

# Law and American Political Development

Paul Frymer

KAHN, RONALD, and KEN I. KERSCH, eds. 2006. *The Supreme Court and American Political Development*. Lawrence: University of Kansas Press. Pp. ix + 494. \$19.95 paper.

*This essay reviews the recent volume edited by Ronald Kahn and Ken I. Kersch, The Supreme Court and American Political Development (2006), as well as the broader literature by law scholars interested in American Political Development (APD). The Law and APD literature has advanced our knowledge about courts by placing attention on the importance of executive and legislative actors, and by providing political context to our understanding of judicial decision making. But this knowledge would be more powerful if it would embrace the broader APD field's orientation toward the importance of state and institutional autonomy for understanding politics and political change. Law and APD scholars could go further in examining the ways in which courts and judges act institutionally, and how the legal branch as an institution impacts American politics and state-building. In doing so, Law and APD scholars would contribute not only to our understanding of judicial decision making but also to our understanding of the place and importance of courts in American politics.*

## INTRODUCTION

In the past two decades, legal scholars have increasingly engaged with the field of American Political Development (APD). APD scholars are interested in the historical progression of the nation-state, particularly the creation of institutions designed to expand the government's authority over economy and society (Skowronek 1982; Skocpol 1992). APD scholarship arose initially

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as a challenge to both pluralist and Marxist understandings of power and political change (Krasner 1984). Instead of viewing government action as a direct and functional response to societal interests, APD scholars contend that political change does not occur independent of preexisting institutions and structures. Since these preexisting institutions were themselves historically established in response to different contexts, political outcomes tend to be dysfunctional; institutions that arise out of different political moments come to coexist often in direct conflict with each other (Orren and Skowronek 2004). By emphasizing the independent impact and historical development of institutions, particularly the way these institutions quietly structure more visible political and cultural conflict, APD scholars situate the role of individual actors, whether legislators, executives, social movement activists, or judges.

To apply the label of “Law and APD scholar” to a specific group of people is difficult because they are a diverse lot, coming primarily from political science, but with allies in history, law, and sociology. If there is an agenda for the Law and APD scholar, it most directly fits around one of two broad intellectual interests: (1) to highlight the role of judges and courts as participants in American state-building and (2) to understand judicial decision making and constitutional interpretation through the lens of a historical-institutional methodology. The first of these interests exists among scholars who wish to revise and enhance the existing APD literature that has tended to emphasize those institutions, such as the executive branch, Congress, and federal bureaucracy, which are more directly accountable to popular will. Parties, presidents, legislators, and bureaucrats are the primary movers of American state-building in the APD literature, and judges are perceived as the “great bogeymen of liberal reform—agents of an exceptionalist and backward-looking American jurisprudential tradition that regularly frustrated modern welfare statebuilding efforts” (Novak 2003, 251). Law and APD scholars have begun to revise this understanding of American state-building with an emphasis on judicial activism that has successfully enhanced, and not just limited, national regulatory power (see Frymer 2003; Melnick 1994; Novak 1996). Scholars have similarly attempted to understand moments of expansive legal authority in the context of electoral and regime politics (see Gillman 2002; Graber 1993; McMahon 2004; Whittington 2007).

The second of these interests comes from scholars seeking to use APD methodology to challenge behavioral approaches to judicial decision making that argue individual judges make decisions predetermined by their own attitudes and policy preferences (Baum 1988; Segal and Spaeth 1993), as well as jurisprudence scholars who tend to see judges motivated by a normative and intellectual pursuit for discovering justice and the law (Dworkin 1986; Post and Segal 2006). These Law and APD scholars also contrast themselves with both rational choice and Law and Society scholars; despite sharing an interest in institutions with these scholars (Feeley and Rubin 1998; Galanter

1974; Kagan 2000; McNollgast 1995), the Law and APD approach emphasizes the ways that historically rooted dysfunction and “intercurrents” inhibit any one model of judicial behavior (Orren and Skowronek 2004).

The edited volume by Ronald Kahn and Ken Kersch (2006) is the third compilation to be published in recent years on Law and APD (see Clayton and Gillman 1999; Gillman and Clayton 1999). The volume also follows on the heels of two book-length synopses of the broader APD project (Orren and Skowronek 2004; Pierson 2004) and numerous review essays (see Gerring 2003; Skrentny 2006; Whittington 2000). Clearly marking a time of both disciplinary assertion as well as introspection, the publication of these works provides an ideal moment to take stock of what the research has accomplished, as well as what it might do better in the future.

The Law and APD literature has provided numerous insights that enrich our understanding of judicial decision making, providing a necessary political, historical, and institutional context often missing in other modes of judicial research. At its best, the Law and APD literature exposes the subtle juxtapositions and intersections of judiciary-based norms and behaviors with the pressures and influences coming from electoral politics and institutions. It has helped explain why an institution with few formal powers has moments of dramatic authority and influence on politics and culture. Law and APD scholars have been exceptional at understanding court authority in relationship to the institutional dynamics of electoral institutions. Moreover, at least in comparison to other many other fields of political science and public law, Law and APD scholars have made increasing efforts to incorporate questions of gender and race into broader understandings of law and courts (Brandwein 1999; Graber 2006; Murakawa 2005; Novkov 2001, 2008; Smith 1997).

At the same time, the field could do more to meaningfully engage with the original APD understanding of institutional and “state” development in determining political and judicial behavior and outcomes. Although the word “institutions” is well on display in Law and APD work, it remains more a term of art than a substantive point of engagement. Law and APD scholars tend to use the word “institutions” but mean a more porous and less analytically rigorous “political context.”

