The Constitution May Be Undemocratic, but Not Supreme Court Decision-making: The Difference between Legal and Political Time

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Introduction: The Supreme Court, "Legal Time," and the Waning of Political Time

Sandy Levinson makes an eloquent argument why the Constitution is undemocratic. And clearly I agree with him that Utah does not deserve as many senators as California. However, the Constitution does not speak; it is interpreted. And the open-ended phrases of the Constitution, including the Bill of Rights and Civil War Amendments, as well as structural concepts on which it is based, such as the separation of powers, mean that to speak of the Constitution as undemocratic we must consider whether the process of interpretation by the Supreme Court, lesser federal courts, and state courts, also can be viewed as undemocratic. That is, if the way the Supreme Court interprets the Constitution has democratic qualities, then the fact that Supreme Court justices are there for life and are only selected democratically by Presidential nomination and Senate concurrence, may not be the start and the end of a discussion as to whether the Supreme Court and the Constitution, which established the selection and removal process for justices, are undemocratic.[1]

In this paper, I argue that the process of Supreme Court decision making, with its Social Construction Process (SCP) may result in the "Legal Time" of the Supreme Court being more democratic substantively, if not in terms of formal process, than the "Political Time" of the Presidency.[2] More specifically, I argue that the "legal time" of the Supreme Court is different from what Stephen Skowronek has called the "political time" of the presidency, and that this difference has important implications for whether the Constitution should be viewed simply as undemocratic and as an anachronistic "Eighteenth Century Constitution in a Twenty-First Century World."

To make this argument, I will draw upon "Social Constructions, Supreme Court Reversals, and American Political Development: *Lochner, Plessy, Bowers,* But Not *Roe,"* Chapter 2, in Ronald Kahn and Ken Kersch, eds., *The Supreme Court and American Political Development* (Lawrence, KS: University Press of Kansas, 2006). I also will refer to some of the other chapters in this volume for additional evidence with regard to the nature of what I call "legal time" and the place of the Supreme Court in APD. Pam Brandwein, Howard Gillman, Mark Graber, Tom Keck, Wayne Moore, Carol Nackenoff, Julie Novkov, and Mark Tushnet,

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[1] In making this argument, I do not assume the Constitution and its interpretation were meant to be simply democratic.

[2] In this ticket to the Schmooze, I draw upon "The Difference between Legal and Political Time: The Supreme Court (and the Presidency) in American Political Development" (Paper presented at the 2005 Annual Meeting of the Western Political Science Association, Oakland Marriott City Center, Oakland, CA, March 17-18, 2005.)

along with co-editor Ken Kersch, are contributors to this volume. This paper is for discussion purposes only; please do not quote it without specific authorization.[3]

I begin with a brief summary of Stephen Skowronek's definitions and positions with regard to the waning of political time for presidents, to which this paper responds with regard with some ideas about the "legal time" of the Supreme Court.[4] Stephen Skowronek has argued that a key to understanding presidential politics through time and the place of the Presidency in APD is to explore the relationship over time of what he calls *political time* and *secular time*. The "historical medium through which authority structures have recurred" is *political time.* "The historical medium through which power structures have recurred" is *secular time*"(p. 30). For Skowronek, presidential leadership in political time refers to "the various relationships incumbents project between previously established commitments of ideology and interest" and a president's "own actions in the moment at hand." He continues, "Presidential leadership in secular time will refer to the progressive development of the institutional resources and governing responsibilities of the executive office and thus the repertoire of powers the presidents of a particular era have at their disposal to realize their preferences in action" (p. 30). Over time, contingent structures of authority are affected by the reorganization of presidential power (in secular time) and how changes in the organization of presidential power have affected the political range of different claims to authority.

Skowronek documents how the effect of institutional thickening on the politics of presidential leadership has increased the potency of those with weak authority claims and decreased the potency of those with strong authority claims. The progressive thickening of the institutional universe of presidential action has hemmed in those incumbents who hold the most compelling warrants for independent action. Thus presidents who are elected at times when they have the authority to act boldly for change, whether liberal or conservative, have shorter time periods for successful innovation. Thus, Skowronek notes, "The 'rise' of the presidency has tended in this way to flatten out potential political prospects for presidents" (p. 31). Therefore, as the expectations, authority, and power of the presidency has increased over the decades, the thickening of the institutional context in which a president acts means that he is limited in time and in the ability to act in a transformative way, even if he has the authority to do so.

The result of these developments has been what Skowronek calls "the waning of political time." Thus Ronald Reagan's rendition of reconstructive politics was more muted in time and

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[3] Since the argument here centers on my contribution to the volume with regard to the nature of legal time and its difference from political time and my interpretation of how the chapters by fellow contributors may inform this question please do not assume that my fellow contributors agree with this argument, or my analysis of their findings. Therefore, again do not quote this paper without the permission of the author. Here is a list of the authors and the titles of their chapters in the book: Pam Brandwein, "The Civil Rights Cases and the Lost Language of State Neglect;" Howard Gillman, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism;" Mark Graber, "Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction;" Tom Keck, "From Bakke to Grutter: The Rise of Rights-Based Conservatism;" Ken I. Kersch, "The New Deal Triumph as the End of History?: The Judicial Negotiation of Labor Rights and Civil Rights;" Wayne D. Moore, "(Re)Construction of Constitutional Authority and Meaning: The Fourteenth Amendment and Slaughter-House Cases;" Carol Nackenoff; "Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s-1930s;" Julie Novkov, "Pace v. Alabama: Interracial Love, the Marriage Contract, and Post-bellum Foundations of the Family;" and Mark Tushnet**,** "The Supreme Court and the National Political Order: Collaboration and Confrontation." The page references in this paper are from the final chapter manuscripts which were sent to the publisher.

[4] Steven Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge MA: Harvard University Press, 1997).

substance than that of FDR; FDR's reconstructive politics were more muted than those of President Lincoln. Moreover, as reconstruction becomes more rhetorical than real, as was the situation with the Reagan presidency, those that govern as loyal sons have an even more difficult time being successful presidents, because of the waning of political time due to the thickening of institutions that limit presidential effectiveness.

The waning of political time for the presidency and the thickening of institutions in American government have important implications for understanding the place of the Supreme Court in American political development. However, to understand these implications, we need to explore how the Supreme Court interacts with the world outside the Court. That is, we need to explore the nature of what I will call the "legal time" of the Supreme Court.

The Distinctiveness of the Supreme Court in APD

The Supreme Court is unique in its decision making and as an institution in American political development. That courts are positioned distinctively at the juncture of law and politics has long been understood by serious historians and political theorists (if less so by modern behavioralist political scientists). The distinctiveness of courts is inherent in the nature of judicial power. Nonetheless, despite the longstanding caution that the power to make laws must be separated from the power to render judgments according to them, and to enforce those judgments, scholars have long since concluded that courts possess powers that can in some respects be described as legislative. Despite this foundational commitment, however, it has long been acknowledged that judicial lawmaking (perhaps inevitably) takes place, if only interstitially. But, given its problematic nature, it is frequently disavowed.

However, it is too reductive to simply view the Supreme Court as a little legislature making bargains, in which justices make policy and act strategically in a way similar to that of legislators. This recognition of some strategic and policy-making actions by justices is an important but insufficient basis for arriving at a sophisticated understanding of the politics of Supreme Court decision making. Kersch and I note the following in the introduction to the volume,"

> Crucial to that understanding is the recognition that while the Court in some respects may be characterized as a little legislature, its claim to authority and the way it makes distinctions is distinguishable from those of either the executive or the legislature … As unelected, life-term appointees, the Court's authority derives chiefly from its claim to be exercising 'neither force nor will, but merely judgment,' that is, to be acting as a neutral, apolitical applier of laws. Its chief claim to authority -- its legitimacy -- is premised on its status as a legal, as opposed to a political, institution (p. 33).

The key to the distinctive qualities of the Supreme Court is the presence of the mutual construction process. While some contributors to the volume disagree on the importance of internalist norms as explanatory factors in Court decision making, and thus emphasize external factors on Supreme Court decision making and doctrinal change, all contributors, whether they emphasize external factors in the mutual construction process, or the equal importance of internal and external influences, provide clear and forceful evidence that the presence of a mutual construction process makes the Supreme Court a distinctive institution in the American

political system, and is central to the role the Supreme Court plays in American political development. Because of the nature of this mutual construction process, legal time is different from political time, and the place of the Supreme Court in APD is different from that of more directly politically accountable institutions.

The Mutual Construction Process

The mutual construction process is what makes the Court unique as an institution. At the center of this process is the interpretive turn, in which both internal legalist and external political and social factors play a key role. The Court is distinctive because the evaluative criteria which Moore finds are central to Supreme Court decision making, are not found in the same way or intensity in Congressional and the Presidential decision making, although weaker and quite different evaluative criteria are found in far less systematic forms in these other institutions. These standards can be seen as internalist or institutional norms as to how to proceed for the Supreme Court as an institution. Moreover, the nature of the criteria and their origins require the Court to look to the world outside to define and apply these criteria. Most importantly, for Moore, the six criteria that he emphasizes are employed by the Court, suggest that what the Court does is linked to popular sovereignty and "the people." He writes, "these norms and practices of U.S. constitutionalism have been in accord with the premise that 'the people' have been sources of constitutional authority and meaning" (p. 48).

What is unique about the Supreme Court is that the presence of the mutual construction process with its interpretive turn defines issues of authority and meaning in a way that is different from more directly politically accountable institutions. Moore demonstrates that when one tries to explain *The Slaughter House Cases*, the interpretive turn applied within both an internal legal and external political environment show that issues of authority and meaning are not dichotomous. More Court definitions of meaning do not result in less Court authority, or vice versa. This is because the process of interpretation by the Court mutually constructs the internal polity and rights principles within the context of the external political and social world outside the Court. These more general issues of meaning and authority are present in the way justices handled issues of meaning and authority in the *Slaughterhouse Cases.* Thus the Court, as it decides cases, is thinking about larger issues of meaning and authority.

Moreover, meanings and authority change through time. For Moore, justices think of Article V as representing "the people," as well as their role as a Court in that process. This can be contrasted with Ackerman's more theoretically grandiose notions of "the people" as acting in politics in founding periods, which is to be contrasted with normal, less transformative historical periods.

