of static or consensual visions of American political culture. I want to emphasize that the problem with the doctrinal view and its radical critique is not simply that both view the American political culture as unitary. I want to emphasize that it is the reinforcing effects of both accepting the American political culture as unitary, and that the doctrinal approach centers only on internal Court decision-making and its radical critique centers only on the world external to the Supreme Court as sources of explanation of doctrinal change, that make both approaches incapable of furthering our understanding of the Supreme Court in American political development. Both approaches assume that the worlds internal and external to the Court are separate, and that the interaction between internal Court decision-making and the social, economic and political world outside the Court is not important. When these two factors join the fact that the doctrinal approach views the place of legal institutional norms and principles as important to Court decision-making and its radical critique does not (because of its focus on the automatic effects of the social, economic, and political stasis ON Court decision-making), we can attain a more precise understanding of why each approach is wanting. Thus, at the core of the doctrinal approach is the view that justices only take legal precedents and constitutional principles seriously in making constitutional choices. Radical critics take the internal for granted as they argue for the prominence of the economic and social inequalities of our capitalist nation (factors outside the Court) as explanations of Court action. Thus, the doctrinal approach is almost completely internal-looking, and does not place Supreme Court decision making within the wider world outside the Court; the external radical critique assumes that institutional norms, court process and principles are not explanatory of Court action.²⁷

Another reason why the doctrinal approach and its radical critique differ is their quite different assumptions as to what constitutes knowledge. The radical critique is built on legal realist premises that knowledge must be based on scientific naturalist principles and that knowledge can only be defined as that which is gained through the study of empirical data, using scientific methods. For something to be knowledge, it must be based on particular factual referents, and scientific replication of the findings must be possible. Also, the radical critique accepts non-Euclidean principles which view logical systems of ideas as unable to constitute knowledge. Nor can systems of ideas be studied scientifically, in part, because their complexity cannot be broken into empirical referents.

Doctrinal theorists, in contrast view Supreme Court decision-making as based on respect for foundational values and deductions from such values, a process which can't be explained under scientific rationalist or non-Euclidean principles. Holders of the doctrinal view, incorrectly, see judging as simply mechanical, as a system of logic. They view the process as

²⁷ The radical critique is completely external-looking; it assumes that institutional norms and the process through which courts make decisions are epiphenomenal to explaining doctrinal change and the place of the Supreme Court in American political development.

internal to courts and refuse to recognize that at the core of Supreme Court decision-making is the incorporation of the social, economic, and political world outside the Court.

Moreover, both doctrinal internalists (law) and legal realist externalists (politics) view questions of doctrinal change as a process of “law versus politics.”²⁸ This, plus the assumption of a unitary American political culture, makes both approaches incapable of explaining doctrinal change and the place of the Supreme Court in American political development. Both reject the importance of the conflicting elements in American political culture within and outside the Court, and most importantly, fail to show how the debates over these elements within and without the Court inform each other. Thus, the fact that the political culture is not unitary, and that its elements are in active play whenever constitutional choices are made within and without the Supreme Court, require the development of a methodology for studying the development of constitutional law and the place of the Supreme Court in American political development that respects these premises. This methodology also requires that when we study how these elements inform constitutional choices in the Supreme Court (and lesser courts) and more directly politically accountable institutions that we respect the importance of differences between courts and political institutions with regard to internal institutional norms and practices, and how they interact with each other and with the external social, economic, and political world in which both are embedded.

This methodology must respect that the relationship between courts and political institutions is bi-directional, as is the relationship between courts and the political, economic, and social structures external to the Court. This methodology must be bi-directional; it must take seriously the fact that what happens inside and outside the Court and political institutions is important for explaining doctrinal change in the Supreme Court and the constitutional debate in the wider society. We must not assume that place of doctrine and legal norms and boundary mechanisms of courts and political institutions are similar. Such a methodology must respect how the Supreme Court and political institutions differ in institutional norms and decision making processes, and how the view of the past, present, and future inform constitutional choices.

We cannot assume that courts and political institutions process the conflicting values of the American political culture in the same way, or that aspects of that culture will be highlighted at the same time in history, because of the institutional differences between the Supreme Court and more directly politically accountable institutions, such as Congress, state governments, presidents, and political parties. Moreover, the difference in institutional norms about the role of precedent (backward-looking) and aspiration in legal principles (forward-looking) and their relationship in courts and political institutions means that the processing of the different elements of American political culture in constitutional law, and their staying power, compared to political institutions, will be different.²⁹ Finally, we must study how patterns of path dependence within courts and political institutions differ, and what informs whether courts and the politics outside courts are in alignment in their decisions. Viewing Supreme Court decision-making as bi-directional and as based on a conflicting political culture also may help us make institutional comparisons in history. For example, because of the presence of a bi-directional process between

²⁸ See Ronald Kahn and Ken I. Kersch, “Introduction,” in Ronald Kahn and Ken I. Kersch, *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006): 1-30, for an explanation of why constitutional change should not be viewed as a process of law “versus” politics.”