The distinction between institutions and political context is not one of trivial semantics. The original APD emphasis on institutions meant attention to the way broad organizations of power use rules, procedures, and norms to create and embed authority and render individual actions marginal and subject to broader workings. The heart of this APD agenda emphasizes organizational and state autonomy and how political power becomes embedded and authoritative through the wielding of institutions. Institutions create a political environment with concrete structural limits on behavior and battles over power. Historical development also means something specific—the uneven temporal development of institutions creates disjuncture and dysfunction in the political arena, as institutions often exist well beyond their initial purpose,

constraining modern day reformers in the process. These specific and definable independent variables—institutional autonomy and historical development—have been replaced in the Law and APD literature with a more porous and less compelling notion that “context” matters. More can be done to assign causal specificity to the role of timing, institutional sequence, and institutional design, and, in the process, understand power and politics as refracted and importantly shaped by institutions and not simply as a direct reflection of individuals and societal interests.

One of the costs of deemphasizing the importance of institutions is that Law and APD scholars tend to, ironically, ignore legal institutions. They write about the law as being defined by nine Supreme Court justices, and they say little about actual legal institutions such as the structure and procedure of courts, its administrative apparatus, its adherence to common law, the adversarial nature of the process, and the organizational role of lawyers and the Bar. Not surprisingly, Law and APD scholars consistently conclude that when it comes to having political influence, judicial power is largely limited to being a veto player, heavily dependent on the support and actions of legislators and executives. How could it be anything else given that they define “law” as little more than nine judges?

Were Law and APD scholars to examine courts more broadly as institutions, they would see the multitude of roles judges (Supreme Court, federal, state, and administrative), lawyers, appellants, and institutional procedures and rules play in both the development and current functioning of modern government, let alone the role they play in shaping and mobilizing societal interests and practices (Feeley and Rubin 1998; McCann 1994; Melnick 1994). If Law and APD scholars were to treat legal institutions the way other APD scholars treat their own specialties such as Congress, federal bureaucracies, and the executive branch—as meaningfully autonomous institutions composed of rules and organizational behaviors—they would find courts play an often central and vital role in enhancing the power of the modern state.

The need for greater theoretical and methodological coherence is not distinctive to Law and APD scholars; it overlaps with broader trends within APD, as the field has expanded its tent and appeal to scholars with diverse interests and theoretical agendas. And this is not necessarily a bad thing, as no one should feel confined by professional concepts and methodological tools in their intellectual approach. Richard Bense (2003), in fact, makes exactly this argument in defending the porous nature of current APD scholarship and dismissing attempts to come up with a core disciplinary standard as limiting the pursuit of knowledge and creativity. I do not entirely disagree, as one of the positive aspects of having a broadly defined professional label is that it enables scholars with a multitude of interests that are deemed marginal in political science—especially issues of race, class, and gender—to congregate under the legitimizing label of APD.

But studies of politics ought to be guided by theoretical and normative concerns, and if we take seriously the origins of APD, and particularly its interest in the state's independent role as a distributor of democracy, we can see more clearly what is lost in being too slippery with concepts such as "institutions" and "functionality." The origins of APD reflect that the discipline emerged not just as a professional label, but as an alternative way to understand power and political change in America. As Martin Carnoy (1984, 5) has written, "theories of the State are theories of politics." By contrast, much of the Law and APD scholarship (and recent APD scholarship) reads as if it lacks a theory of politics and power. This leads the scholarship to be far too casual in its analytical understanding of power and to ignore some of the normative insights that were originally closely associated with the mission of APD (see Smith 1988).

I begin this essay with an overview of the APD approach, including a discussion of how it has addressed the role of courts in state development. I spend the remainder of the essay exploring the contours of the Law and APD literature, particularly as displayed in the Kahn and Kersch compendium, both to illuminate the impact of this field and to raise possibilities for further growth.

## AMERICAN POLITICAL DEVELOPMENT

The label "American political development" encompasses a core or canon of works and ideas as well as a broader range of tangential topics that fit more or less comfortably within its midst. Non-APD scholars often mistakenly equate the field with political history, but although history is central to the APD project, neither historians nor APD scholars would say that the intellectual motivation is strictly or even primarily political history. There is a world of political and legal historians who exist outside of APD that are interested in overlapping but meaningfully different debates about the place of history, narrative, politics, and power (see Gordon 1984). Legal historians such as Mary Dudziak (2000), Robin Einhorn (2006), Lawrence Friedman (2002), Risa Goluboff (2003), Cheryl Harris (1993), Hendrik Hartog (1989), Morton Horwitz (1977), Michael Klarman (2004), and John Witt (2004) are sometimes cited by Law and APD scholars, as they should be, given the ways in which their works enrich the understanding of law and the historical construction of race, class, and legal norms. At the same time, APD is not an artificial boundary created by political scientists attempting to separate themselves from historians. Rather, APD scholars ask different questions than political historians, and they examine and use history for different purposes.

What separates APD from political history is its interest in institutional and ideological development and its insistence that political power is

determined within these sites. The field originates from a multitude of intellectual strands and substantive debates, and those who identify with the label point to a diverse set of influences. Karen Orren and Stephen Skowronek (2004, chap. 2), two of the field's founders and most influential members, argue that the questions of APD initially derive from long-ago debates between Woodrow Wilson and John Burgess over the importance of culture versus structure. Another strand of APD emphasizes notions of "path dependence" that sees its intellectual origins equally in classical economics as much as political theory (Pierson 2004). The field's earliest work developed hand-in-hand with comparative politics scholars who claimed to be "bringing the state back in" to the study of political change (Evans, Rueschemeyer, and Skocpol 1985) by resurrecting Max Weber's counter to Karl Marx that revolutions and political change do not occur absent existing bureaucracies and professionalism.

