THE DISTINCTIVENESS OF THE SUPREME COURT: AN HISTORICAL INSTITUTIONALIST PERSPECTIVE

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ABSTRACT

This essay challenges the assimilation of the U.S. Supreme Court by a diverse array of political scientists by analogy to either a legislature or an executive branch bureaucracy. Using a schematic map of the basic underlying structure of the U.S. Constitution's core institutions, I argue that the Court, considered as an institution, is *sui generis* and distinctive, and should be studied as such. The Article I Congress is structured horizontally. As such, the chief institutional challenges it confronts are collective action problems, which can be resolved through rewards, punishments, bargains, trades, side-payments, leadership, and caucusing. The Article II executive is structured vertically. As such, the chief institutional challenges it confronts are principal-agent problems, which can be resolved through monitoring and command and control. The Article III Supreme Court is structured triadically. As such, the chief institutional challenges it confronts involve problems of authority and legitimacy, which can be resolved through justification. The study of judicial politics should not elide these core institutional differences and dynamics, but rather should recognize and embrace them.

KEYWORDS: *U.S. Supreme Court; U.S. Constitution; institutionalism; historical institutionalism; judicial politics; legislatures; bureaucracies; courts*

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I. INTRODUCTION

Why should political science students study the Supreme Court? Not long ago, this question probably would not have been asked. The Court sits at the pinnacle of one of the three constituent branches of the national government. The Court's policy impact in major areas has been readily apparent, whether in affirming chattel slavery, thwarting the push to create modern regulatory or administrative state, affirming and then outlawing racial segregation, or proclaiming rights to religious liberty and bodily autonomy.[2] Polls have long rated the Supreme Court as the federal government's most respected branch, and one of its most respected institutions. Scholars were interested in it, and students—who take naturally to its adversarial dynamics—wanted to study it.

Political scientists, however, are increasingly dubious. The assaults rain down from all directions. As Ronald Kahn has repeatedly observed, the increasingly scientistic mainstream of "Americanist" political science has for all intents and purposes asserted that the real politics of institutions is inherently legislative or executive. It has then applied the questions and methods devised with legislatures and the executive branch in mind to the Court (and courts). The written opinions of the Court, once considered the chief object of careful study by important Americanist political scientists (one thinks of Robert McCloskey, Wallace Mendelsohn, Alan Westin, and others), are dismissed as little more than post hoc justifications for tallies of votes registered to advance the justices' individual policy preferences. A sense of diminishing returns has set in, so the call has gone out to career-savvy "law and courts" graduate students to ply their wares on the less-studied state courts or trial courts of various types. From a different perspective, others have questioned the policy impact of even landmark Supreme Court rulings like *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Roe v. Wade*, 410 U.S. 113 (1973) (Rosenberg 1991).

But the case against the Supreme Court as a worthy subject of political scientific study is not made only by attitudinalists, strategic model game theorists, and policy impact scholars. Historical institutionalists, who focus increasingly on the Constitution outside the Courts, have joined the trend; many arrive at this disposition by rejecting the judicial supremacist identification of the Constitution with

2. See, for example, *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Lochner v. New York*, 198 U.S. 45 (1905); *Schechter Poultry v. U.S.*, 295 U.S. 495 (1935); *Carter v. Carter Coal*, 298 U.S. 238 (1936); *U.S. v. Butler*, 297 U.S. 1 (1936); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

what the Supreme Court says about it, citing progenitors like Thomas Jefferson, Andrew Jackson, and Abraham Lincoln. Viewed over the long term, of course, the states have never been shy about asserting their independent authority to interpret the Constitution, sometimes as against the interpretations of the Supreme Court. Social movement and other popular political actors frequently advocate for alternative interpretations of the Constitution, in defiance of the readings of the High Court. And, as Mark Graber has reminded us, many major constitutional issues over the course of American political development never came before the Supreme Court (Graber 2004).

Throughout his career, Kahn has steadfastly retained his focus on the U.S. Supreme Court. Moreover, he has retained his focus on the written opinions of the Supreme Court—the arguments that the justices make justifying their votes. Today, to do so is increasingly rare among Americanist political scientists, although such analysis still finds a home amongst precincts of (normative) political theory.

