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IS THERE A POLITICAL TILT TO “JURISTOCRACY”?

CAROL NACKENOFF*

It has become increasingly difficult for those of us in political science to pin political labels on the diverse array of legal scholars who call out for a people’s constitution, for taking the Constitution away from the courts, or for much greater judicial restraint so that constitutional values can be deliberated—and indeed more fully owned—outside the Court.¹ One strain of the argument has been staked out by conservatives who decry the arrogance of the Court in supplanting the will of majorities as they articulate a constitution more egalitarian and democratic than the Framers gave us.² In this view, decency, morality, piety, and federalism are all casualties of an overreaching, power-intoxicated, and rights-creating judiciary. Justice Scalia recently complained, in *Roper v. Simmons*, that “[t]hrough the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.”³

However, these critics of contemporary legal thinking and of political activism aimed at the Court are now joined by more liberal and progressive legal scholars who, never expecting the Court to be much of a progressive force, are dismayed by the Rehnquist Court’s dismantling of the constitutional order (including some of the power of Congress through the Commerce Clause, state sovereign immunity, and the Tenth Amendment). Jack Balkin has pointed out that “[b]y the end of the 1990s, the major beneficiaries of the emerging conservative judicial activism appeared to be whites, state governments, advertisers, opponents of environmental and land use regulation, and wealthy contributors to political campaigns.”⁴ Ran Hirschl, who explores the rise of “juristocracy” in several nations and finds lessons for the Ameri-

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1. For one very helpful discussion, see Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 90 GEO. L.J. 233 (2001), a contribution to the Symposium *Justice, Democracy, and Humanity: A Celebration of the Work of Mark Tushnet* (discussing different views on what it means to be a “populist”).

2. Classics include ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., 1997).

3. 125 S. Ct. 1183, 1225 (2005) (Scalia, J., dissenting).

4. Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN v. BOARD OF EDUCATION SHOULD HAVE SAID* 3, 18 (Jack M. Balkin ed., 2001).

can case, argues that where “judicial empowerment through constitutionalization” occurs, it generally results from

a strategic tripartite pact between hegemonic, yet increasingly threatened, political elites seeking to insulate their policy preferences from the vicissitudes of democratic politics; economic elites who share a commitment to free markets and a concomitant antipathy to government; and supreme courts seeking to enhance their symbolic power and institutional position.⁵

Tom Keck calls this the most activist Court in American history, with Cass Sunstein’s most “minimalist” Justices embracing judicial review and demonstrating no significant deference to the elected branches.⁶ Moderate and left-leaning legal scholars began to urge respect for democratic, majoritarian decision-making, concerned for what the Court was pre-empting in the name of being faithful to the Constitution. Those legal scholars who placed far more faith in elected branches and social movements than in the Court to bring about real, lasting social change worked overtime to demonstrate that the heroic efforts of the Court in decisions such as *Brown v. Board of Education*⁷ or *Roe v. Wade*⁸ had little impact by themselves, in any case.⁹ Or the argument that the Constitution included values compatible with a wide array of political programs undercut the claim for a nonpolitical exercise of judicial review.¹⁰ As Mark Graber has pointed out, “[v]irtually every political movement that has enjoyed substantial political success in the United States has eventually concluded that the Constitution of the United States privileges its particular political program.”¹¹

I suspect that some part of the more centrist-liberal interest in popular constitutionalism can be located in the desire of Third Branch scholars to get involved in the decline-of-civic-engagement debate. That is, with the proclamation that discussion of public affairs,

5. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 214 (2004).

6. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 293 (2004).

7. 349 U.S. 294 (1955).

8. 410 U.S. 113 (1973).

9. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 70-71, 201 (1991); see also Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (arguing that the Court’s ability to protect minority rights is more limited than widely believed). *But see* David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg’s The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL. 63, 67 (1996).

10. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 823-24 (1983).

11. Graber, *supra* note 1, at 250.

trust in government, and social capital are all suffering decline,¹² a less activist and ambitious Court might leave ambiguities and unfinished business for legislatures to flesh out—and democratic citizens could even be stimulated to deliberate the meaning of constitutional values (instead of watching *Survivor XV*). The Court, having probably contributed to the problem in the first place by usurping popular prerogatives,¹³ could help Americans with their deficit of democratic deliberation. Sunstein's formulation in particular suggests that narrower and less fully reasoned decisions are generally more democracy-promoting (or democracy-permitting) than other kinds of decisions.¹⁴ If the object extends beyond getting Congress to say what it means and flesh out values and goals better—if it is in part to take the Constitution to the streets and town meetings—I remain skeptical. Leaving *Dred Scott v. Sandford*¹⁵ aside as an extreme case, I would suggest rather that the kinds of decisions that capture popular imagination and discussion about constitutional values are more like *Brown*, *Roe*, and *Miranda v. Arizona*¹⁶—decisions that people recognize because of their relative clarity and breadth.