Moore, Kersch, Graber, Gillman, Kahn, Novkov, Brandwein, and Keck each demonstrate that the interpretive turn has substantive constitutional commitments in which process and substantive norms are linked, perhaps even enmeshed. For example, Moore argues that in addition to meeting the procedural rules of Article V processes, the Court discusses a shift to whether the 14th Amendment adequately represented substantive constitutional commitments of "the people." Moore notes that in the discussion about the substantive aims of the 14th Amendment, the Court accepted as authoritative that the press, and therefore the citizenry, discussed the adequacy of processes and constitutional aims, with the notion that this added to the authority of the 14th Amendment. Politics outside the Court are seen as something to be respected even though there was no formal process of ratification in the states.

This interpretive turn is distinct from more directly politically accountable institutions because of both the importance of principles in the process, and the mutual construction process which melds these internal principles to the world outside the Court. I make a similar argument with regard to when the Court chooses to overturn landmark cases. I argue that "the social construction process" with its key interpretive turn is based on the mutual construction of internalist polity and rights principles with the Court's reading of the social, economic and political world outside the Court. This social construction process is unique to the Supreme Court because the Court is forced to view the outside world, and its social facts, in terms of the polity and rights principles that members of the Court hold dear. Moreover, because following precedent is an important institutional norm, the process requires the Court to compare by analogy the social constructions and principles developed in prior cases, to see whether it is just or unjust for the Court to grant rights to additional minority members of the community. The social construction process forces the Court to make constitutional choices in quite different, and in more disciplined ways than members of more directly politically accountable institutions. In so doing, because both principles and a consideration of the world outside the Court are central to the interpretive turn as Moore and other scholars have argued, the Court gains in its legitimacy as an institution in the American political system.

What is also distinctive about Supreme Court decision making is the degree to which it is both inward and outward looking. Moore, as well as Kahn, Kirsch, Novkov, and Nackenoff, describes how the Supreme Court looks outside to see if politics has discussed issues. The Court is not simply imposing its views because these political actions are considered by the Court. Moore demonstrates that the Court considered the role of the Reconstruction Acts in making its decision in the *Slaughterhouse Cases.* This provides additional evidence as to how the external comes into the internal. The Court also presumed that slavery ended as a necessity of the bitterness and force of the Civil War. The Court looked at Congress's construction of the 13th Amendment through passage of the Civil Rights Act of 1866. Congress began to "construct" the 14th Amendment's meaning through passage of the Enforcement Act of 1870, as it had constructed the meaning of the 13th Amendment though passage of the 1866 law.

Moreover, by comparing the social construction process in landmark cases and more contemporary privacy cases with historical cases presented by Kersch, Brandwein, Novkov, Graber, Nackenoff, and Moore, one can see that the seeds of *Griswold, Roe*, and *Lawrence* are present in a process of mutual construction that has been present throughout the history of the Court, although it has changed in important ways over that time. Thus, Moore's constructive constitutional authority can be seen in the *Slaughterhouse Cases.* It is not the product of a new post-*Brown* age, as many legal scholars would argue. Also, as Moore states, the outside political, social, and interpretive and scholarly communities are part of Court decision making. Implied fundamental rights are not simply creations of the Court out of whole cloth. This raises serious questions about the degree to which one can argue that the Supreme Court is as anti-democratic as originalists suggest. Moreover, it suggests that the counter-majoritarian difficulty of the Court may not be a serious one for the legitimacy of the Court.

For Keck the unique and special role that the Supreme Court plays in the feedback loops found between law and politics suggests that special concern must be shown by scholars for the internal norms and polity and rights principles used by the Supreme Court to make its decisions. One can say that we see here a model of advocacy politics. It is clear from Keck's work that any theory building on Supreme Court decision making must consider that it is never simply internal or external. The Court greatly influences politics and has a unique role to play. However, the

Court is also subject to external politics—but is more autonomous of such politics given the nature of the role of precedent, institutional norms, sequence, etc. in Supreme Court decision making.

Keck provides clear findings of the importance of legal decisions and the Supreme Court as a forum in which future politics are debated. These set the tone as to what affirmative action policy can and cannot be. Keck's argument about the role of internal polity and rights principles as key to the nature of advocacy politics, with a feedback loop back to lower Courts and then to the Supreme Court, suggests the distinctive and important role for the Supreme Court and law in American political development, and is central to what constitutes legal time. The Court's mutual construction process, especially with regard to the clarity of principles that it enunciates has much to do with how politics reacts to the Court, and how the Court reacts to those politics. This is a different type of bi-directionality between the Court and external institutions, than found in the Presidency.

Nackenoff too describes the Court as a unique institution. She writes, "The Court is not an institution that simply resembles or mirrors others" (p. 9). The Court has "its own norms, dynamics, and institutional history," but this distinctive institution leaves room for political actors (p. 10). Drawing on intercurrence language, Nackenoff states:

> The Court is as an institution with its norms, dynamics, and institutional history; as it came in contact and conversation with other institutional actors during the Dawes Act Era, there was, indeed room for political actors to work creatively…The Court viewed citizenship issues through channels of doctrinal development that included federalism, the 14th Amendment, commerce, protective legislation, contracts, property and treaty law (p. 10).

Kersch presents a forceful examination of why the mutual construction process places the Court in a distinctive role in American political development and its process of decision making. He presents much evidence that because of the legalistic nature of the Supreme Court and how the external comes into that decision making, the Supreme Court is very distinctive. For Kersch, the nature of the construction process of the internal and external in a mutually constitutive way makes the Supreme Court, and courts in general, unique as an institution. While all institutions have their norms and legalisms, and all must deal with the internal and external, concern for fidelity to the law and principles by the Supreme Court is a far stronger institutional norm, and a stronger norm in the wider society, than in politically accountable institutions, like the Presidency or Congress, as well as bureaucracies. Moreover, like Moore, Kersch argues that the legitimacy of the Court is based on its uniqueness as an institution where the rule of law is central. Also, the decline in judicial self-restraint as an internalist value is key. Kersch argues that the Supreme Court somewhat abandoned judicial restraint in pursuit of its goals. He notes that an institutional interest in judicial restraint, particularly in the *Senn* and *Lauf cases*, dictated how others would bring cases to the Court. He writes,

> Given this anti-judicial power turn in the Court's statutory jurisprudence, and broader the constitutional ethos of groups that under girded it, the civil rights leadership came to appreciate, first, that it would be newly advantageous to press their case as a group or class, and, second, that their interests as a group would

benefit from having courts categorize race discrimination disputes as a species of class-based "labor dispute" (p. 51).

These factors lead to a level of autonomy for the Court that makes it a distinctive institution in American political development. For Kersch, the new regime may get some of its policy wants from the Court; however, legalist principles and internalist Court norms mediate those wants. Court decisions cannot be dictated or even controlled by the new regime. Thus, Kersch adds the internalist explanations of change to Gillman's and Tushnet's primarily externalist explanations, and argues that internalist formalism and rules of law limit the direct effect of the governing majority coalition to a important degree.

Because of the above factors, as well as the special nature of the Court's mutual construction process, Kersch argues that scholars of APD must recognize this distinctiveness of the Supreme Court in their theories and empirical work. Moreover, he states, "Neither the legalist nor the political models do justice to this distinctive developmental process (p. 68)."

It is quite clear from Keck's analysis that the Court as the maker of legal decisions is a unique actor in American political development, but one that is not autonomous of long term social, political, and economic factors in APD. Most importantly, the Court set the tone with its law and principles for how the overall society should view affirmative action. Then politics, such as the growth of conservative political action can influence Court choices in the future. However, the Court is distinctive in that it does not simply respond to political pressure like more directly electorally accountable institutions. Moreover the presence of the feedback loop has important implications for whether path dependence is one of increasing returns. It suggests that it is not.

For Brandwein the Supreme Court is distinctive because the mutual construction process allows it to have a moderating influence in the process of American political development. Brandwein argues that the Court was distinctive because of its (a)politicalness; it was able to take a middle path that provided for stability in a transitional period. While Radical Republicans and Democrats represented two extreme views, the Waite Court avoided both extremes and used the concept of state neglect to make a compromise. This moderate path tended to leave the door open for properly worded indictments and properly fashioned laws, instead of shutting down the possibility of federal legislation altogether.

Gillman finds the Supreme Court distinctive and different from legislatures; he does not view them as "little legislatures." Nor do Justices act like elected officials. Rather, Gillman likens them to bureaucratic agencies and independent regulatory commissions whose members are appointed by political branches of the government for the purpose of carrying out policy ends. Justices are seen as specialized policy-makers, not elected officials. Changes in "institutional behavior" can often be linked to "changing goals and agendas of other power holders in the regime" (p. 2). Gillman is presenting what we shall call an "institutional" or "temporal" attitudinalism, which influences the Court due to the politics of retrenchment. Although Gillman offers evidence that the Court is influenced by external factors such as the politics of retrenchment, legalist internal norms do inform Court choices. According to his view, there is not an automatic retrenchment-Court doctrine change process. Therefore, for Gillman, court action can never be explained simply by external factors. For Gillman, the internal legal principles and institutional norms peculiar to the Supreme Court work against the Supreme Court simply being like legislatures, or even bureaucracies and independent agencies.

Supreme Court Authority and Legitimacy

The Court also is distinctive because it gets its legitimacy both from following the rule of law and precedent, as well as from external politics and meanings. Moore demonstrates that Justices of quite different constitutional visions and backgrounds agreed on the nature of this mutual construction process. Both the majority and minority on the Court presumed that they were "constructing" the fourteenth amendment authority and meaning on behalf of "the People" (p. 27). Therefore, processes of how the Justices are chosen and make decisions on the Court, adversarial postures, majoritarian rules of decision making, the Court's authority to provide substantive meanings to words in the Constitution and statutes, and the substantive meanings themselves of text and statutes, add to the authority of the Court and thus to their decision in the *Slaughterhouse Cases.* The Supreme Court is unique in engaging in such a mutual construction process.

Moore demonstrates the Court secures its legitimacy and authority not from legalist principles in the Constitution and not simply from its interactions with the world and factors outside the Court. It secures its legitimacy from the bi-directionality of legalisms and politics. This interaction means that constitutional legitimacy gets its substance from both a legalistic and empirical base—again legalisms and the external world outside the Court are mutually constructive. Moreover, we see that the construction of authority does not come from "the Constitution," but rather is formed and shaped over time through the interplay of principle and politics.