Like Kahn (after all, my onetime coauthor and fellow denizen of historical institutionalist and American political development circles), I have little affection for the direction that mainline Americanists have taken political science generally, and the study of courts and the Supreme Court in particular, and I find the imperialism of contemporary Americanists especially troubling. At the same time, and perhaps unlike Kahn, while foreswearing imperialist ambitions, I do join many historical institutionalists who lately have found it productive to de-center the study of American constitutionalism away from the Supreme Court. In this brief essay, as a way to reflect on Kahn's scholarly career, I would like to step away from that a bit and reflect along Kahnian lines about the ways in which the Supreme Court is a unique, and uniquely valuable, institution in the U.S. constitutional system, and why it is still, as always, worth studying—and not as a bastard variant of some other government institution but rather for what it is.

II. COURTS AS INSTITUTIONS

If the study of political institutions is valuable, then the study of courts is valuable, not because of the ways in which courts share institutional traits with legislatures, with the executive, or with bureaucracies and administrative agencies, but rather because they are distinctly themselves—that is, they are their own type of institution that do court-like things. The institutions that constitute Articles I, II, and III of the U.S. Constitution are different and distinctive. Each is and does different things in a liberal constitutional political system. As such, although it is certainly possible to find overlaps and commonalities that are worth studying, there

TABLE 1. Structure of the U.S. Constitution's Core Institutions

Constitutional Article	Institution	Structure	Core Problem	Means of Solution
I	Legislature	Horizontal	Collective Action	Rewards, punishments, bargains/vote trades, side-payments, leadership, party caucuses
II	President	Vertical	Principal-Agent	Monitoring, command and control
III	Judiciary	Triadic	Authority-Legitimacy	Justification

is considerable—indeed, unique—value in studying each on its own terms, for its own sake. Only if this is afforded an equal partnership within political science are we able to begin to fully understand the operation and development of American government.

The actual operations of the core institutions of American constitutional government do many things in many ways, both as sketched in basic form in the U.S. Constitution and in their real-world operation pursuant to both formal and informal rules and procedures. Each has a basic foundational structure that can be identified and is worth identifying. At its base, the legislature (Article I) is structured horizontally, the executive power (Article II) is structured vertically, and the judicial power (Article III) is structured triadically. The orienting structure of each formal institution has distinctive political implications.[3]

3. These are simplified pure-type characterizations of the basic institutional structure of the three branches of the U.S. government under the nation's Constitution. Of course, the realities are more complicated and have became even more so as the system has moved forward through time. The executive branch may be basically hierarchical. But islands of independence, quasi-independence, and term independence have developed. The president appoints the commissioners of the nation's independent regulatory commissions. But they are appointed for a fixed term of years. During those years, they not subject to removal (except for cause, which is exceedingly rare). Civil service legislation has insulated cadres of career, expert civil servants within the executive branch from the hierarchy of presidential selection and control. To various degrees, norms of independence and expertise counsel against the president's micromanaging of the decisions of his or her appointees, even in cabinet departments that are part of the executive branch hierarchy. The legislative branch may be horizontal, but it has its own typically informal but nevertheless consequential hierarchies by which some members are more powerful than others, whether generally or in particular areas of operation (in this regard, nonconstitutional House rules set the structure in which the hierarchies are instituted). An individual court may not be hierarchical. But judicial systems involving many courts are typically arranged hierarchically.

Legislatures are, at their base, horizontal. In liberal democracies, their members generally are elected by different (typically geographic) constituencies, with each constituency a coequal of every other constituency within the relevant legislative chamber (most are bicameral). In this way, the populace of the polity is covered—represented—in the legislature, as equal citizens, with a (formally) equal voice.

The horizontal nature of government officials in a legislative chamber has some basic implications. First, within the legislature, for purposes of making decisions, each vote is weighted equally, whether for or against enacting legislation (or voting to consider it). Each legislator has the (formally) equal power and right to perform the core functions afforded to every other legislator, including the right to introduce or sponsor legislation. Each legislator, regardless of his or her standing in the legislature, ultimately answers only to his or her electing constituency: without the support of that constituency, the legislator ultimately will be removed from office and replaced. For purposes of legislating, individual legislators are powerless—their power to legislate is collective—that is, it depends on the summation of individual votes of equals, typically amounting to a majority of individual members.