Given several decades' decline in survey indicators of confidence in the people running national institutions,¹⁷ why is it that the public is more likely to express a great deal of confidence in the Supreme Court than in other branches of the federal government and less likely to indicate it has hardly any confidence in the Court than in the other branches? Table 1 indicates that the Court has enjoyed higher and apparently more stable levels of public confidence than either Congress or the Executive Branch during the past thirty years. Is it simply because the Court is more insulated from the public eye and guards its secrets of the temple better, while President Bill Clinton answered press questions about what his underwear looked like? Judge Walter L. Nixon aside,¹⁸ we see fewer scandals and indicators of

12. See Robert D. Putnam, *The Strange Disappearance of Civic America*, AM. PROSPECT, Dec. 1, 1996, <http://www.prospect.org/print/V7/24/putnam-r.html>.

13. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) (noting that over the course of most of American history, the courts were subordinate to the judgments of the people); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

14. CASS R. SUNSTEIN, ONE CASE AT A TIME 26 (1999); Cass R. Sunstein, Op-Ed., *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, § 4, at 9.

15. 60 U.S. (19 How.) 393 (1856).

16. 384 U.S. 436 (1966).

17. Press Release, Pew Research Ctr. for the People & the Press, Court Critics Now on Both Left and Right: Supreme Court's Image Declines as Nomination Battles Loom 3 (June 15, 2005), available at <http://people-press.org/reports/pdf/247.pdf>.

18. I refer to *Nixon v. United States*, 506 U.S. 224 (1993).

corruption involving members of the federal bench in the press, despite Internet cartoons such as the Elmer Fudd-inspired one in early 2004¹⁹ that featured duck hunting and Justice Scalia's refusal to recuse himself in *Cheney v. United States District Court for the District of Columbia*.²⁰ If the public believes the Court protects rights they wish to see protected, then Justice Scalia is the one who wants a minimalist constitution. Alternately, one might make an argument that the public has grown accustomed to a Court that speaks authoritatively about its prerogative to say exclusively what the Constitution means and that Americans are happy to leave that authority in the hands of non-elected elites. After all, perhaps the public craves certainty and settled, known law, not constant legal deliberation and flux that the adversarial process generates. Jean Jacques Rousseau certainly thought there was something to this idea, and so did Robert Nagel.²¹ If we want claims adjudicated and want to believe that the Constitution has clear meaning, why politicize it more than it already is?

As a caveat, it should be noted that Americans do not seem as happy with the Court as in the past; some indicators of public support have declined as criticism from both liberals and conservatives has grown more pronounced.²² The Pew Research Center for the People and the Press announced in June 2005 that the Supreme Court's image has deteriorated.²³ Historically favorable views of the Court that persisted through 2000 began to ebb among Democrats following *Bush v. Gore*²⁴ and began to decline among conservative Republicans and white evangelical Protestants around the same time; the desire to overturn *Roe v. Wade* was central to these latter two groups of respondents.²⁵ Although favorable opinions of the Court have dropped in the Pew Survey, favorable opinions of Congress also declined and are,

19. Editorial Cartoon, Mark Fiore, Duck Season (Jan. 28, 2004), <http://www.markfiore.com/animation/duck.html>.

20. 541 U.S. 913 (2004).

21. See JEAN JACQUES ROUSSEAU, *A Discourse on the Moral Effects of the Arts and Sciences, in THE SOCIAL CONTRACT and Discourses* 145, 153-55 (G.D.H. Cole trans., 1950) (advising that mankind benefits from simplicity); ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 2-4 (1989) (stating that Americans have become increasingly reliant on the judiciary to resolve problems). Akhil Reed Amar's suggestion that James Madison's and John Bingham's recognition that "a Bill [of Rights] that did not live in the hearts and minds of ordinary Americans would probably, in the long run, fail" might be read in somewhat the same vein because it stresses meanings enduring outside of courts and law offices. AKHIL REED AMAR, *THE BILL OF RIGHTS* 297 (1998).