If there is a common substantive question that draws these scholars together, it is the ever-present and never satisfactorily answered, "why no Socialism" in America—why is the nation seemingly unique for having a relatively small federal government with limited authority to control economy and society? Particularly influential for this scholarship was Louis Hartz's (1955) pronouncement of America's liberal exceptionalism: he claimed that the nation failed to develop the same form of welfare state and class-based political parties because of its unyielding and seemingly irrational allegiance to the creed of Lockean liberalism. Numerous APD scholars have sought to challenge and refine Hartz's argument with attention to the ideological and institutional boundaries that shape America's unique political development (Greenstone 1986; Norton 1993; Orren 1991; Rogin 1988; Smith 1997). What ties these various APD works together is that all of the scholars agree that a uniform national culture is an insufficient explanation for the slow and incomplete development of the American welfare state. The ideological and cultural will for a social welfare state existed; it is just that this public will was thwarted by governing institutions too weak to defeat the hegemony of corporate capital (see Bensel 2000; Berk 1994; Hattam 1992; James 2000).

But even more than the question of "why no Socialism," APD scholars agree with the contention that neither pluralist nor Marxist explanations of politics and political change are satisfactory. Governing institutions do not simply reflect societal interests, whether the interests are defined broadly and democratically as pluralists contend, or narrowly and hierarchically as Marxists alternatively contend. Influenced heavily by Weber's (1978) attention to bureaucratic development and the creation of a seemingly separate professional class of government workers bound by rules of objectivity and rationality, as well as Nicos Poulantzas's (1974) attention to the autonomy of interests among government or "state" actors, APD scholars argue instead that political change is constrained by preexisting government institutions and rules. The officials who work within these governing institutions derive

interests from their occupations, and thus come to see themselves as independent and even in conflict with the interests of society (March and Olsen 1984; Skocpol 1985). Because institutions do not refract interests directly but instead represent an amalgam of historically produced and institutionally entrenched archeology, the actors within them do not mirror society. Government institutions and actors come to play roles that are meaningfully autonomous from society—hence the notion of a “state” with independent interests from any specific societal group. These government institutions create an analytically distinct set of interests and politics that cannot be explained without attention to the rules and incentives inherent within the institutions that motivate individual behavior and political outcomes.

Once the state develops in a particular manner, which is itself a reflection of a particular combination of historical and political events, its existence leads the actors working within governing institutions to both develop an understanding of themselves as independent sources of power and authority and to subsequently use their power to defend these institutions against future reform. Not only do institutions create and shape the interests of those who work within them, the rules, structures, and provinces of authority that these institutions embody have consequence in shaping the broader polity and society. Society, in terms of how it is categorized and divided, is shaped significantly by government policies that empower, legitimate, and normalize some interests and marginalize, demobilize, and make deviant others. Future efforts to change the government, to change politics, then, results neither in reforming a blank slate nor in a functional response to new societal demands, but takes place in the context of preexisting institutional structure and authority.

Moreover, the creation of different institutions at different moments leads the state to have multiple political components that progress at different temporal speeds and logics. Multiple political orders exist simultaneously in America, and institutional contradiction and fragmentation can make it difficult for mass movements to gain power, even with ample numbers and support. As such, APD scholars pay great attention to the development of new institutions that fail to dislodge old institutions and polities but that instead come to coexist and often conflict with the old order, creating a “disjointed” polity with multiple mandates emanating from various historical eras (Orren and Skowronek 2004; Schickler 2001; Skowronek 1982). Preexisting governing institutions—whether it be congressional rules of seniority or government agencies initially designed with mandates to exclude certain swaths of the population—have functioned to mitigate the success of the nation’s largest political movements, from farmers to laborers to racial minorities, because preexisting institutions were impervious to the democratically led reform efforts.

Institutional fragmentation and contradiction can also provide for surprising opportunities to groups that are typically at the margins of political

power. Theda Skocpol (1992) has emphasized the ways in which women were able to achieve political goals that were unexpected, given the context of capitalist development and the hierarchies and morays embedded in society at the time. John Skrentny (2002) has made a similar argument with regards to the benefits that African Americans, Latinos, and women received from the 1964 Civil Rights Act, despite significant institutional weaknesses in the Act itself. Civil rights groups relied on a variety of institutional and political alternatives to buttress the power of an otherwise hollow law (Lieberman 2002). Amy Bridges (1984), Ira Katznelson (1981), and Martin Shefter (1988) all explore momentary flourishes of regulatory power at the local level, despite the seeming absence of weapons for these institutions.

Part of the fascination with state-building, then, is that it is not uniform, functional, or rational, and that pockets of opportunities and successes exist that would surprise scholars who are American apologists and critics alike. Authority “develops,” with some of it deeply embedded while other aspects are surprisingly open to reform. Unlike pluralists who see social movement achievements as evidence of diffuse political power (Huntington 1981), or Marxists who see it as evidence merely of brief moments of chaos and opportunity in the midst of structural constraints (Piven and Cloward 1977; Thompson 1977), APD scholars see these successes as influenced and structured greatly by institutional and historical forces that provide specific moments of opportunity for the powerful and powerless to converge and alternatively fight or preserve politically created hierarchies.