Moore argues that the Court plays this role because of its constant contact with institutions and social and political realities outside the Court. The authority and legitimacy of the Court is a product of the outward and inward-looking qualities of its principles, the text of the Constitution, and its process of decision making. In the process which Moore describes, the Court looks outside its borders for making its constitutional choices. We witness the importance of the legalist process and legal and Court institutional norms as they are applied in the context of definitions of what the 14th Amendment means in the politics outside the Court.

Moore demonstrates that the Court attributed the 14th Amendment to "the people," but in a different way than Ackerman does. He considers Ackerman too externalist in his definition of the authority of the 14th Amendment. Moore shows that Ackerman bases his reading of the events as a foundational moment when "the people" spoke up for a new Constitution. In contrast to Ackerman, internal Court decision making is key. In contrast to Ackerman, whose constitutional moments center on the external as a basis for the authority of the 14th Amendment, Moore sees the Justices as deliberately affirming the Amendment valid, based on the formal criteria of Article V. Moore's objective is to account for ways that the majority and dissenting opinions explicitly and implicitly relied on additional criteria of constitutional validity, including those oriented primarily to matters of substance (p. 15). They did this to reinforce, consolidate, and extend the 14th Amendment's authority. Both those for and opposed to the monopoly claimed the authority of the 14th Amendment in support of their position, rather than raising procedural and substantive arguments against its authority. According to Moore, Ackerman relies too much on his interpretation of the events as a foundational moment where "the people" spoke up for a new Constitution. Ackerman does this perhaps because his objective, unlike that of political scientists like Moore, is to make an argument to counter originalist notions of what constitutes the authority of the Constitution and the Court, rather than to explain the role of the Supreme Court in APD.

The Interpretive Turn Within the Social Construction Process

The nature of the social construction process provides clear evidence that the "law" versus "politics" debate that has dominated much of the academic debate over the nature of Supreme Court decision making is misguided. This debate is better conceptualized as about the respective influences of internal and external factors on Supreme Court decision making, with "law" being an important potential internal influence and electoral "politics" being a significant potential influence (that does not exhaust the category of external influences). The complex interplay of these factors is distinctive to courts as institutions, and it is crucial to understanding them as such. It is because of this dynamic perpetually playing itself out in courts that courts are not "little legislatures." The interplay of the internal and external taking place in courts also gives them a special place in accounts of American political development. I explore how the Court links or bridges the internal to the external in its decision making, that is, another aspect of how the internal and external mutually construct each other in Supreme Court decision making.

When one considers modern historical and behavioral political science analyses of Supreme Court decision making and doctrinal change, one sees primarily what I call external explanations. In external explanations, decision making within the Court is explained not by the application of polity and rights principles within a case and the deciding of cases in light of prior precedents. Rather, historians view doctrinal change as a result of major historic events outside the Court, which some have argued result from "revolutions" in the nation, such as the Founding, the passage of the Civil War amendments, and the New Deal. Although recently some of these historians have begun to reconsider the revolutions thesis, historians in and out of the legal academy such as William J. Novak, G. Edward White, and Barry Cushman, have argued that change in doctrine is the result of historical events such as the New Deal revolution and critical elections. Some legal scholars have adopted the historians' external stance by arguing a revolutions theory. These include the preeminent revolutions constitutional scholar of our age, Bruce Ackerman, who argues that periods of usual normal politics are punctuated by periods of constitutional revolutions, such as the Founding period, the passage of Civil War Amendments, and the New Deal which resulted from critical elections and the growth of the administrative state, causing the Supreme Court to decide the *West Coast Hotel* case, a revolution in jurisprudence because of its rejection of *Lochner* era jurisprudence.

Behavioral political scientists also argue that external factors explain Supreme Court decision making. They view the internal process of decision making as not central to explaining Court action. They see the Court as simply responding to preconceived ideological or policy commitments, as evidenced by attitudinalists, or to politics outside the Court. These include such preeminent political scientists as Robert Dahl, and more recent adherents of this view such as Gerald Rosenberg, as are more recent rational choice scholars of the Court.

Moreover, the presence of the social construction process, makes threadbare the position of the most die-hard contemporary originalists, such as Meese and Bork, who maintain that in order to be faithful to the intent of the founders that the Court should try at all cost not to bring the outside world into Supreme Court decision making. To understand the problem with this position, and most importantly, why it is impossible not to bring the outside world into Supreme Court decision making, I present evidence that at the core of the Supreme Court's decision making process is an interpretive turn in which the mutual construction process occurs, a process which has both normative and empirical elements. This process raises serious questions about

originalism, which has both internal legalist elements and external elements, which for the most part stop at the period of the founding of the part of the Constitution which is being tested in Court. Thus, the mutual constructions process for originalists does not include post-founding interpretations of the Constitution and the social constructions within those interpretations that are based on the relationship of polity and rights principles and their application in the social, economic, and political world outside the Court.

Ironically, scholars who seek to explain Court action in terms of the direct effects of an external political or historical act are just as wanting. There may be positivist roots to both originalist and open-ended living Constitution notions of Supreme Court decision making. Therefore, I, and other scholars in this volume, seek to unbundle what the term "living Constitution" means, and why scholars who rest their explanations of Court action on either internal or external factors are unable to do so. The mutual construction process belies the validity of such approaches.

I, like Moore, Kersch, Graber, Keck, Nackenoff, and Novkov, make an affirmative argument that the process of Supreme Court decision making requires that the Court take the world outside the Court into its decision making, and does so in a disciplined way. The process is empirical in the sense that the process of interpretation requires that a jurist look not simply at the law, the polity and rights principles, as defined in prior cases. The jurist must also apply the principles in light of his construction of the world outside the Court. A primary objective of this book is to look into this process over time. Where does the jurist get this construction? More importantly, why must there be a construction process?

There must be a construction process because, in a sense we don't know what a right is, or what the powers of government are, unless we can see the polity and rights principles applied in real cases. Thus, in addition to the polity and rights principles in a prior case, and most clearly in a line of cases, there is construction of the conditions that led to the definition of the rights. While I call this a "social construction," the construction might be of the economic and political world outside the Court as well. Thus, prior cases include a social construction that I argue becomes part of the precedent itself, which later courts look at when deciding cases. A good example of this is the definitions of conditions of liberty from *Griswold* through *Casey*. It is this construction process that originalists oppose and the most open non-originalists say is at the core of the modern living Constitution. Moreover, it is this construction process that too many people view as the "illegitimate" part of what "unelected" courts do.

Thus, a disciplined concept of a living constitution requires one to see jurists both looking at the principles from past cases in light of the new case, and constructing the social, economic, and political conditions in the new case in light of principles and the construction of conditions in past cases. I explore why this process is bounded or disciplined. In part it is due to the fact that the social construction of a right of liberty develops over time from past cases; in a sense there are added filigrees to the construction as more cases are decided.

I also reject simple pragmatist descriptions of Supreme Court decision making. I argue that principles and constructions have solidities that make the analogical process more disciplined than pragmatists, such as Posner, would admit. Thus the process by which non-originalists seek to ensure the enduring power of polity and rights principles is different from that of originalists and the most open-ended of non-originalist thinkers.

Moreover, how legalists (internalists) and social scientists (externalists) explain what makes a Constitution "Living" is quite different. For legalists the Constitution is living to the degree to which a jurist or scholar admits that the law changes over time with society; they

usually make the argument in normative ways as to the need for the Constitution to change. Legalists tend not to explain how the outside world comes into Court decision making; they simply say it should not.

For externalist historians and behavioral social scientists, the Constitution is "living" because jurists primarily respond to social and economic conditions and events outside. Critical legal studies scholars emphasize that the court simply mirrors the dominant economic and social powers outside the Court. Supreme Court decision making is not viewed as constitutive, with precedents, polity and rights principles, and institutional norms having an explanatory effect the development of constitutional law. For these scholars Court decision making is not viewed as autonomous of the world outside the Court in any significant way.

However, I argue that the Supreme Court decision making process is not simply the normative application of polity and rights principles in a closed system of decision making and not simply the making of choices based on external factors, such as policy wants of the justice or the President who appointed him, or an event like the New Deal. Rather, it has both normative and empirical elements. Therefore purely internal (legalist) or external (historical or behavioral political science) explanations of court decision making are wanting. The dual normative and empirical constitutive Supreme Court process, one that is neither simply foundational or legal realist in nature, requires us to find a way to explore the construction process of the Court, as many of the contributors have done.

Supreme Court decision making is normative because the application of polity and rights principles includes basic notion of fairness as seen in the past application and discussion of those principles; it is also empirical because the application of polity and rights principles is done analogically in light of the social constructions in prior cases when the polity and rights principles were applied. Therefore, Supreme Court cases involve the consideration of polity and rights principles and the social constructions found in precedents, as compared with the principles and social constructions in the case before the Court. Therefore, I show that it is both aspects of the constitutive process defined above which make its decisions binding and legitimate, and as Goldford argues, is both more democratic and disciplined than both originalist and wide-open non-originalist conceptions of Supreme Court decision making. Thus to understand how the outside world comes into Supreme Court decision making, we need to adopt what Goldford calls an "interpretive (not positivist) theory of constitutional textuality" (p. 12).

Thus, I argue that Supreme Court decision making is not about putting the policy choices of the framers into law, but rather is about the application of the words of the Constitution, in light of their interpretation through time in all ages.[5] The text, as interpreted though time, is the only source for the oughts of the Constitution, as within the polity and rights principles, except for the most trivial of clauses, such as that one must be 35 years old before they can be President. The decision in the cases does not come directly from natural rights or from Ely's, or the founders' vision of what the Constitution means; it is a constitutive process. This does not mean that what the founders said, or political theory of the government and Constitution, or the notion of natural rights is unimportant to the normative/empirical constitutive process of Supreme Court decision making. It only means that where and how a justice views issues of fairness and justice differs, in terms of how he views his responsibilities as a jurist to define rights and the power of government in light of prior cases, and in light of social constructions in prior cases and lines of cases.

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[5] Dennis Goldford, *The American Constitution and the Debate Over Originalism.* New York: Cambridge Press, 2005 (in press), p. 126.