Legislatures thus face perpetual problems of collective action, including issues of coordination, bargaining, and sanctioning. Efforts to overcome collective action problems are, moreover, the central problem of the institution, and thus the means of overcoming those problems that might, in other institutions (like courts), be considered normatively antithetical are, in legislatures, normatively accepted and even approved. The norms and principles underlying legislative bodies not only accept things like trades, bargains, threats, and the distribution of rewards and punishments, but also consider these essential to the proper function of the body. Legislative assemblies use a variety of ways to overcome these collective action problems, including organization by political party caucuses (which can use systems of payoffs and penalties), hierarchical leadership, and vote-trading opportunities and side-payments. The ability to use these levers skillfully is understood to be the hallmark of a successful legislator. These tools and dynamics are normatively legitimate, and the yardstick of success for the institution is coordination.

In contrast, the executive, at its base, is vertical. Liberal constitutional executives differ, of course, with the major formal division being between executives in presidential and those in parliamentary systems. In the latter, the executive is simultaneously a member of the legislative branch; in the former, he or she is not (although the vice president does hold a, typically absentee, simultaneous role as president of the Senate). The executive power typically is vested in a single official

who is given hierarchical authority over all within the executive branch. The structure is thus one of command and control. As such, the chief problems for executives are not collective action problems (as is the case for legislatures) but rather principal–agent problems. The executive is held to the test of functionality, accountability, and responsibility. The challenge is to meet that test through hierarchical control—a challenge in large complicated bureaucracies is to successfully monitor, command, and control. For legislatures the yardstick of success is coordination; for executives, the yardstick is control.

Courts are structured triadically. That is, they are structured to resolve disputes between two parties via an appeal to a third-party: the judge. The triadic judge, sitting in a legally constituted court, in a rule-of-law system, is, as Martin Shapiro set out in his important book *Courts: A Comparative and Political Analysis* (1981), at the far end of a continuum of formality and rules that runs from go-between to mediator to arbitrator to judge. Crucial for courts operating on a triad in the context of an active bilateral adversarial dispute are issues of authority and legitimacy. In the end, adjudication is designed to issue an authoritative declaration of a winner and a loser. If the loser does not accept the result as legitimate, the dispute remains, in some sense, unresolved, and the purpose behind the institution is thwarted. The yardstick for well-functioning courts is settlement—the authoritative resolution of the dispute. The currency of settlement is justification (Shapiro 1981).[4]

Courts resolve both private and public law disputes. In the latter, which includes constitutional law, one of the parties to the dispute is the government. For this reason, the court's decision in a constitutional public law dispute, in effect, creates a rule concerning the powers of government under the Constitution, a rule that may run the gamut from narrow and shallow to broad and deep (Sunstein 1999). Given the Janus-faced nature of adjudication in a common-law legal system like that of the United States—in which a court is simultaneously looking backward when applying ostensibly extant rules to past events, and forward because the application of any rule of this dispute to novel facts in the future entails an at least incremental creation of a new rule—courts, as Shapiro has emphasized, are perpetually poised on a precarious balance point concerning their legitimacy. As Alexander Hamilton famously wrote in Federalist No. 78, they have "neither FORCE nor WILL, but merely judgment," which entails that their authority, in

4. See also Donald Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institution, 1977); Laura Nader and Harry F. Todd, *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978); Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281–316.

the end, largely rests on respect for the quality of their judgment, perhaps in the individual case but certainly as part of the legal system as a whole.[5] Because their core function is triadic dispute resolution according to preexisting law, their authority to make law is more or less denied, unacknowledged, and, perhaps, these days at least, even presumptively unacceptable, particularly given that under what some have called the modern "statutory" or "policy" state (Orren 1991; Mayhew 2012; Orren and Skowronek 2017), it is the legislature (and its delegates) that has exclusive authority to make new laws. Courts are thus perpetually in crisis, of a sort. They are tasked, in sharp tension with the realities of their operation and position, with the job of law-finding and law-applying, not law-making. For this reason, a key part of their job is to explain how, in each individual case, their decision resolving a bilateral, adversarial dispute involves finding and applying preexisting law, and not legislating.