Methodologically, these substantive and theoretical questions cannot be adequately explored without attention to the independent influence of history and the development and existence of political institutions. By examining the disjuncture between societal demands and political outcomes, as well as the ways in which initial institutional choices at specific historical moments foreclose future avenues, it highlights the importance of two independent variables—institutional autonomy and historical progression—that are too often ignored in academic models of politics. Employing a historical methodology enables scholars to illuminate the ways in which existing institutions and the politics that they create are products of particular historical junctures. As path-dependence research has well illuminated, the historical choices at an institution’s initial creation shapes future choices (Pierson 2004).

This methodology also highlights the absence of functionalism in our state-building choices and pathways. Institution-building is disjointed and historically contingent on preexisting relationships, producing historical lags in which, contrary to the expectations of rational choice scholars, the rules and structures of a governing body will reflect multiple layers of interests that diffuse political power in unexpected ways (Schickler 2001; Skowronek 1993). The policy making of specific historical moments is often the product of exceptional acts such as social movements, war, and mass economic

transformations. Though these moments are short-lived and exceptional, the institutions they produce have consequences that skew political debates and outcomes for decades, if not centuries.

## APD SCHOLARS' SKEPTICISM OF COURTS

When APD scholars first examined law and courts in their work on American politics, it was in the context of these central theoretical and substantive questions involving state and institutional power. Courts—and particularly questions of how courts work and judges behave—were not the center of the research, but neither were they ignored. The rule of law and the centrality of lawyers and judges have long been recognized as an exceptional feature of the American polity reflecting the liberal-individual nature of society (Tocqueville 2001). Law in America may have “flourished on the corpse of philosophy,” as Louis Hartz (1955, 10) claimed, but it has also always had a prominent place in broader theories of institutional and state power. Max Weber (1930) argued that law was the basis of the legitimacy of modern state domination or authority, as the ideal-type Western state was a “political association with a rational, written constitution, rationally ordained law, and an administration bound to rational rules or laws, administered by trained officials” (xxxix).

Legal domination is necessary for the sustained functioning of bureaucratic administration and capitalist development and APD scholars have often portrayed court influence in this light. In Skowronek's (1982) study of state-building, the Supreme Court “shaped the boundaries of inter-governmental relations. It defined the legitimate forms of interaction between states, between state and national governments, and within the national government itself” (27). The judiciary's role in the burgeoning capitalist economy was particularly important, as courts aggressively asserted themselves into economic affairs by promoting both theories of laissez-faire capitalism and a slowly evolving theory of employer liability for dangers in the workplace. The industrial revolution and its consequences moved government actors to try and invigorate weak state institutions, and courts at this time “filled a governmental vacuum left by abortive experiments in the administrative promotion of economic development. . . . courts molded the prerogatives of government into predictable but flexible patterns of policy toward capitalist accumulation” (27).

Note, however, the specific role courts are perceived as playing at this time: in direct opposition to an activist regulatory government. In detailing the emergence of a “new American state” during the late nineteenth century to confront the societal consequences of the industrial revolution, the bulk of scholarly work has emphasized the importance of elected officials responding to a variety of interests, from laborers to farmers to capitalist entrepreneurs.

The Supreme Court, in contrast, is seen as the foil of these efforts, as it strikes down the Interstate Commerce Commission (Skowronek 1982), state-level workplace laws (Gillman 1993), railroad regulation (Bensel 2000; Berk 1994), and laws designed to promote labor union formation (Forbath 1991; Hattam 1991; Orren 1991; Skocpol 1992). Modern accounts of the role of courts and state development continue to convey this perception, such as the recent work of Jacob Hacker (2002), who argues that courts discourage government activism in the realms of retirement and health insurance expansion.

APD scholarship sees the New Deal as a defining juncture in the development of a national welfare state, a political moment when the judiciary deferred authority over the economy to elected actors. The history of Supreme Court opposition to specific acts of regulatory expansion, especially during the so-called *Lochner* era, is clear. But APD scholars have gone too far in juxtaposing court power against other political institutions and, as such, have tended to overlook more subtle roles that judges and courts play as democratic state actors.

Part of the reason for these skewed conclusions is how APD scholars define “law and courts.” In contrast to how they portray executives, legislators, and bureaucrats as institutionally driven actors, APD scholars define the set of legal institutional actors quite narrowly, with reference focused often exclusively on the Supreme Court and its nine individual justices. Court decision making is seen less as government-by-law and institutional than as “government by gentlemen,” an elite group of individual judges seemingly using value judgments as opposed to following rules and procedures (Skowronek 1982, 28). Judges are not seen as byproducts of institutional incentives, constraints, and structural features. In contrast to Weber’s rational bureaucrat or the political actors described by APD scholars when they refer to presidents (Skowronek 1993; Whittington 2007), Congress (Schickler 2001), parties (Bridges 1984; Frymer 1999), and bureaucracies (Carpenter 2001), judges are simply individuals following their own elite preferences and backgrounds. As such, APD scholars tend to portray courts, as Justin Crowe (2007) has recently commented, in a manner that is institutionally thin, and have ignored the development of judicial administrative capacities, jurisdictional authority, and coercive power.

For example, the role of lawyers as political entrepreneurs—as shapers of judicial decisions and thus as bulwarks of institutional autonomy—has been generally absent from APD discussions of courts. Despite Skowronek’s (1982, 34) argument that lawyers are the intellectual bulwarks of the state—the “proliferation of politically neutral legal advocates marks a general movement toward greater rationality in the operations of the early American state”—few APD scholars have paid attention to lawyers, the Bar, legal administrative apparatuses, or to a myriad of ways in which judges are legally obligated to respond to mobilized opinions in ways that elected officials are

not. This is particularly surprising because of the procedural centrality of lawyers to the courtroom, to the structure of legal argument, and in turn to the outcome of legal decision making (Fuller 1978; Galanter 1974). It is also surprising, given the new interest among APD scholars in the importance of political entrepreneurs (Carpenter 2001; Sheingate 2003) in shaping institutional power. Lawyers have always been critical political actors, and their entrepreneurship in gaining control over policy realms is legendary in the twentieth century, from the New Deal to today, and yet there is little to no APD scholarship that portrays lawyers as critical to judicial decision making or to broader policy making in an equivalent manner of so many Law and Society scholars (see Derthick 2001; Galanter 1974; Kagan 2001).