What is the derivation of the moral force of rights? It derives from the ability of a justice to define the rights principles at issue in a case, in light of past notions of rights and by analogy, to suggest that the right should apply in the case, before the Court because similar issues of fairness are present, as compared to past cases. This process does not involve simply a choice for or against a specific policy or outcome in a case, because of who appointed him, or his personal policy wants, no matter for what reason "external" to the constitutive process itself. External "revolution" theorists try to make a link directly from, for example, the growth of the administrative state to the need for a new right. However, that is far too general, and does not give respect to the affects of the incremental process of application of polity and rights principles and past social constructions.

Because law is both empirical and normative at once, Supreme Court decision making is a constitutive process, and a public one at that because of oral argument and the requirement of written opinions. The internal account of the constituting process, with the process of bringing the outside world into itself, is so important to the development of law. It is not reducible to the sum total of individual private preferences of justices, in contrast to what the attitudinalists argue; nor can the act of constituting be reducible to explanations based on historical and political events external to the Court. Counting outcomes does not explain the nature of the constitutive process.[6] The constitutive process has a reality of its own; it defines, limits, and constrains individual choices in a way that external scholars reject and internal scholars fail to define, in part because they have not explored the process through which the outside would informs Court decision making.

It is important to see the constitutive legal process as constraining on individual preferences. It is bigger than the individual justice. Preexisting institutional norms and expectations of behavior limit the effect of a priori policy wants on judicial decision making. The process is public, involving polity and rights principles and their construction as cases are decided. Constitutional and legal forms are not metaphysical; they can be studied through case analysis to see patterns at work. When we see these patterns, we see they are not explainable in terms of simple big events, or revolutions outside the Court. The constitutive process, and the objectivity of that process in Searles's terms, means that there are patterns in the development of law, and those patterns can be studied. Because the process is at the same time "normative" and "empirical," that is, constitutive in my terms, it has an ontological character of its own that is not reducible to either the polity and rights principles or the social construction of them. I describe such principles and constructions at work in considering why *Plessy, Lochner*, and *Bowers* were overturned, but not *Roe*. Moreover, because the text and the world are mutually constitutive, they situate themselves within the general paradigm of interpretive social science rather than behavioral social science.[7]

The objective world of social reality is not in principle independent of the subjective order of human beliefs, feelings, and values, and thus the distinction between social reality and the language of description of that social reality, is viewed as artificial. Inter-subjective meanings define or constitute the reality as found within the social constructions made by the justices. Even though this is so, I argue that it is possible through the analysis of cases to explore both the polity and rights principles at issue in a case and the social constructions found in prior cases and lines of cases. Constitutive Supreme Court decision making is a social process; the Constitution is not simply a document; it is the principles and meanings that its words have taken

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[6] Ibid., p.335.

[7] Ibid., p 339.

on over time and the social constructions created to help define what those principles mean that are open to study.

Studying patterns of principles and constructions can help us gain a better grip on why landmark decisions are overturned or not, and through the analysis of such patterns, we can begin to understand how the outside world comes into Supreme Court decision making. The process is disciplined and bounded in part because justices accept the system of rule-governed behavior and the need to apply such rules in light of precedents, understood as both states' principles and their construction in light of the world outside the Court. It is rule-governed behavior because it occurs in terms of individuals understanding both the norms they are following and their activity of following norms. As I argue, for the justices who must clearly make constitutional choices each day, even more so than citizens there is an ontological character of the Constitution; Justices live in the world constituted by the Constitution. [8]

The constitutional text, as words as interpreted through time, structure the Supreme Court decision making process, as it structures the social practice of citizens who see themselves as standing in relation to the constitutional text. The language of the Constitution, especially for justices, who seek fame and stature from fellow justices, is neither individual and private, nor is it inherently subjective, to be counter posed to an objective, brute social reality: rather language is social and public in that it is constitutive of social reality. Supreme Court decision making is both subjective and objective at the same time; and we as social scientists must explain that process, not simply argue for this or that rights or polity principles. Both the decision making process and the realization that both principles and social constructions are central to the constitutive process, means we need to better understand the construction process, in part because much of constitutional theory and scholarship centers on arguments for one principle or the other, in the false hope that if you can get someone to accept your principles or theories of rights or polity, that you can influence the definition of rights in ways that you want. This belief is based upon internal-legalist assumptions that the process is simply about rights as norms, rather than a process of Supreme Court decision making which involves both polity and rights principles and social constructions in precedents that result in Court decisions that can't be explainable in simply in terms of principles. Moreover, the legalist constitutional practitioner, as lawyer-advocate or constitutional scholar, is concerned about advocacy of normative positions rather than exploring the nature of Court decision making.

An institution is a system of not merely regulative rules; it is at bottom a system of constitutive rules, which we must know to understand that institution. These inter-subjective meanings on the Court, or in any institution, are in the minds and practices themselves, which cannot be conceived as a set of individual actions, but which are modes of social relation or mutual action. This means that all justices agree to follow precedent, consider polity and rights principles, and engage in analogical reasoning.

I look at this by exploring what the implications of being an originalist and non-originalist justice is, and, in part, to part to show that the obverse of originalism is not a non-originalism that denies foundationalism in Court decision making. Rather, I argue that the interpretive turn with its mutual construction process is normative and empirical, and more bounded than is indicated by more open-ended non-originalist (or) critical legal studies view of

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[8] Ibid. Goldford writes, "the Constitution is a "living"–and thus binding-document, whereas we enter into the Gone with the Wind world only imaginatively. As a Living text, the Constitution is already a structure of constraint." P. 341

Supreme Court decision making. Inter-subjective meanings on the Court and under our notions of rule of law oppose such open-ended Court decision making.

These inter-subjective constitutive meanings of institutional practices on the Court suggest Court decision making has an objectivity that is independent of the sum total of subjective opinions held by participants.[9] Thus, the Constitution, in principle (and as constitutive practice) is distinct from whatever anyone says about it, including the founders. The Constitution can be invoked as a critical standard against current practices which are alleged to be unconstitutional.

It makes a great difference whether status quo is or is not assumed to be neutral. It makes a great deal whether the Court sees it role as engaging in a social construction process to see whether the status quo is neutral. In Sunstein's scholarship in *The Partial Constitution,* that is, prior to his concentration on judicial minimalism, was the notion that the Court must not accept the status quo as neutral. The Court must acknowledge that private and public actions are structured by the state, and ensure that the government makes decisions based on public regarding values, as directed by a set of normative principles in the Constitution. I argue that the Supreme Court applies these principles in light of the social, economic, and political world outside the Court. It sets principles as well as a construction process for the Court. When Sunstein later argues for judicial minimalism and de-emphasizes the importance of the need for the Supreme Court to not accept the status quo as neutral and calls for a more open-ended pragmatism which he calls judicial minimalism, Sunstein radically changes his account of the constitutive Court decision making process. "Not accepting the status quo as neutral" required the Court to assume that the world outside as if it were structured by government. By doing so it said that state-action was both suigeneris and controlling. This placed the Court in the position of considering whether there were a wide range of rights violations in the public space. This delinked the rights and normative premises in his constitutional theory from the social construction of world outside the Court. In so doing, the constitutional theory is less transformative, and less related to the way the normative and the empirical are linked. [10]

We can see this problem by looking at both why the Court decided *Plessy* as it did, and why it overturned *Plessy* in the *Brown* case. In *Plessy*, the Court said that the African-American feelings about inferiority where the result of private, social conditions; not the result of public state-actions. This treating of the status quo as neutral, as not state induced, was a social construction that was rejected by Justice Harlan in dissent. It was the change in the construction of feelings of inferiority as private/social not state action in *Brown*, which is central to why Plessy was overturned. By no longer accepting the status quo as neutral, not state structured, the *Brown* Court could overturn *Plessy*, and thus show that the 14th Amendment was violated. The synergy between constitutional principle and social construction, the two way process of interaction, means that we can't explain doctrinal change simply by looking at changes in polity and rights principles; nor can we simply study doctrinal change by studying social constructions, because each informs the other. By denuding constitutional decision making of a close look at whether the status quo is or is not neutral, Sunstein denuded his constitutional theory of its transformative potential; moreover, by not linking Court action under a process of judicial

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[9] Ibid., p. 338.

[10] 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 H.N. Hirsch, ed, *The Future of Gay Rights in America* (New York, Routledge Publishers, 2005), in press, for an extended argument on this point, with particular regard to Sunstein's judicial minimalism.

Minimalism to a clear process of construction, and replacing it with a notion of pragmatic incrementalism, one case at a time, he misunderstands the fact the Supreme Court decision making requires both clear polity and rights principles and a construction process that is related to those principles.

Plessy was overturned in part because the *Brown* Court recognized a more complex notion of the interrelationship of government and social beliefs, that resulted in a conclusion that black children were not being treated equally compared to white children, and that lack of equal treatment resulted from state action. There was a change in the Court's concept of whether the status quo was equal for all. Note this conclusion was not based simply on the question of whether the framers would have allowed segregation, but rather whether state equality with regard to its policies for back and white children could be said to exist in 1953, compared to 1996, when the state was not involved in public education for all its children. The critical standard as to what the Equal Protection Clause required both changes in terms of normative elements and also in terms of how the world outside the Court is constructed, in light of prior cases.

All Claims Are Subject to Interpretation

Graber emphasizes the centrality of interpretation to all claims regarding the determinants of legal decision making. This is a very crucial point, and one that, given the "new positivism" in APD and our focus on courts as unique institutions, is really important for us to emphasize: I think Graber really makes one of the best arguments here for the indispensability of doctrinal analysis in studying the politics of courts.

For Graber, legal (internal) and strategic (external) explanations rely as much on the interpretive turn as on "logic" (p. 25). Therefore, it is up to the scholar to rule out one or the other explanation--by considering evidence from law and precedent as well as external political and historical factors. Most importantly, because law and precedent (and attitudes) help constitute how the Court looks at external factors, strategic reasons alone cannot explain Court action. Both legal and strategic interpretations "at bottom depend on an interpretation of practices. Neither is more scientific than the other" (p. 25-26). Moreover, judicial rules that are best explained at first by strategy or values over time become best explained by law. So one must study the path of the law and practice—not one act or one rule at a point in time. Therefore, Graber argues, "all judicial choices have legal, strategic, and attitudinal components" (p. 29). There are no "neat distinctions" between legal, strategic, and attitudinal decision making (p. 30). Thus, Graber demonstrates how the internal and external influences that he has identified are continuous and in a mutually constitutive dynamic relationship.