22. Press Release, Pew Research Ctr., *supra* note 17, at 1.

23. *Id.*

24. 531 U.S. 98 (2000).

25. Press Release, Pew Research Ctr., *supra* note 17, at 2.

TABLE I
 CONFIDENCE IN THE PEOPLE RUNNING U.S. INSTITUTIONS, 1972-2002

	1972-82	1986	1988-91	1994	1998	2000	2002	2004 ^b
<u>Executive Branch</u>								
A great deal	18.2%	21.2%	22.1%	11.5%	14.4%	13.8%	27.3%	22.0%
Hardly any ^a	27.3%	24.2%	24.0%	35.8%	36.4%	35.0%	21.7%	30.8%
<u>Congress</u>								
A great deal	15.8%	16.7%	16.9%	7.9%	10.9%	12.6%	13.4%	14.8%
Hardly any	23.2%	20.9%	23.1%	40.5%	31.0%	29.5%	25.5%	25.9%
<u>Supreme Court</u>								
A great deal	32.7%	30.9%	36.9%	31.2%	32.7%	33.9%	36.5%	32.1%
Hardly any	15.8%	14.7%	12.1%	17.0%	14.8%	13.5%	11.8%	14.9%

^a Category not shown to sum to 100% is "Only some."

^b Data for 2004 are from an initial release. Thanks to Tom Smith and Jibum Kim at the National Opinion Research Center for their assistance. The weight applied for the 2004 data was WT2004.

Source: General Social Survey. Conducted for the National Data Program for the Social Sciences at National Opinion Research Center, University of Chicago.

as General Social Survey data indicate, lower than for the Court.²⁶ With looming battles over judicial nominations at a time when so many decisions are made by narrow majorities, it may well be that this is a historical moment when the Court encounters more public criticism and scrutiny than other periods in time. The Court nevertheless appears to retain broader public confidence than is enjoyed by other branches of the federal government. If the Court fails to please the left or the right, perhaps it remains sufficiently consistent and sufficiently moderate to generate respectable levels of public confidence. With marked levels of polarization in Congress and a highly mobilized social conservative movement, the current Court may be pursuing a path of greater moderation than we might otherwise have expected.²⁷ On the basis of opinion data, it is not easy to maintain that the agendas of Congress or the White House are more in line with the wishes of the public or that those who seek to hasten change on the Court clearly speak for “the people.”

Some scholars contend that liberal legal scholars and members of the bench are attempting to thwart new constitutional understandings. In his new volume, *Constructing Civil Liberties*, Ken Kersch argues that Bruce Ackerman and other liberal legal scholars are busy defending Whiggish narratives with their liberatory and society-centered, rather than state-centered, analyses of constitutional development.²⁸ To defend the constitutional legitimacy of the New Deal order, such scholars must defend (and simplify the development of) the particular civil-rights/civil-liberties arrangements and understandings as the will of the people, while denying that popular will is expressed in different understandings in the Burger and Rehnquist Courts.²⁹ While Kersch argues that the Whig narrative is disintegrating before our eyes because of its own historical implausibility,³⁰ I would suggest that it is

26. While fifty-seven percent of Pew respondents retained a favorable opinion of the Court, only forty-nine percent had a favorable opinion of Congress in June 2005. *Id.* at 1, 3. Both have declined. *Id.* General Social Survey data do not indicate a pattern of decline in confidence in the Court.

27. Polarization of current congressional voting behavior has been amply documented in KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997). See also Norman Ornstein & Barry McMillion, *One Nation, Divisible*, N.Y. TIMES, June 24, 2005, at A23 (attributing political polarization in Congress to redistricting and the rise of partisan media). For a discussion of divergence of parties and elites from the public on framing policy alternatives, and the public's distaste for polarized options on many public policy issues, see E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 9-23 (1991).

28. KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* 5-7, 16 (2004).

29. *Id.* at 18-21. In addition to Ackerman, Kersch argues that Amar, Ronald Dworkin, and John Rawls in some measure all share in this project. *Id.* at 5-7.

30. *Id.* at 5.

also important to think about how contemporary scholars are creating new narratives to befit a new state project and new constitutional order.