The consequence of seeing courts as institutionally thin is that it leads APD scholars to miss the important ways that courts contribute to the development of state power. Judicial authority has been absolutely essential to the power and reach of the modern regulatory state. Courts have sometimes opposed the building of a national welfare state and sometimes have been critical to its strengthening. Legal historians William Novak (1996) and John Witt (2004), both of whom examine the expansion of common law and tort law in the absence of state regulation of the workplace during the late nineteenth century, illuminate the myriad of ways in which courts have worked as bulwarks of the state by providing workers common law protections against employers and corporations that the national government refused to pass. Legal scholars of the post-New Deal era, particularly the civil rights movement of the 1950s and 60s, have chronicled how courts were emphatically positioned at the center of national policy-making realms from school desegregation and illegal race classifications to affirmative action, criminal justice, employment, welfare, and voting rights (see Bumiller 1987; Frymer 2003; McCann 1994; Skrentny 1996). Courts have become a critical form of government enforcement in a whole host of arenas in the modern state, as legislators now commonly provide courts with both explicit and implicit authority to enforce and interpret large provinces of national policy making (Barnes and Burke 2006; Feeley and Rubin 1998; Lowi 1967; Melnick 1994). As a result, courts have also been both a target and a vehicle of political efforts to retrench the New Deal and civil rights eras (Staszak 2007).

## LAW AND APD SCHOLARSHIP

In the introduction to their edited volume, *The Supreme Court and American Political Development*, Ronald Kahn and Ken Kersch (2006) suggest that they are going to go in a different direction than much of the previous law and APD work, as described above. They proclaim an ambitious and exciting agenda for the volume: “we believe that the time has come for public law scholars who consider themselves part of the broader APD project to

step up and provide a more subtle account of the way law works and of the role that the Supreme Court plays in American political development” (13). And there is great potential for their volume because they include an exciting group of Law and APD scholars whose work has, in many cases, not received the attention it deserves.

The question, however, is what this agenda of Law and APD scholarship looks like—what it means to assert this scholarship as part of the broader APD project. Prior to the Kahn and Kersch compendium, the most popular subject for Law and APD scholars has been the role courts play in the broader political regime. Extensive attention has been given to detailing the relationship between the decisions of the Supreme Court and the will of elected officials. This view sees courts less as autonomous institutions than as respondents to the dynamics and incentives of the executive and legislative branches. It follows in the broader spirit of political science skepticism of court power—Robert Dahl’s (1957) influential claim that the Supreme Court is unlikely to disagree with national majorities in the legislature for very long because politicians will slowly reign judicial decision making more closely to their interests through judicial appointments, Segal and Spaeth’s (1993) claim that judges are operating as political appointees, and McNollgast’s (1995) claim that they are acting as administrative bureaucrats. Equally influential is the work of Gerald Rosenberg (1991), who called the Supreme Court a “hollow hope,” claiming that courts are ineffective policy makers. Using some of the Court’s most hallowed decisions of the twentieth century as evidence, he argues that without the active help of the weapons that the other political branches have at their disposal—such as the power of the purse and sword—the Court is ineffective as a policy actor.

Law and APD scholars have complicated these arguments by explaining why elected officials, despite all of the formal power at their disposal, often find it in their own interest to grant great amounts of authority to the judicial branch. Mark Graber (1993) has argued that judicial review is not simply a product of activist judges but is intrinsically tied up in regime politics. Dipping into and twisting realignment theory, Graber argued that courts are encouraged to be active in moments when one of the dominant political parties wishes to avoid a political issue that has the potential for disrupting its electoral coalition. In a more recent article, Graber (2000) argues that Supreme Court authority was enhanced in the nineteenth century as the Court asserted authority by making decisions that were simultaneously intrusive on the power of other federal branches and popular with critical political actors.

Graber has inspired numerous scholars within his field. Howard Gillman (2002) has prominently and persuasively argued that the ideological makeup of federal courts has often reflected efforts by party leaders to entrench their policy goals through court appointments. George Lovell (2003) and Kevin McMahon (2004) argue that an overlooked reason for the judicial activism

in labor and civil rights policies was the Roosevelt Administration's efforts to deflect controversial statutory and political issues to the quieter avenue of the judiciary, because the president and others in his administration recognized the difficulty of such an approach through legislative politics. Lovell examines the writing of ambiguous labor statutes (both pre-New Deal acts such as the Erdman and Clayton Acts and Roosevelt's passage of the Wagner Act in 1935) as a strategy to avoid political accountability, and McMahon examines the ways in which Roosevelt used appointments to both the Department of Justice and the various branches of the judiciary to enact civil rights reforms through litigation.

More recently, Keith Whittington (2007) argues that moments of Supreme Court assertion is in many ways a by-product of the willingness of presidents to legitimate such authority, often for their own interests instead of any broader concern for court institutional power. Whittington applies Skowronek's (1993) theory of presidential regimes—which claims that presidents enter into a specific historical and institutional context when they are elected that serves to independently determine the contours and possibilities of their authority and power, including court appointments and, thus, court power. In contrast to those who blame the court for its own activism, Whittington (2007) writes that “even before the Supreme Court claimed that it was the ultimate interpreter of the Constitution, political leaders had already asserted the same thing. The strategic calculations of political leaders lay the political foundation for judicial supremacy” (5). In so arguing, the activities of judges, whether cautious or renegade, are as much the product of elected official goals as of their own activism. The judiciary is powerful and active, therefore, because other people—who are more politically powerful—want it to be: “the judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate” (9).