Graber sees legal, strategic, and attitudinal models combining to produce these Civil War-era and Reconstruction cases. "Judicial decision making, *Roosevelt* and *McCardle* reveal, is a practice that mixes legal, strategic, and attitudinal considerations in ways that cannot be fully isolated by scientific investigation" (p. 5). Neither a legal explanation nor a strategic explanation (which explains the justices' actions as a response to the political climate) is wholly explanatory. For example, in *McCardle*, the precedents that the justices relied on to reach their legal decision were not themselves purely legal decisions, and showed evidence of strategic and/or attitudinal decision making. Graber writes: "The precedential evolution from...*Wiscart* to *McCardle* illustrates how judicial rules once best explained by strategy (or values) may over time become best explained by law" (p. 28).

Graber demonstrates that when scholars argue only for one explanation, in most cases they misunderstand how all three aspects of choice construct how any one basis for choice is viewed in a case. Moreover, if a government act is clearly a violation of individual rights, the Court might declare the act unconstitutional. Graber writes, "Had the *McCardle* majority thought martial law in the South a gross violation of fundamental human rights, the Chase Court might have thrown law and strategy to the winds." (p. 30)

Graber argues that a full consideration of the *McCardle* and *Roosevelt* decisions demonstrates that legal, strategic, and attitudinal considerations can interact in complex ways that are often belied in the judicial decision making literature. Judicial decision making, Graber contends, is inherently a practice that mixes legal, strategic, and attitudinal considerations. Moreover, it does so in ways that cannot be fully captured by social scientific analysis. This is because the categorization of a particular decision depends on contested interpretations of what constitutes competent legal, strategic, or attitudinal practice. Any finite series of decisions can be described without logical contradiction as good faith efforts to interpret law or sophisticated efforts to realize policy preferences (i.e. persuasive explanations about case outcomes ultimately and inevitably rest on claims about good law or good strategy).

Graber shows that legal precedent itself is often informed by strategic calculation. "Whatever areas of law scholars consider," Graber concludes, "the most fruitful investigations will explore the ways in which legal, strategic, and attitudinal factors interact when justices make decisions and not engage in fruitless contests to determine which single factor explains the most" (p. 70). The legal can be viewed as internal and the strategic and attitudinal as external. We do so because the strategic explanation emphasizes that courts make decisions in response to external pressures on them from politics, such as the fear of non-support by political actors.
The attitudinal model may be viewed as external because the policy wants of justices are viewed by attitudinalists as policy positions or ideologies in the minds of justices prior to the case itself. Graber argues that the scholar should not preload her analysis by the emphasis on internal "legal" arguments, or external strategic and policy preferences. He shows that *McCardle* is not best explained by the Court making a strategic decision in response to external pressures. Graber argues that "no decision can be explained entirely as a sincere or sophisticated effort to secure policy preferences,"—a view which attitudinalists fail to acknowledge (p. 5) While Justices have attitudes about policy, both the law, precedent, and external strategic concerns limit the application of simple policy wants. While law does not compel a specific action by the Court, for Graber a clear line of precedents with regard to Court action does produce a boundedness of action in Court decision making, to a far greater degree than scholars of external strategic causation are willing to admit.

Temporal Sequencing, Path Dependence, and the Difference Between Legal and Political Time

Path Dependence

A central question which engages many of our authors is fixing the precise way in which Supreme Court decisions situate themselves temporally within constitutional and political development in the United States, and how they come to alter (or fail to alter) that course, with particular regard to questions of path dependency. Because of the unique relationship among

what I have called the social construction process, temporal sequencing with regard to Supreme Court decisions, and the trajectory of path dependence for the Supreme Court, legal time is far different from political time. The mutual construction process, which is explored by all the authors, and what I have called the social construction process, result in "legal time" for the Supreme Court being quite different from the "political time" of the President and other more directly and primarily politically accountable institutional actors in American political development.

Many contributions provide evidence of how the mutual construction process affects whether the Court should be viewed as path dependent in the same way as the term is used with regard to more directly politically accountable institutions. Kersch, Graber, Novkov, Nackenoff, Brandwein, and Moore, like Kahn, take up the question of the likely future fate or trajectory of a landmark decision. We explore the conditions which maintain or cause a departure from the prior path in the law, as well as the role of the Supreme Court in such departures. While all contributors discuss cases early in their developmental path (i.e. during a time of contingency and contestation), I focus more on when the path is likely to end or switch. All the scholars show that the particular actions taken by the Court are often determined by the place of a case in a sequence. Graber provides evidence that the analysis of one-time-only cases can offer much for a development theory of the Supreme Court and law in American political development. Tushnet and Gillman provide insights into path development of the Supreme Court by testing Dahlian premises about the Supreme Court in American politics.

I discuss path dependence both in a broad, theoretical sense and in the context of Court decisions to either follow or to abandon a landmark precedent. In my consideration of the Court's decision of whether to overrule a landmark precedent, I reflect on how, by considering the court's relation to ambient social facts we might arrive at a proper framework for understanding when a path is or is not likely to be followed. I suggest that precedent is not always along one path, and that conflicts exist within paths, sometimes for longer times, as in affirmative action cases, or shorter time periods, as we see in case of rights of sexual intimacy. I argue that paths are usually followed, but at key points in time they change, along patterns that are not serendipitous but are principled. Over time they become more principled as Justices of quite different political and legal philosophies accept social construction as a normal part of Court decision making. I explore cases in which the Court decides to follow paths, or change the paths they are to follow in the future. I argue that as the world outside the Court changes, these changes may be indicated within prior cases, as exemplified in the higher education segregation cases in the late 1940s and early 1950s prior to *Brown*, which overturned *Plessy.* In these cases, Court views on the impact of government (schools) and other societal factors on school children counter the *Plessy* 1896 view that school children are responsible as individuals for their unequal place in a segregated society. Thus, the assumption in *Plessy* that an African-American child's place in the segregated society is a product of the personal qualities of the individual child is radically changed in *Brown.* Other changes in the path of the law are documented in Supreme Court decisions that overturn *Lochner* and *Bowers*, but not *Roe.*

Because of the social construction process, which involves the mutual construction of legalist principles and the world outside the Court, externalist methods of analysis simply do not work, because they do not explain what the Court does when it makes constitutional choices. Most importantly, it is difficult to argue that externalist political factors support the overturning of *Plessy* in the *Brown* case, *Bowers* in the *Lawrence* case, and not overturning *Roe* in the *Casey* decision and *Bakke* in the *Grutter* case. Thus, if traditional explanations by attitudinalists and

other behavioralists do not explain these decisions, I ask us to consider a more complex analysis of the relationship of the internal and external, with the external being social and economic, not simply political, as defined by conventional political scientists.

The presence of the social construction process in Court decisions involving whether landmark decisions should be overturned raise serious questions about various aspects of Pierson's concept of path dependence. I find that some of the features which Pierson finds intrinsic to politics and political institutions may not be intrinsic to the Supreme Court. These include the prominence of collective action problems, the prospects for using political authority to amplify asymmetries of power, short time perspectives of political actors, and the strong status quo bias associated with decision rules.

Pierson assumes that most institutions make policy based on the increasing returns of prior policy; he assumes that most institutions by nature are change resistant. However, I argue that the Supreme Court may not be as change resistant as are political institutions. Nor is the Court as resistant to change as Pierson's concept of path dependence would have us believe. This is so in part because the construction process in Court decision making allows a natural process of application of polity and rights principles to the world outside the Court. This does not mean that the Court always engages in a (re)construction process, and always seeks to interpret the Constitution in light of change outside the Court, as the *Lochner* period demonstrates. Polity and rights principles and the social constructions on which they are built, such as in the *Lochner* case, may become static. However, I argue that this is not the usual process of Court decision making and doctrinal change.

These qualities of the Supreme Court and its decision making process result in fewer incentives and more costs for Justices to be path dependent in rights and policy terms. Also, there may be fewer start-up costs to develop new social understanding than in political institutions, in part because the construction process continually brings new understandings into Supreme Court decision making (Pierson 2000, 260-61). Also, the Supreme Court is a unique institution in American politics because, at least formally, it has the authority to make final decisions about the nature of individual rights and the legitimate use of governmental power.

While binding rules are important to both the Supreme Court and political institutions, part of the process of decision making requires justices to engage in an interpretive turn both at the polity and rights principle level, and at the level of social, economic, and political construction. Moreover, the Supreme Court is the major institution under our Constitution with the authority to circumscribe and legitimate acts of institutions of the state, as well as private institutions, through its power to establish "legally binding rules." Also, it is not limited by elections and popular opinion.

Therefore, the Supreme Court has more of a free reign than political institutions to make constitutional choices and to engage in the construction process. Thus, political institutions may have greater incentives than the Supreme Court to engage in increasing returns to seek equilibrium with, rather than question the actions of other institutions, and to shape its choices to the wider social, political, and economic world. Moreover, I suggest that the Supreme Court is subject to fewer "switching costs" for changing paths because it tends to hear cases and issues over which lower courts and society are in conflict; institutions outside the Court are not sure what the law is or what the Constitution requires, and in many cases are demanding an answer in order to secure stability. Settled expectations may be needed by path dependent political institutions; however the Supreme Court must engage in constitutive decision making and the construction process to provide a definition of expectation. In other words, cases are not heard

unless “reversals of course” are a real possibility. The hypothetical alternatives, which political institutions abhor, are part of the regular business of the Supreme Court.

While the “cost of exit” from paths for political institutions is high, the cost of exit and change for the Supreme Court is not. Change is based on a constitutive decision making process in which polity and rights principles, and the social constructions from prior cases in which such principles have been applied, are compared to principles at issue and constructions in the new case. As we saw in the Court’s considerations of the constitutionality of principles at the core of the *Plessy* and *Lochner* decisions, for the Court not to overturn those cases would have required it to continue constructions of the social, economic, and political world outside the Court which were no longer valid. As stated in the *Casey* joint opinion, if they had not overturned these landmark decisions, the Court would have had to accept constructions in 1954 and 1937 which no longer had meaning and reject constructions of the social, economic, and political world which were now uncontested by the nation and most of its jurists.