Several generations of legal scholars wrote in support of the Progressive Era and New Deal Era projects of building state capacity. Once the Court stopped blocking favored federal social and economic reforms, these scholars tended to endorse a role for the Court in authorizing the expansion of the power and scope of the national government.³¹ They helped build Chief Justice John Marshall's legacy—via decisions such as *McCulloch v. Maryland*³² and *Gibbons v. Ogden*³³—as a major force in creating and expanding the power of the national government.³⁴ At the same time, legal scholars often applauded a Court that exercised the power of judicial review to strike down federal (and state) interference in new, broader understandings of civil rights and liberties.³⁵ The Court's use of judicial review to expand the scope of civil rights and liberties pointed to the power of Chief Justice Marshall's *Marbury v. Madison* decision.³⁶

How, then, should we understand the current revisionist projects that downgrade the accomplishments of the Marshall Court, argue that the Court has rarely been a powerful agent of change, and suggest that the current Court makes far grander claims for its own power to interpret the Constitution than Chief Justice Marshall ever did in *Marbury*? What is the political consequence of charges that the contemporary Court in the American political system behaves like a juristocracy? Is it not possible that scholars who would take the Constitution away from the Court provide the intellectual foundations for an era of contracting state power or nation-state dismantling? If I am at all correct, are we, then, Antonio Gramsci's organic intellectu-

31. See Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and "We the People": Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339, 1341 n.10 (2002) (citing the works of legal scholars who have analyzed the role of popular sovereignty in the national government).

32. 17 U.S. (4 Wheat.) 316 (1819).

33. 22 U.S. (9 Wheat.) 1 (1824).

34. See Flaherty, *supra* note 31, at 1356-67 (presenting various twentieth-century readings of John Marshall's *McCulloch* decision in light of the debate over which "We the People" framed the Constitution).

35. See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 313 (1994) (arguing that support for judicial power remained in the face of progressive and populist criticism of Court decisions); Steven F. Lawson, *Progressives and the Supreme Court: A Case for Judicial Reform in the 1920s*, 42 HISTORIAN 419, 419-36 (1980) (describing how the Court's decisions on labor, management of the economy, and civil liberties tended to split progressives in the 1920s).

36. 5 U.S. (1 Cranch) 137 (1801).

als,³⁷ generating the intellectual framework for this new constitutional order as we engage in handwringing about juristocracy in America and attempt to rethink the Court's place in the American political system?³⁸ I wonder what we may be saying to those who had such a difficult time having their rights recognized absent judicial intervention in the political process, however anemic those judicial interventions may have sometimes been?³⁹ Was the Court not offering hope, and occasionally powerful rhetoric, in political struggles? Should progressive legal scholars among the Court critics simply signal their willingness to abandon minorities and historically disfavored groups to the democratic will just because judges, too, make value choices? It is not obvious that curbing the activity of the Court would usher in a more democratic order.

While it is obvious that there are conservatives and progressives who are interested in curbing Court power and enhancing democratic deliberation where it is currently being silenced or supplanted, there is a clear political struggle going on about what a more vigorous democratic order would look like. If democratic formalism "identifies democracy with whatever happens to emerge from majoritarian politics,"⁴⁰ then how do progressives want to talk about democracy? Since I believe that democracy probably means something else—something more substantive—to many of those who might take the Constitution away from the courts, I think it is time for a discussion about whether progressives who are willing to reduce the Court's judicial review understand democracy as something other than "whatever happens to emerge from majoritarian politics." What would the strug-

37. SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 5-14, 452-53 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

38. I shall have to leave aside fascinating questions that are raised about the role of globalization, international human rights norms, and international law in reconstructing the American constitutional order and constitutionalizing politics even further. Rather than blame Justices for looking abroad for norms to import (as conservatives so loudly do), I would suggest that treaties, international organizations with enforcement powers such as the World Trade Organization, and statutes such as the new Copyright Act that attempt to harmonize American law with laws elsewhere have done far more to "change" the Constitution than a few Justices running around to international conferences on the death penalty.

39. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149, 152-53, 159, 163 (1991). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87-104 (1980) (arguing that the Justices should take a representative approach to judicial review rather than a fundamental values approach). Hirschl argues that Ely's attempt to rescue judicial review for a supportive and confined role via policing the process of representation fails to survive a democratic critique. HIRSCHL, *supra* note 5, at 162-63, 188-89. Moreover, "simple and sweeping claims about the unequivocally positive effects of constitutionalization on historically marginalized interests ought to be viewed skeptically." *Id.* at 168.