All of these scholars are cognizant of not only how the activities and decision making of the Supreme Court are directed by elected official activity, but also the subtle weaknesses of elected officials in trying to accomplish policies alone. Graber (1993) and McMahon (2005) see specific historical moments and political problems that electoral leaders feel that they cannot address directly through their own agencies, for the concern of these politicians is to avoid controversial policies that could lead to electoral ruin were the party to promote such policies in the legislative arena. For Whittington (2007), there is a myriad of structural weaknesses built into the executive and legislative branches that lead presidents and other democratic actors to alternatively assert or assent to high court activism. In short, elected officials need help, and they look to courts to provide it. They are restricted by their party coalitions, by public warrants for assertion, by constitutional and institutional resources, and by having to share powers with others.

**Kahn and Kersch: *The Supreme Court in American Political Development***

Some of the above perspectives to understanding court authority are on display in the Kahn and Kersch edited volume. In his contribution to the volume, for instance, Howard Gillman extends his early work on the post-Reconstruction Republican Party to the New Deal Democratic Party, providing evidence that Democrats actively sought to promote their policy agenda by expanding the courts in terms of seats and jurisdiction, and by planting like-minded justices on these newly expanded courts to carry out their political vision. In turn, their actions could create at least the potential for a long-term buffer or institutionalization of the party's political agenda well after they lose national majorities. Mark Tushnet's chapter also examines the place of the Supreme Court as it relates and responds to other branches, focusing primarily on the authority of the Warren Court in the mid- to late twentieth century, arguing that Supreme Courts are most powerful when there is a shared "commitment to policy-making by an elite of professional specialists" (Kahn and Kersch 2006, 123).

There are also pieces in Kahn and Kersch that engage seriously with APD arguments that historical development produces multiple political orders in conflict, resulting in a surprising set of politics and opportunities. Julie Novkov's chapter on how the Supreme Court came to rule on issues of interracial love in the post-Reconstruction era is nuanced in combining external factors such as historical and political influences of the time with internal factors such as legal norms and judicial behavior. Her study, closely scrutinizing the written decisions of state, federal, and Supreme Court judges, nicely shows a broad question in flux: the legal and political determination of what is public and private, especially with regards to racial discrimination. Her study shows how a myriad of forces (from public attitudes to lawyers to politicians to state and federal judges) all followed individual rules and structures, necessitating their involvement in particular ways, yet culminating in a "framework" that shaped the possible ways that judges could decide these cases. Recognizing courts as "passive institutions that by design must directly grapple with outside social and political phenomena without the capacity to exercise significant control in shaping their own broad agendas" (359), she nonetheless finds judicial institutions played important roles in the outcome. "There was very little elite support for or interest in invalidating bans on cross-racial intimacy. Nonetheless, lawyers representing convicted defendants . . . had sufficient incentives to challenge the prohibitory regime on any grounds that could conceivably succeed" (359).

Ken Kersch's chapter is similarly nuanced in examining how the Supreme Court dealt with multiple traditions and understandings of democracy to create a new constitutional order during the post-New Deal era. Kersch particularly excels at weaving jurisprudential narratives with

institutional processes, especially those processes such as the National Labor Relations Board, which come with statutory authorization. By showing the complex interplay between labor law, constitutional law, and competing political and legislative coalitions of the New Deal, Kersch illuminates the importance of multiple orders working simultaneously, and as such, in tension and dysfunction. He argues that previous scholarship has been wrong to see changes in jurisprudence during this period as a singular transformation, but instead should be seen as “complex negotiation” of ideas, ideological agendas, and precedents that became “woven into complex developmental patterns” (177–78). Changing labor law involved overturning old laws of economic individualism and antigovernment, but in the process it forced the court to address new issues—notably civil rights—which would force it to return to the old ideas dressed, so to speak, in new clothes.

But Kersch’s and Novkov’s analysis are exceptional in that they combine an understanding of the judicial decision as a dependent variable with a subtle understanding of how both political and judicial structures, and the historical development of these structures, operate as independent variables. They recognize that judicial decision making is the confluence of factors both internal and external to the Supreme Court. This fits with the dual messages of the book—that one cannot understand judicial behavior without attention to political development, and that one cannot understand the American state without the role of judges.

The bulk of the compendium, however, is engaged less with the substantive and theoretical APD project than with using APD methodology to engage scholars in other fields of political science interested in explaining how Supreme Court judges make decisions. As mentioned in the introduction, Law and APD scholars have employed historical-institutional methodology to refute behavioral theories of judicial decision making. Behaviorists argue that Supreme Court justices make decisions based on their own political attitudes and policy preferences, focus on the political backgrounds of individual judges, and argue that changes in judicial doctrine are a direct result of changes in the makeup of the Court (Baum 1988; Segal and Spaeth 1993). Individuals act sincerely as individuals; only when individuals on the Court are removed or added is there change in the judicial branch’s decision making. Context and institutions are not considered beyond the ways in which either variable directly motivates judges to perform certain tasks such as casting votes and granting *certiorari*.