To not overturn *Plessy* and *Lochner* would have added to the illegitimacy of not only the Court but the rule of law, which in part gets its moral support from having the Constitution engage in what Lawrence Lessig calls “translation with fidelity.” When the incremental constitutive Supreme Court decision making process becomes so out of kilter with the social, economic, and political world outside the Court, then the possibility of even landmark cases being overturned will increase, if not in the short run, in the long-run. [11]

However, I argue that such landmark cases as *West Coast Hotel* (1937) and *Brown v. Board* (1954) should not be viewed as critical moments, junctures or triggering events, or even branching points from a normal status quo system of the Court in which paths are reinforced. This is because such reversals in doctrine occur after a far longer-term incremental process of testing accepted polity and rights principles, which are then found wanting as Kersch, Novkov, Moore, Nackenoff also have demonstrated in their contributions to this volume.

Thus, landmark cases are not the result of big events, revolutions, or historical points as many externalists argue. Rather, such events and big cases tend to ratify and state the results of an incremental process in which social, political, and economic constructs have been under attack, at times for decades. This finding raises additional questions about path dependence viewed as a process of increasing returns. Moreover, the route not taken in *Casey*, the overturning of *Roe*’s right to abortion, and therein the rejection of political pressure as a basis for such an action, is additional evidence not only of the importance of the construction by the Court of the world outside, but also of the degree to which that process is related to internal institutional norms and rules. The construction process makes the Court less inner-directed and less concerned about the loss of equilibrium with the world outside compared to political institutions, upon which Pierson’s model is based.

Pierson cautions us not to view the social world as overly static, not to view increasing returns processes as generating only brief moments of “punctuation” in a largely frozen social landscape, and to develop concepts that identify paths caused by increasing returns processes. However, I argue that if we base our study of the Supreme Court on the assumptions that Pierson makes about (political) institutions, scholars are less likely to understand both the process of Supreme Court decision making and its place in American political development.

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[11] *McCleskey v Kemp* (1987), the capital punishment is a candidate for overturning. In future years it will look as anachronistic as *Lochner* looked in 1937 and *Plessy* looked in 1954. Recently, we have witnessed Rehnquist Court’s restrictions on the use of the death penalty with regard to defendants who are under the age of 18 or retarded.

Part of the problem with Pierson's notion of path dependence is that it seems to concentrate on the boundary problems of institutions, and how institutions act to ensure increasing returns as the external world changes. Pierson supports historical institutional premises for his research on path dependence: it is historical because it recognizes that political development must be understood as a process that unfolds over time; it is institutionalist because it stresses that many of the contemporary political implications of these temporal processes are embedded in institutions-whether by formal rules, policy structures, or norms. However, there is no analysis of how the internal is linked to the external, even for political institutions, other than providing a statement of expected institutional responses or "emotions" to the world outside. This problem may be central to much of path dependence theory of American institutions.

For Pierson, as for other externalists, the nature of the ideal typical responses of institutions to the external world is based on events external to institutions. Without a theory of institutions that relates the internal to the external in a particular institution, much of the heavy lifting in testing the usefulness of Pierson's concept of path dependence must be done by scholars of particular institutions. The difference between the political institutions upon which the concept of path dependence is based and legal institutions, such as the Supreme Court, may be too wide to bear the weight of the concept's generalizations. A similar problem bedevils those scholars who rely only on an internal or an external approach to understanding the Supreme Court in American political development.

Kersch, like myself, demonstrates that the particular actions of the Court are often determined by the place of a case in a sequence of cases, because the trajectory of cases is not one of path dependency and increasing returns as the Court hews out a narrative. Rather, the mutually constitutive process of internal and external means that the path is created as the Court acts in ways that are not linear movements to African-American rights or labor rights or business power and rights. The path is not preordained because of the complexity of Court decision making. We cannot see the changes as increasing returns because Court decision making is neither simply a response to institutional needs from externalist factors, nor simply increasing returns for legalistic purity. Nor do big events explain Court action—given the long-term incremental process of doctrine, Kersch rejects the progressive "origins myth" that says that the Court threw away formalism after the *Lochner* Era and only then began to let the outside world into its decision making and produce progress for the nation. The FDR Court never rejected formalism/legalism to let the outside world in. Kersch writes:

> [Interpretations of the New Deal period] that posit a radical breakthrough in the nature of constitutional adjudication are to a significant extent highly ideological efforts designed to legitimate the prevailing post-New Deal regime. The barrier-and-breakthrough metaphor has for too long obscured key patterns in the trajectory of twentieth century constitutional development" (p. 2).

Kersch argues that with regard to path dependency, legalists view cases after the decline of *Lochner* era principles as extending the principle of equality. Externalist developmentalists see the Court as committed to institutional path dependence. The cases can be read as amounting to a movement by African-Americans along an institutionalized path that had been paved earlier by organized labor. Kersch writes:

> Legalists can read [the "Don't Buy Where You Can't Work" cases] as extending the principle of equality from one deserving group (labor) to another (blacks). Developmentalists committed to theories of path dependency can read them as amounting to a step by blacks along an institutionalized path that had been paved earlier by organized labor " (p. 49).

Novkov, Nackenoff, Brandwein, and Moore explore the battles in contested interpretive space in which there is negotiation about constitutional meanings in light of societal norms and politics. All note that that the negotiation takes place in influential ways outside the Supreme Court. Novkov focuses on state courts, Nackenoff on advocacy politics, and Moore on Congress. All trace sequences of the negotiation, with the Supreme Court interpretation coming relatively late in the process.

In her case study of both state and federal constitutional law concerning inter-racial marriage from the same era, culminating in the Court's decision in anti-miscegenation in *Pace v. Alabama* (1883), Novkov uncovers a complex constellation of open constitutional contingencies and possibilities. There is no predetermined path; nor is the path one of increasing returns. Wide legal choices and complex politics lead to changes that produced the *Pace* decision.

She details the processes by which most of these were gradually foreclosed and constitutional settlements were reached. At the heart of her account of the way in which a constitutional settlement was negotiated is an intense and hard-fought thirteen year state-level legal, political, and cultural battle over interracial marriage which culminated in a reworked understanding of the white family as a quasi-public entity of special political value as a bulwark of states menaced by the radical implications of Reconstruction.

On the state's side, the interplay between the Alabama courts and the US Supreme Court demonstrated the state's need to justify both its specific policy on interracial sex and its assumption of the authority to regulate daily life in the wake of Reconstruction. On the US Supreme Court's side, the Court's response signaled a tacit acceptance of a dividing line between state and federal authority as well as the federal government's willingness to read the Fourteenth Amendment's guarantees in superficial terms. Much has been made of the legal distinction between social and political equality, and this distinction was central to significant analytical work by courts and lawyers which enabled the rise of Jim Crow. Nonetheless, Novkov shows that the fundamental distinction in *Pace*'s appeals was between interracial sex's purported threat to the state and the lesser dangers posed by illicit intraracial sex. This reasoning began the process of closing the doctrinal path of reading substantive guarantees of citizenship rights through the Fourteenth Amendment, a path that would not reopen on racial grounds until the twentieth century (pp. 36-37).

While closing this door, the US Supreme Court opened another. The reasoning in *Pace v. Alabama* suggested to the states that their articulations of the dangers posed by black equality and their need to develop legal means of articulating and entrenching white supremacy would largely be allowed to stand without serious review. In the south particularly, the states were not slow to see and accept the invitation (p. 37).

The simple way to explain *Pace* is to say that the US Supreme Court heard a case involving a challenge to state anti-miscegenation statutes in the early 1880s; it ruled in favor of such laws by relying on a thin conception of equality based on the observation that blacks and whites were subject to the same punishment under Alabama's law. The case, coming before

lengthier and more substantive analyses like the *Civil Rights Cases* and *Plessy v. Ferguson,* was unremarkable except insofar as it hinted at what was to come (p. 38).

This interpretation, however, overlooks the back history of the case and thus misses its significance. *Pace v. Alabama* marked the first steps on a path that would lead to a comprehensive national acceptance of the systematic legal entrenchment of white supremacy in the South. *Pace* in fact marked the end of an era in a certain sense: after the ruling by the US Supreme Court, no defendant in Alabama challenged a conviction for miscegenation on constitutional grounds again until 1954 (p. 38).

The period between 1868 and 1882 was a time of negotiation and contingency on the state level. The state courts genuinely struggled with the issue of interracial marriage, with the most fully developed and contested line of cases emerging in Alabama. As the debate progressed, the state courts winnowed through various arguments and a gradual consensus on framing the issue emerged around a thin conception of symmetry as equality. The shape that the debates took influenced the way that the US Supreme Court would ultimately address the issue, making it appear to be more of a foregone conclusion than it actually was, and the Supreme Court ultimately did not deal with the state courts' concerns about marriage's public significance. The Court's opinion thus left marriage simultaneously as a public institution but as wholly within the states' control (pp. 38-39).

Nackenoff questions path dependence as increasing returns because of the presence of multiple institutional actors. For Nackenoff, path dependence is difficult to maintain because many feedback loops are involved in this process of deciding citizenship rights for Native Americans. She writes, "Conceptions of citizenship and standing in the political order generated on the 'outside' influence the Court, and doctrinal developments 'inside'; both reshape the efforts and affect the mobilization language and strategies of activists"(p. 8). In this important example of the mutual construction process at work, the Court is one of a number of "policy windows" that activists use to secure change. This is politics as dialogue or iteration.

Moreover, the role of the Supreme Court can occur at almost any time in the sequence of actions among Congress, advocacy groups, and lower level courts. Nackenoff writes: "[T]he Court is not necessarily the temporal leader and initiator in the process of conceptual change that impacts legal decision making. Activists press particular understandings and expectations about citizenship... on Congress and the Court, and there are institutional responses" (p. 7). Timing may be very important. She writes,

> Opportunities may come and go like 'policy windows' that policy entrepreneurs attempt to exploit when a problem is recognized, a solution is developed in the policy community, and the opportunity for change is present... [Therefore,] the allocation of attention to issues and problems on the Court may nevertheless often be more episodic than incremental. (p. 8).