40. SUNSTEIN, *supra* note 14, at 212.

gle over a more democratic constitution look like, and how might it take place in a less "juristocratic" political order?

Those who think a juristocratic Court is usurping democratic deliberation in America may be overly alarmist. The Hirschl study stressed the importance of comparative constitutional investigation and focused on Canada, Israel, New Zealand, and South Africa to make the case for mechanisms of judicial empowerment.⁴¹ *Towards Juristocracy* does also consider important issues for the American context, such as constitutionalization, the judicial interpretation of rights, and the judicialization of mega-politics.⁴² However, doesn't the Court in the United States face major obstacles to the judicialization of politics even if it tries? Wouldn't the arguments that the Court is a great deal weaker than it apparently wants to be tend to support this idea? I do not claim that obstacles to juristocracy are unique to the United States; I simply contend that where institutions and traditions of civil society differ, obstacles to juristocracy are quite likely to differ as well.

Perhaps if we think about how to locate the Court in an interpretive community in the United States, the juristocracy problem might diminish. The Supreme Court is surely not the final arbiter in struggles over the meaning of constitutional language and values. Recent scholarship has turned to examination of how and why courts fail to monopolize the meaning of the Constitution. Mobilized activists, interest groups, lawyers, legal scholars, social scientists, legislators, administrative officials, other political figures, journalists and editors, and now perhaps bloggers play important roles in framing—and re-framing—constitutional issues. When scholars focus narrowly on the Court's interpretation of constitutional meaning, they neglect the ways in which constitutional meaning is actively constructed by other actors in the public sphere. There is robust "elaboration of constitutional meaning outside the courts."⁴³ Keith Whittington points out that "[t]he jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text."⁴⁴ Judicial activism and attempted foreclosure of constitutional questions from the bench generally fail to resolve various issues at stake in political disputes; both historically and at present, "public debate over constitutional meaning has been a significant component of developing

41. HIRSCHL, *supra* note 5, at 4-5.

42. *Id.*

43. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 207 (1999).

44. *Id.* at 5.

the constructions.”⁴⁵ If the Court cannot monopolize the Constitution’s meaning or foreclose avenues of deliberation elsewhere, it would certainly suggest there is room for considerable creativity in the construction of constitutional meanings.

In some periods of constitutional contestation, the relationship between the Court and other members of the interpretive community could be characterized as an iterative process. Interest groups fund particular cases to get questions before the federal courts; they even search for appropriate parties to gain standing.⁴⁶ As Charles Epp has argued, resources for litigation must be available if certain constitutional issues are to receive sustained attention in Court.⁴⁷ Groups, unhappy with a particular Court decision, press statutory reforms upon Congress and on state legislatures. Legislative responses help determine the kind of cases that come to the Court. The Court then engages in statutory and constitutional construction that leads to criticism by activist reformers, members of the legal community, and policy-makers, followed by a new round of proposals and responses by institutional actors, among which the Court is one. Activists press particular understandings and expectations about constitutional meaning upon the Court, and doctrinal developments within the Court reshape the efforts and affect the mobilization, language, and strategies of activists.⁴⁸

Moreover, if the Court sometimes appears to settle constitutional matters for some period of time (e.g., the New Deal Court’s reading of substantial effects and aggregate effects on interstate commerce), the Court also frequently unsettles constitutional matters. Some moments are riper than others for those outside the Court to contest particular constitutional meanings. Opportunities may open and close like “policy windows” that stay open only for short periods and present well-positioned policy entrepreneurs with opportunities for policy

45. *Id.* at 226.

46. See, e.g., Thomas M. Keck, *From Bakke to Grutter: The Rise of Rights-Based Conservatism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., forthcoming 2006) (exploring the process of bringing *Grutter* and *Gratz* to the Supreme Court, including the recruitment of litigants by the Center for Individual Freedom).

47. Charles R. Epp, *External Pressure and the Supreme Court’s Agenda*, in *SUPREME COURT DECISION-MAKING* 255, 260-62 (Cornell W. Clayton & Howard Gillman eds., 1999). Of course there are, then, “message skews” in what kinds of groups and claims have access to the Court.