Many of the essays in the Kahn and Kersch compendium argue that judicial decision making is not simply a reflection of individual attitudes but is dependent on a whole host of external factors as they exist in specific historical moments. These factors emanate from a wide range of political entities, from Congress and the presidency to social movements and interest groups. The articles in the volume illuminate the “long-term processes that lead to the construction of both judicial preferences and of the institutions

that constrain the choices of judges as they pursue them” (2006, 14). Kahn and Kersch argue in the introduction that the Supreme Court is not simply a legal institution, it is also a political one; at the same time, they rightly argue that to “simply seek to ‘link’ the courts to events in the nation’s ‘political’ branches . . . flatten[s] the unique properties and processes at work in courts in an effort to more easily assimilate them into models designed with other institutions in mind” (19). Judicial decision making, they and their contributors argue, needs to be subtly situated in a web of historical constructions, developing norms, and external pushes. Court decisions are the product of an intricate process of judicial learning in the context of their quasi-autonomous situation of responding and not responding to political pressures (20). Development of constitutional jurisprudence includes “not simply precedent and electoral politics but also the continual process of the formation, transformation, interplay, and disintegration of a broad array of categories—legal, intellectual, political, social, cultural—that constitute constitutional analysis” (20).

Numerous chapters in the book nicely explore the thinking of individual judges in writing these decisions, while placing their decision making within a context of both external and internal forces lurking at the time the decision was being formulated. Mark Graber focuses on two famous cases of the 1860s, *Roosevelt v. Meyer* (1863) and *Ex Parte McCordle* (1868); he examines both of them from numerous perspectives, including behavioral and strategic, as well as examining normative values and jurisprudence norms. He argues that no single factor can explain the outcome of these cases. Instead, by combining a study of common law precedent—which in different ways binds and authorizes judicial decision makers, particularly because the meanings of important common law decisions are still in flux at the time of new decisions—with external influences such as the legislative and executive branches, Graber argues that no one paradigmatic understanding of judicial decision making can independently explain the Court’s logic. Some contributions to the Kahn and Kersch volume illuminate the long-standing consequences of a decision, such as Thomas Keck’s analysis of the *Bakke* affirmative action decision of the mid-1970s, whereas others, such as Carol Nackenoff’s essay on Native American law in the early twentieth century, show the limit of the Supreme Court in influencing how groups think about critical categories of identity.

But while most of the chapters in the book are excellent examples of constitutional interpretation, they are less enlightening as works of APD. Even as pieces that emphasize APD methodology, they do not rigorously examine the role of institutions, instead relying on—as I wrote in the introduction of this essay—political context as a substitute for institutions. These essays put famous court decisions in a broader political and historical context; what they do not do is meaningfully scrutinize the role of institutions and historical sequence as important determinants of causality, let alone explore the consequence of these factors for state development, authority, or power.

Wayne Moore, for example, smartly scrutinizes the Fourteenth Amendment's political limitations to help explain why the justices were constrained in formal ways by the politics of the time, using a normative and legal-theoretical understanding of how judges think and argue. With a close reading of the *Slaughterhouse Cases* (1873), Moore argues that judges were not simply interpreting the Fourteenth Amendment doctrinally in terms of its internal consistency and consistency with the written Constitution, they were constructing this meaning within the web of multiple political actors and the role of "We the People," and as such were aware of their purpose and their place in this broader political context. Ronald Kahn looks at more recent twentieth century cases to explore why judges reverse long-standing legal precedents in some situations but not in others. In doing so, he examines the degree to which judges think strategically, ideologically, or from the perspective of normative theory. He finds somewhat ironically—at least in the context of APD theories of path dependence—that the Supreme Court is able to break fairly easily from previous precedents. Court autonomy, he argues, allows it to "feel less threatened by outside pressures than by directly accountable political institutions" (101). In making this argument, he is sensitive both to the impact that external politics has on court decision making as well as the more subtle influences on judges that set their form of "politics," as apart from legislative and bureaucratic decision making. Neither Kahn's nor Moore's essays, however, do much meaningful work with notions of institutional autonomy and historical development. While they place their cases in political and historical context, they do not extensively examine how these cases are the products of institutional refractions and limitations.

A similar example of both the excellence in case law interpretation and the relative absence of APD theory and institutional methodology is Pamela Brandwein's close and interesting read of Justice Bradley's decision making in the *Civil Rights Cases* (1883), a decision delivered in the midst of Republican Reconstruction efforts after the Civil War, and one that in many ways narrowed the reach of legislative efforts to protect basic forms of equality for newly freed African Americans. In her chapter, Brandwein nicely situates Bradley's interpretation in the historical context of the time and uses a broadly interpretive view of institutions to understand how judicial decision making impacts the future course of Supreme Court jurisprudence. She argues that legal scholars have missed the moderate message that the Supreme Court wished to promote at the specific time of national rollbacks on civil rights in the 1880s. With particular attention to the language of the Court and its consistencies and inconsistencies with politicians of the time, Brandwein argues that the *Civil Rights Cases* offered more possibilities for civil rights reform than have been recognized by recent legal scholars and judges. The Waite Court sought a principle of state neglect that protected certain rights for black laborers, but not a more radical vision that included substantive rights protected by a strong federal regulatory regime.

This is an important corrective for judges and law professors concerned with correctly interpreting Supreme Court precedent. Brandwein nicely shows that modern interpretations have missed the multiple meanings of the Court's vision of state-centered federalism, and she smartly interprets what she sees as the real meaning of the decision. It is unclear, however, what analytical leverage is realized in showing that this decision has, in many ways, been misinterpreted over the decades and centuries. Brandwein sees institutions as vocabularies, ideas, and concepts, but she does not show how this language is causal for legal outcomes. She does not address how the institutionalization of words potentially impacted the decision, or future decisions, by limiting or expanding the outcome. By focusing so carefully on a single Supreme Court decision, as many authors in this book do, Brandwein directs too little attention to the politics that constrains judges and shapes both subsequent interpretations of judicial decisions, particularly the way in which such decisions are lived in politics and society.