²⁹ See Mark Tushnet, “Popular Constitutionalism and Political Law,” *Chi-Kent Law Review*. (forthcoming 2006), for the argument that for the most part courts are backward-looking and political institutions are forward-looking.

Court and society, we may find that, instead of the “waning” of political time that Stephen Skowronek found in the historical development of the Presidency, the “legal time” of the Supreme Court may not be waning.³⁰ Such a finding may help us understand decisions of the Supreme Court at times are so at odds with the politics outside the Court.³¹

C. Popular Constitutional Theory

The centrality of conflicting elements of American political culture to constitutional change, the bi-directionality of Supreme Court decision-making, and differences in the way it and political institutions process the conflicting values of the American political culture, raise serious questions about theories of popular constitutionalism by such prominent scholars as Mark Tushnet³² and Larry Kramer.³³ This may be because they presuppose that a civic republican stance is the core value which should be optimized in constitutional theory. They do not see the importance of full range of conflicting values in American political culture. These scholars assume that more participation is better than less participation, and that the quality and range of participation, is the most important variable to consider in a theory of the “best” process for making constitutional law.

They argue that courts (as compared to more directly politically accountable institutions) should not be viewed as more legitimate venues for making constitutional choices. This view is not simply because of the civic republican values of these scholars and their rejection of the importance of humanist and reform liberal values within American political culture. Their support of popular constitutionalism also results from their failure to take seriously the presence of a bi-directional Supreme Court decision-making process, in which doctrine and legal norms and the external social and economic world are important.

Moreover, rejecting the importance of differences between courts and political institutions, popular constitutionalists tend to overemphasize the place of legal principles within political institutions and public debate. If there are conflicting accounts of American political culture, and if institutional differences between the Supreme Court (lesser courts) and more directly politically accountable institutions are important to the way such values are incorporated into their decision-making, than arguments for trusting politics and taking the Constitution away

³⁰ See Ronald Kahn, “Social Constructions, Supreme Court Reversals, and American Political Development: *Lochner*, *Plessy*, *Bowers*, But Not *Roe*,” in Ronald Kahn and Ken I. Kersch, eds., *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006): 67-113, for the argument as to why this is so. Also see, “The Difference between Legal and Political Time: The Supreme Court (and the Presidency) in American Political Development.” (Paper presented at 2005 Meeting of the Western Political Science Association, Oakland, CA, March 17-18, 2005).

³¹ See Ronald Kahn, “Why *Lawrence v. Texas* (2003) Was Not Expected: A Critique of Pragmatic Legalist and Behavioral Explanations of Supreme Court Decision Making,” in Harry Hirsch, ed., *The Future of Gay Rights in America* (New York: Routledge, 2005): 229-264, for the argument that the bi-directional nature of Supreme Court decision making, and the quite different boundary conditions of the Supreme Court and political institutions, result in conservative Supreme Courts in conservative eras making progressive constitutional choices. Discussion is also provided as to why pragmatist scholars, such as Cass Sunstein, as well as behavioralist political scientists, fail to explain, much less predict, such phenomena.

³² See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) for his theory of “populist constitutional law.”

³³ See Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), for a history of why judicial supremacy is the vision of Court power today, and why this vision should be changed.

from the courts are suspect. For example, if institutional norms, such as *stare decisis*, result in the Supreme Court keeping alive precedents based on reform liberalism when the nation is in a period of humanist liberalism (as we find our nation today), and the Court is bi-directional as it applies reform liberal premises, then we can envision a situation in which a conservative court in a conservative era makes decisions which are counter to the social and political proclivities at a specific point in history. *Lawrence v. Texas* (2003) and *Planned Parenthood of Southeastern Pennsylvania* (1992) can be explained in such terms.

Taking the Constitution TO the courts in general, and to the Supreme Court in particular, may be more supportive than trusting politics for social change because courts are more likely to consider the three conflicting accounts of American political culture, both in precedents and through their application at first instance. Finally, if the Supreme Court's processing of the conflicting elements of American political culture is bi-directional, that is, if both doctrine and the external social, political and economic world are central to its decision-making, there also is reason to question the emphasis that scholars of popular constitutionalism place on the counter-majoritarian difficulty of the Supreme Court.