48. I attempt to explore some of these processes and feedback loops with regard to deliberation about the meaning of Native American citizenship. See Carol Nackenoff, *Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s-1930s*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT*, *supra* note 46.

change.⁴⁹ The allocation of attention to issues and problems on the Court may sometimes, then, tend to be more episodic than incremental. Frameworks through which issues are analyzed in the Court may, rather like Congress, alternate between periods of relative stability and rapid change. Frank Baumgartner and Bryan Jones contend that "the American political system lurches from one point of apparent equilibrium to another."⁵⁰ This would tend to support Whittington's assessment that much of our constitutional development has a punctuated character; when existing institutions, settlements, and norms that had contained political pressures reach an untenable point, development occurs.⁵¹

Although I have borrowed from literature describing the patterning of other American political institutions, it should be clear that the Court is not an institution that simply resembles or mirrors others. Historical institutionalists Karen Orren and Stephen Skowronek find that different institutional formations are relatively independent; having had different historical origins, these institutions have had different patterns of development.⁵² Engagements throughout the polity bring together different norms embedded in different institutions; "at any moment in time several different sets of rules and norms are likely to be operating simultaneously."⁵³ If, as a result, relations among political institutions are likely to be in tension, political actors may exploit tensions and contradictions that exist because of these institutional mismatches, and one can see the potential for creativity by various political actors.⁵⁴ Intercurrence specifies "a political universe that is inherently open, dynamic, and contested, where existing norms and collective projects, of varying degrees of permanence, are buffeted against one another as a normal condition."⁵⁵

The Court has its own norms, dynamics, and institutional history; it has doctrine, rules, precedents, metaphors, and language peculiar to it. And although precedents and stories about case-law history es-

49. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 173-80, 212-13 (1984).

50. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 12 (1993).

51. WHITTINGTON, *supra* note 43, at 216.

52. Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building in the Fullness of Time*, in *NOMOS XXXVIII: POLITICAL ORDER* 111, 111-12 (Ian Shapiro & Russell Hardin eds., 1996).

53. *Id.* at 111.

54. Karen Orren & Stephen Skowronek, *In Search of Political Development*, in *THE LIBERAL TRADITION IN AMERICAN POLITICS* 29, 39 (David F. Ericson & Louisa Bertch Green eds., 1999).

55. Orren & Skowronek, *supra* note 52, at 139.

tablish the terrain on which contestants frame their complaints, these are continually reworked. Litigants bring their own understandings about law to court, creating a contact between the institution and actors that is important in keeping law in touch with the social order.⁵⁶ As Ronald Kahn has insisted, the Court brings the outside world into its decision-making in more ways than taking cognizance of events and facts.⁵⁷

Now if the Court is located in the political system and in the history of American political development in these ways, it is harder to be quite so juricentric. Some among us are being rather too court-centered in our analysis of constitutional dynamics. If we recognize the involvement of other institutions and actors in the shaping of the Constitution's meaning, a domestic version of juristocracy doesn't carry quite as much weight. Juristocracy claims too much.

There is certainly reason to be concerned that some political issues are being over-constitutionalized. This may sometimes tend to "freeze" the language with which we think about questions of values and impoverish our political debate.⁵⁸ There is reason to be concerned if other actors in the political system are becoming too deferential to the judiciary, although the range of politicians, religious leaders, and organizations mobilized to criticize the Court or influence judicial selection suggests something other than deference. There is also a need to pay close attention to the ways in which international opinion, treaties, and human rights discourses are reshaping constitutional reasoning, threatening some constitutional protections and possibly expanding the scope of others. I do not wish to be Pangloss or Polyanna, but I am not prepared to conclude that juristocracy rules.

So I return to an earlier question about some of the additional reasons this question of juristocracy—along with the demotion of the Court and of the scope of key Marshall Court decisions—has such resonance for progressives. To what extent is this a conversation about the ways in which the nation-state is being dismantled from one side and superseded from another? Are progressives trying to make the best of a bad bargain in an era when war and tax-cut driven budget

56. Austin Sarat, *Going to Court: Access, Autonomy, and the Contradictions of Liberal Legality*, in *THE POLITICS OF LAW* 97, 111 (David Kairys ed., 3d ed., 1998).

57. Ronald Kahn, *Institutional Norms and the Historical Development of Supreme Court Politics: Changing "Social Facts" and Doctrinal Development*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 43, 43-59 (Howard Gillman & Cornell Clayton eds., 1999).

58. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 13-14 (1991).

deficits undermine nation-state capacity and when globalization threatens to undercut the institutions of the nation-state and generate supra-constitutional obligations and power arrangements? If Americans cannot hope to count on the constitutional order from the era of state building, for what can they hope to count on the Court now?