### BRINGING THE STATE INTO LAW AND APD SCHOLARSHIP

Ignoring the courts as institutional actors does not avoid deeper scrutiny of how history and institutions can impact political and legal outcomes. It leads Law and APD scholars to lose sight of the theoretical core of APD. Law and APD scholars have emphasized political context, but they have placed less emphasis on institutional and state autonomy. As such, it is now unclear whether there is anything conceived of as a state existing in many of these studies, raising the question of what political paradigm underlies this scholarly agenda. As mentioned earlier in the essay, APD began as an attack on pluralist and functionalist accounts of politics. But because of the reliance on Robert Dahl and because of an overemphasis on the words and ideas of Supreme Court justices, many of these studies blur quite nicely with pluralist accounts of the judiciary and political power.

For example, in his contribution to the Kahn and Kersch volume, Mark Tushnet argues for the notion of a "collaborative Court" that sees judges in much the same way that the pluralist scholar Richard Neustadt (1961) saw presidents many years ago—as important institutional actors that succeed or fail depending on a variety of considerations, including their own views and actions and the actions and views of others. He relies in this essay on Robert Dahl (1957) and Martin Shapiro (1981), both pluralist scholars who see courts as part of a national political system without any meaningful sense of independence and interests. What Tushnet and other Law and APD scholars do not examine is how judges act independently of broader societal and political interests. How are courts acting as institutions in a manner that meaningfully stamps their own autonomy and preferences on politics? Are there ways that the institution—perhaps because it is a house of elite

argument where “rights” tend to resonate over political deliberation—will inherently bias itself toward civil and individual rights and oppose economic and group rights?

There is some of this in the earlier work of Law and APD scholars. Scholars such as William Forbath (1991) and Howard Gillman (1993) have argued that the unusually elite background of judges has led courts to develop and maintain a jurisprudence with theoretical ideas about democracy and economy that are often out of step with the rest of society, based more on philosophy than rooted in everyday policy concerns. The institutional position of judges gives them autonomy of power, allowing ideas and viewpoints to germinate and be invoked into public policy—ideas and viewpoints that would not otherwise have had significance, given popular and political opinion at the time. Similarly, other scholars have argued that judges have been involved in defining what is understood to be political and legal, and have in particular found “rights” language appealing in constructing notions of legality and democracy because it fits with their values and elite position (Bybee 1998; Smith 1997; Whittington 1999). In this sense, the Supreme Court has consistently been an important site for the expansion of ideas and ideologies that became institutionalized into national policy.

But much more can be done with this insight—that judges behave the way they do because of their institutional position and because they are a product of a certain type of training and incentives that lead them to behave much like Weber’s bureaucrat and Skowronek’s president—just in the context of a different set of institutional guises. To find more detailed attention to institutions as refractors of political power, we need to look to law scholars in other disciplines. The rational choice literature is one approach that has explored how strategic behavior within legal and administrative structures creates a politics that exudes independence (McCubbins, Noll, and Weingast 1989). The Law and Society literature has perhaps explored these questions to the greatest extent. For example, Marc Galanter’s (1974) article, about the impact that “repeat players” have in structuring the rules of the legal process and courtroom, reflects the ways in which the judicial institution evolves—in a manner independent of societal preferences—to have long-standing consequences on the politics it produces. Galanter argues that because repeat players such as corporations and the government are in court consistently, they have a very different courtroom strategy than “one shotters,” who show up only occasionally to remedy a specific legal problem. Repeat players concentrate on long-term interests and thus pay attention to legislative and judicial debate over courtroom procedure and over common law precedent in a way that both gives them an institutionally entrenched advantage over one-shotters, and also dramatically shapes how courts and judicial outcomes will occur quite independent of the facts and justice of a single case.

Galanter did not place his study of courtroom dynamics in a historical perspective, and an APD scholar could do much to show how his study

exaggerates a specific historical moment into a broader phenomenon. Galanter also ignores how competing institutions both conflict with and interact with courts to provide greater dysfunction and opportunities for the have-nots in the court room. Galanter's ignoring of judicial interactions with legislators, for instance, leads him to miss the importance of attorneys' fees and class actions—both passed by Congress—as a way of helping poor litigants because they are not “repeat players” interested in long-term rules (Frymer 2003). But Galanter's detailed attention to the way in which the courtroom functions as an institution is something that can and ought to be drawn upon further by APD scholars, both to show more clearly the institutional nature of judicial decision making and to show how power in American society gets refracted in a way that is both fought for within and driven by institutional dynamics.

This brings us to perhaps the most important reason why states and institutions ought to be brought more centrally into an understanding of law and courts. As the early writers of APD and new institutional scholarship well argued, it is within institutions that power is fought over and formulated. From Weber to Foucault, to James Scott and David Garland, to Theda Skocpol and Stephen Skowronek, scholars have sought to show the ways in which power lies in institutions. The best work of legal scholarship continues to remind us of these considerations. To include discussions of power need not take legal scholars back along a route of simply normative politics—a “jurisprudence of values” that Rogers Smith (1988) warned against. Putting questions of power and politics back into Law and APD is instead a call to be more explicit in understanding what is behind the driving forces of legal action, as well as to make this subfield a more central part of APD and American politics broadly by actively engaging in the paradigmatic and substantive questions that engage the broader fields.

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