The place of the Court in the path of the law is dependent on the fact that the actions of members of the interpretive community and activists outside the Court play a huge role in decision making. Nackenoff writes, "Justices, courts, and legal professionals were neither autonomous nor fully insulated from 'outside' forces or 'social facts' as they formulated legal ideas" (p. 11). She notes that the particular view of history taken by the legal community in this period formed another important external factor on the Court's decision making. Also, stories were formed that focused on learning lessons from the experience of African-Americans and the Fourteenth and

Fifteenth Amendments: "The reworking of this history in law reviews, essays, exchanges at Mohonk, Congressional debates and elsewhere both responded to and, in turn, reshaped the official narratives told by the Court (p. 24).

Moreover, Nackenoff finds the pace of change to be episodic, rather than incremental because the relationship between law and politics is episodic. Moreover, as with my findings, when institutions such as Congress, the Court, and advocacy groups seek changes in the path of the law, the Court's response is not one of increasing returns. A terrific question for future scholarship is whether the long-term incremental development of doctrine in the mutual construction process that Kahn, Kersch, and Moore describe, at times intersect with an external political event, which may lead to significant changes in the path of the law.

Nackenoff argues that a growing rights-consciousness and attendant developments in federal case law added an important dimension to arguments and assaults on assimilation and the prevailing government policies [under the Dawes Act]. She writes,

> During the second wave of Native American reform efforts, activists who engaged the language of rights, freedom of religion, the ability to make contracts, presence/absence of legal recourse, and equality under the law consciously constitutionalized conflict... Framing wrongs against Native Americans in this manner became an important vehicle for mobilizing popular opinion and pressure against current government initiatives" (pp. 56-57).

Therefore, Nackenoff makes a strong argument that the complex process of intercurrence among a wide set of institutions challenges the presence of an incremental process and one that can be characterized as a path defined as increasing returns. This is clearly the case with regard to Supreme Court landmark cases on Native American citizenship rights. They were reactive to politics, as politics were reactive to the Court. However, the nature of the path of the law and the place of institutions in developing that path means that there were certain qualities about the Court and rights principles which affected the development of public policy.

Pamela Brandwein's chapter discusses the ways in which such paths are constructed, in part through the construction of knowledge in particular social and institutional contexts. Brandwein offers terrific evidence that legal paths are created. It is not simply a disciplined, closed path of the law. Rather, courts and scholars have leeway to develop rights concepts which reflect the changing social, economic, and political reality. The state action doctrine as we know it today is such a path that was created, which limits government responsibility for its actions, as we see in the *DeShaney* case. Therefore, one needs to study the full path of doctrine, to see how paths were defined in their first cases, and to see how and why these first paths are transmogrified over the decades. Brandwein's evidence also suggests the temporal importance of a specific period of time being a transitional, uncertain period that may have encouraged minimalism and a certain view of doctrines.

Brandwein suggests that we must rethink our understanding of the Reconstruction and Progressive eras. It was not until the 1920s that the canonical reading of the *Civil Rights Cases* in Supreme Court decisions was established. Therefore, we need to ask what social and political forces, and developments in the academy and interpretive community in the Progressive era and the Post-WWI era, produced this orthodoxy in state action doctrine. Was the key fact that racism was at a high in these years and even liberal reformers cared little about the conditions under which blacks lived and worked, Brandwein asks. In the large new administrative welfare state,

institutional language now talked about the "the Negro problem" and "the Great Migration," not about rights or government and court support of rights. Did the interpretive community reflect these changes and abandon the more critical language of rights and government responsibility?

Wayne Moore conceptualizes the digging of a constitutional developmental channel as, to a significant extent, involving a project of the construction of legal authority (or authorities). A number of other essays focus on the ways in which the Supreme Court may grapple with threats posed to the continued stability of established institutional paths of development. The mutually constitutive process of Supreme Court decision making presented by Moore offers clear evidence that Supreme Court decision making cannot be viewed as one of path dependence. The Court makes a path. However, the complex interaction of the internal and external means that the path is not predetermined, or primarily determined, by the institutional needs of a Court fearing the world outside. There are too many sources of Court legitimacy and Court action, many of which are mutually reinforcing, that place the Supreme Court in a different position institutionally than more directly politically accountable institutions.

Moreover, it is quite clear that even if one could make an argument for some path dependence, it most likely would not be one of increasing returns. The path is open in part because of the complex negotiation of internal and external as Moore outlines. However, Moore does present clear evidence that the temporal sequencing of law and principles (and of events outside the Court) is important to the development of doctrine and the place of the Supreme Court in American political development. However, even though sequencing is important, Moore's contribution suggests that the role of principles, moral standards, politics, etc. in Supreme Court decision making provides the Court with space for making its choices at different times in its history. Thus, Moore's findings suggest that the process of negotiation between law/courts and politics/history leaves the direction of change as more open-ended than the building-up increasing returns model would suggest, although the process is still a disciplined one.

It is quite clear that path dependence is not one of increasing returns—rather the path is open to the nature of complex negotiation of the internal and external as Moore and I outline. The temporal sequencing is important—yet the role of moral norms, politics, etc. gives the Court space for making choices at different turns. [12]

Graber provides a developmental theory as well. He argues that the interplay of legal, strategic, and attitudinal factors prevented the Supreme Court from declaring martial law and other military related policies unconstitutional. Republican presidents and legislators acted within accepted legal frameworks when they sought to forestall adverse judicial decisions. Elected officials did not use abolition of judicial review, impeachment, and other purely strategic grounds to ensure Court support for Civil War and Reconstruction measures. (p. 44) Presidents abandoned or settled cases when they thought the Court would decide against them.

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[12] Comparison of the contributions of Novkov, Brandwein, Moore, Kersch, and Kahn offer important evidence as to whether a model of path dependence in general, and increasing returns in particular, are valid ways to view the politics and law surrounding the interpretation of the 14th Amendment Equal Protection Clause. Moreover, an interesting question to consider is how the nature of Moore's evaluative criteria for the Court changes over the decades. Which become more or less important over time? Is there a path dependence of evaluative criteria? Also, does the importance of a criterion of authority for the Court change depending on whether a case is first or last in a sequence of cases?

Thus sequencing is important: the fact that strategic decisions were made in the past allowed the Court in *McCardle* to make a legal decision based on that precedent. Graber's analysis here is about the use of legal means to secure judicial restraint. He does not make issues of path dependence a central problematic. However, it is quite clear that the mutual construction process that Graber describes produces some leeway for the Court in creating a path.

Thus, Graber demonstrates that there is a key path dependence aspect of Court decision making. He notes that decisions in cases are often determined by their place in a sequence of cases, as Kahn, Kersch, and Keck also emphasize. For example, Graber argues that the legal options open to Chief Justice Marshall were closed to later justices, partly because of the strategic choices that Marshall had made. Graber writes:

> Path dependence theory highlights how particular actions are often explained largely by their place in a larger sequence. Random choices or decisions between available alternatives made at one point in time typically limit or change the alternatives that may be selected at later points in time. *Wiscart* and *Durrousseau* were decided early in Supreme Court history...Both justices choose not to exercise judicial power...Legal options open to Marshall had been closed, partly because of the strategic choices Marshall made. The Supreme Court voted to deny jurisdiction in *McCardle*, a path dependent perspective suggests, because Chief Justice Chase decided after, not before, Chief Justices Ellsworth and Marshall" (pp. 41-42).

With regard to path dependence Graber writes, "Precedent shapes and constrains normal decision making, not that stare decisis never encompasses policy preferences and strategic considerations" (p. 30). However, rarely are Court actions simply strategic with regard to external factors. Graber writes, "Strategic decision making (almost?) always takes place in a context of practice whose norms sanction sophisticated choices under some circumstances while restricting the strategic options that may be chosen." (p. 36)

Graber talks of path dependence theory in highlighting how particular actions are often explained largely by their place in a larger sequence, and how "random choices or decisions between available alternatives made at one point in time typically limit or change the alternatives that may be selected at later points in time" (p. 41). Graber writes, "Standard features of most judicial systems have strong tendencies to generate precedential sequences that favor restraint whenever policies favored by most elected officials are challenged in court." (p. 42) This explains *McCardle*. Graber writes, "The later a judicial opportunity to strike down measures favored by powerful political actors occurs in the life of a court system, the more likely existing precedents will support either denying jurisdiction or sustaining regime policy." (p. 44)

Tushnet's study raises fascinating questions and offers interesting evidence about the relationship of the Supreme Court to politics, with important implications for questions of path dependence. He does so by asking how institutional channels or trajectories of development are carved out, when (and, for Tushnet, *if*) Court decisions flow within those channels, and when they might leap over its banks. It is clear that Tushnet is rejecting Dahl's simple equilibrium model, because for Tushnet whether collaboration among institutions is found, is itself conditional, and not an expectation in all historical periods. Also, Tushnet's argument is not that law follows politics, but that law follows the coherence of the national government. These

findings can add much to the questions about incompleteness and incongruities in institutional patterns that Orren and Skowronek have identified in their most recent work.[13]

Gillman also provides important insights as to whether the Dahlian formulation is still valid. In doing so, Gillman identifies the importance of path dependence and sequencing, but shows a more complex picture than that evidenced by increasing returns. Yet Court decisions are not as serendipitous as Dahl suggests. Gillman writes:

> [T]hese developments highlight the role of sequencing and dynamics of path dependency on the specific shape of constitutional change. If Nixon had won the 1960 election, or if Kennedy and Johnson preferred to marginalize the judiciary by fortifying the Harlan-Frankfurter wing of the Court, then it is difficult to imagine a scenario whereby similar precedents have an opportunity to earn the respect or toleration of later Court majorities" (pp. 16-17).

Thus, like Tushnet, divided government can inform what courts do. Temporal sequencing is important; President Nixon follows liberals. Yet, the path is not one of increasing returns for Gillman. The evidence that he presents questions that path dependence should be viewed as increasing returns; the Supreme Court does not simply follow the majority coalition because it is limited by internal Court principles and norms. Gillman provides evidence that the doctrine continues as in the past even when new majority coalitions come into power and place justices on the Supreme Court.

The Difference Between "Legal" and "Political" Time

A number of scholars provide evidence that "legal time" is different from "political time." They show that the explanatory factors which explain patterns of doctrinal change in Supreme Court decision making do not demonstrate a process of "thickening" that occurs with regard to politically accountable institutions. Skowronek has found that the "political time" of the Presidency is limited because of this thickening. With each passing decade, this thickening reduces the time a president can institute change, as well as the scope and the speed of that change. This limits the possibilities of, and time open, for the use of presidential power and authority.

The mutual construction process of the Court is not subject to the effects of this process of thickening, at least in a way that limits the transformational possibilities of the Court. This has significant implications for whether the Court is a distinctive institution in terms of American political development. It also informs the nature of the Court's collaboration with more directly politically accountable institutions. Another important implication of this finding is that concepts like "political time" which may be important to our understanding of institutions like the Presidency may need to be modified because what we call the Supreme Court's "legal time" is so different. This insight may help us explain why the Supreme Court is a forum for social change even in a conservative political era.

Pierson's concept of path dependence as increasing returns is based primarily on the external analysis of causes of change by electorally accountable political institutions. Therefore, Pierson's path dependence could only become helpful for understanding the place of the

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[13] See Karen Orren and Stephen Skowronek, *"The Search for American Political Development* (New York: Cambridge University Press, 2004.)

Supreme Court in American political development if the relationship of the internal and external in that theory is more clearly defined. Moreover, there must be a clear consideration as to whether how the internal institutional norms of more directly politically accountable institutions relate to external social, political, and economic institutions, the paradigmatic case on which Pierson's increasing returns theory is based, are similar to the relationship and nature of internal institutional norms to the world outside, when the Supreme Court and lesser courts make decisions.

The best example of the limitations of path dependence as increasing returns as a model for analyzing Supreme Court decision making may be seen by contrasting Supreme Court decision-making with that of more directly politically accountable institutions. I suggest that we systematically contrast the Supreme Court and the Presidency, drawing upon Stephen Skowronek's superb explanation of the Presidency in American political development. Skowronek argues that throughout the history of our nation, and with each passing decade, there has been "a waning of political time," in which each president can meet his commitments, due in part to the "thickening" of political institutions. This results in increasing demands for and the expectation of political change by the President, and less time and resource increases to match such demands. This problem is most evident in reform minded presidents, but is evident for all presidents, and is increasing with each decade. At the core of this analysis is a concept of path development which views the normal path as a waning of political time.

Acceptance of the social construction process, by all non-originalist justices results in an opposite pattern to that found in the Presidency. This is because the path established by a Supreme Court which is actively engaging in a constitutive decision making process, with its social construction process and process of analogy to prior cases—principles and social constructions—is quite different than that found in electorally accountable political institutions, the example upon which most path dependent concepts are based. I suggest that path development on the Supreme Court may result in the opposite pattern to that of the presidency.

Instead of the waning of political time, the legal time which results from the social construction process and the acceptance of the notion that the Supreme Court is the final arbiter of the Constitution, allows the Supreme Court to more freedom to innovate, and be less subject to the thickening of institutions that Skowronek demonstrates with regard to the presidency. That is, the Supreme Court is able to make more choices in opposition to the primary commitments of the governing elite, than the president, even though all choices by the Court may not be in conflict with various institutions that make up the governing elite, as Graber and Whittington have argued.[14] Like the concept of path dependence, these general theories of American political development seem to rest primarily on an assumption of external causation, in a modified equilibrium model, and fail to link the internal to the external, generally, and with specific regard to the nature of the Supreme Court and courts. The explanatory usefulness of such general theory is limited without middle-range theories that both accept the importance of internal norms and processes, and link them to external factors on development sequences. Thus, the concept of path dependence, and the generalizations scholars make about institutions based on this concept, needs to be rethought, as do some general theories of American political development for

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[14] See Mark Graber, "The Non-majoritarian Difficulty: Legislative Deference to the Judiciary, "*Studies in American Political Development* 7(Spring, 1993): 35-73; and Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court," (presented at University of Maryland Discussion Group on Constitutionalism, University of Maryland Law School, Baltimore, Maryland, March 4-5, 2005).

understanding the place of the Supreme Court in American political development, in light of my findings on path dependence.

My findings with regard to the nature of legal time are supported by other contributors to the volume. Brandwein provides evidence that "legal time" is more open-ended than political time. The more complex administrative state, and the ideas about change through politics that went with it, undercuts the rights talks of the *Civil Rights Cases* and forces a new definition of the responsibilities of government under law. However, because law is not simply internal or logical, but brings this world of life into it, it seems not to have the building up and additive quality of "political time."

Keck's findings suggest that because legal time is so fluid, as is the political time of interest groups, the Court is in a different position than the President, who is hemmed in by a thickening political system of groups. The discretion by the Court in deciding cases means that the Court can influence the restructuring of political debate, and is not as subject to the political costs of doing so. At the same time, it is not elitist to the degree many scholars suggest, since the cases at both the Supreme Court and lower court level, and the mediation of principle and facts about society in the briefs, for example, means that the Court is not subject to the same thickening and narrow times to which presidents are subject.

In Tushnet's contribution, we see that the Court's "legal time" may not be subject to the same limits as the concept of political time suggests. Tushnet argues that temporal attributes occur when the Court acts to change policy made at an earlier period of time as with the Americans with Disabilities Act. Path dependence is completely related to politics/change and later court action to pull back—except when the collaborative court is present. The difference between old policies and contemporary policies and governing majorities leads the Court to pull back. At certain times, collaboration is difficult, particularly when there is a divided national order or no clear national project. In these situations, the Court is unusually free to take its own path and become an autonomous lawmaker, in the process allying itself with parts of the system as is convenient, against the preferences of others. Occasionally, under these conditions, justices can define a central project for themselves and may be able to impose it as constitutional law.

Although the Court reacts to the political time of the President and other political institutions, which seems to be on the wane if Skowronek is correct, the structural relationships among institutions provide conditions for some autonomous Court action. For Tushnet, the thickening and thinning of constitutional law seem to be based on the possibilities of the conditions for collaboration or autonomy, such as divided government and the degree of political and policy consensus in the nation. However, given the implicit notion of the lack of thickness over time of political institutions, because they react to political will, Tushnet seems to reject Skowronek's notion that political time for the President and other political institutions is on the wane. As presidents change, policies change in liberal and conservative directions, and vice versa, and courts react. The Supreme Court reacts to politics, public opinion, and institutional coherence, and that is a good thing. Justices are policy-makers, reacting to politics, and this gives the counter-majoritarian Court legitimacy under our democratic values. Principles do not form the basis of the Court's legitimacy.

Kersch offers evidence that there may be a thickening of legal time with each passing decade. The complexity of the internal and external grows as the Court develops principles and decides cases. This process does not necessarily lead to progress, clearly not in a linear way. However, we also see in Kersch's work that the Court creates its paths, and the complexity of the internal and external, with different possibilities for mutual construction, meaning that legal time

is far less thick than political time—in part because of the Courts discretion in the choice of principles and the analogical process through which the internal and external are mutually constructed. The Court may have more leeway for action than the President; it may be less constrained by the political needs of the governing majority coalition, as Tushnet demonstrates. One can say that the thickening process is different, or one can say that there is a way to thin out the effects of past principles, precedent, and responses to politics by the Court. Kersch suggests that one can take this metaphor too far, and not witness the fact that the process is more bounded and disciplined than the externalists would have us believe, and less bounded than simple legalist analyses would have us believe.

This question of whether there is a difference between legal and political time may help us explain why the Court has been able to decide issues such as rights of privacy for women and homosexuals in such ways that they have less policy limitations on what they can do. All contributors argue that today the nation has accepted the norm that the Supreme Court is the final arbiter of the Constitution as a legal document, while realizing that the politics of implementation may limit the effect of a Supreme Court decision, and thus must be subject to study.

The acceptance of the social construction process by all but the originalist Justices, as I argue, also offers fodder to the argument that legal time is different, as may not be so temporally limited for Justices compared to presidents. Moreover, the iterative politics that Nackenoff, Novkov, Moore, and Graber elucidate in their contributions, and the importance of divided government to Court discretion that Tushnet, Gillman, and Keck document, suggest that the nature of legal time in the Rehnquist Court era may have allowed the Supreme Court to be more transformative on social policy, compared to the Presidency, with regard to both Republican and Democratic presidents. The Supreme Court is not subject to the limits that presidents face in Skowronek's "political time." Legal time may be more transformative because more and more, as Tushnet finds, the national political system tends not to have a central project (p. 22). While the Supreme Court may also not have a central project, it does have precedent, discretion to act, institutional norms, and a decision making process which includes a mutual construction process, an interpretive turn, and the social construction process, as well as the authority to act in ways that Presidents do not because they are acting within the confines of political time.
It also may be possible that the waning of political time in Skowronek's terms of the Presidency and for other electorally accountable institutions in this age of cultural and institutional division means that the Court is more open to make decisions which differ from those of political leaders in those institutions that are boxed in by political time and the division among their members. The social construction process, rights talk and definitions, and Court legitimacy mean that the Court can foster social change, when the overall political system cannot do so.[15] Thus, Clinton and Bush II may be viewed as similar in some ways as to their power and how they frame issues. The Court is under fewer constraints. However, Kersch raises important issues that urge us to wait before crowning the Supreme Court as a venue for social progress. I hope that scholars will compare the nature of legal and political time historically and presently, and offer insights to this query about the future place of the Supreme Court in American political development. Moreover,

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[15] Moreover, if it becomes impossible for originalist and more radically liberal justices to be appointed to the Court because of factors similar to those that produce the waning of political time in the Presidency, than more moderate, liberal, and conservative non-originalist justices will be selected in this age of dividend and ideological politics. Once on the Court they will have space to make decisions which increase Court discretion under the mutual construction process that has been discussed in this paper.

it would be wise for scholars to see how patterns of intercurrence among political institutions and Courts will inform the nature of legal and political time in the future.[16]
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[16] These essays raise many questions for future inquiry with regard to the difference between legal and political time. Scholars may wish to ask what effect legal time has on Court power as compared to political institutions, as venues for change and reform. Also, the mediation role of the Supreme Court between law and politics that many contributors document suggests that the Supreme Court may be a particularly important institution in defining the nature of the process of intercurrence in American political development. Scholars of American politics can use Kersch's study to clarify the changing relationship of the Supreme Court to interest group liberalism. For example, are there conditions under which the Court is more likely to accept or reject interest group liberalism as a definition of how government operates, or should operate?