A vast body literature, of course, questions the possibility of making a formalistic distinction between law-finding and law-making by courts in a common-law system. Tocqueville noted the problem in his famous chapter on lawyers in *Democracy in America*, and the legal realists spent much of their time insisting on a new frankness about the law-making powers of courts, and an open embrace of those powers by judges and others. It seems we are left in a position in which it is undeniable *both* that judges in some meaningful sense "make law" (at least interstitially; see Cardozo 1921) *and* that a perpetual hint of illegitimacy surrounds that reality. This is the crisis of legitimacy that Shapiro has described as the perpetual fate of courts.

Students of political science should study courts—and the Supreme Court is the highest level court in the land, typically both in the quality of its reasoning and, in many cases, in determining the meaning of the U.S. Constitution—to confront this feature of this institution as a unique realm and species of politics. That is the value added in studying the Supreme Court. Of course, the Supreme Court can be studied as a nine-person legislature or an ersatz executive or bureaucracy: it is, in many ways, both of these things. Where does that leave us concerning knowledge of courts as courts?

Kahn's work has squarely confronted the Court as a court and has studied the Court for what is distinctly important about it as a court. His primary interest has been in Supreme Court's language of justification—the arguments it makes

5. To be sure, multiple audiences make this assessment, ranging from the parties themselves to the other branches of the federal government and the states, political parties, journalists, academic, and other opinion makers. See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2006).

and the reasons it gives for why it has done what it has done. Moreover, Kahn has focused in particular on the Court's language of justification when the Court operates at the tipping point where, given the nature of the particular issue in dispute, it is balancing on the precipice of illegitimacy—the place at which there are sharp political divides in the country about what the law commands, with one side of the divide holding, often passionately and angrily, to the view that the Court has tumbled over the cliff into the realm of illegitimate law-making, legislating, and judicial activism.

Kahn's work, moreover, has been concerned with the question of the construction of legitimacy across time: he looks not at single cases, but rather at lines of cases concerning these fraught constitutional issues. His chief insight into this process of constitutional development has been that the process of constitutional development proceeds by judges making choices between polity and rights principles and interpreting law in light of changing social facts. This is an intertextual reading of U.S. constitutional development.

The social facts that judges adduce in applying the law of the Constitution to new disputes in new contexts are apprehended by judges through various media—from direct and indirect personal experience, from the media, and through the intercession of the interpretive community. Because facts do not interpret themselves, or typically conduce to any particular meaning, each enlistment and application of a fact involves an exercise of meaning-making (although Kahn does not discuss it as such). In their judicial opinions, judges embed facts in narratives that lend those facts meaning. These narratives have their logics—scripts, even. As Kahn has rightly recognized, the much-vaunted commitment of the courts, *pace* Rawls, to the principle of liberal neutrality involves not a true neutrality toward the nature of the good, but rather a consensus on the nature of the good that, because of the consensus, has the appearance of neutrality. Constitutional development involves the temporal construction of the appearance of neutrality.

Kahn's pluralism appropriately captures the real-world dimensions of constitutional adjudication in triadic courts. Although he is commonly cast by attitudinalists as their placeholder doctrinalist, that label facilely oversimplifies exactly what it is Kahn has been doing. For Jeffrey Segal and his ilk, Kahn can be classed as a doctrinalist (and, hence, a useful foil for their academic journal articles and books) because he has focused substantively on what is written in judicial opinions (Segal and Spaeth 1993). But Kahn reads these opinions pluralistically. They are sites where different vectors and choices meet. His approach is heavily temporal and, hence, developmental. Attitudinalism, particularly where it emphasizes votes as liberal or conservative, is static—that is, it disregards any significant temporal

dimensions of constitutional politics. But as anyone with a more serious grounding in constitutional law and politics knows, the political incidence of any constitutional commitment alters across time. To be sure, a judge can stick with one particular orientation toward polity or rights principles or to a reading of the facts in a particular context over the long term. But those interpretations won't mean the same thing, politically, at different times. The cases are legion: a robust commitment to federalism, or judicial protection of rights, or judicial deference to legislatures each meant different things politically in 1850, 1905, 1927, 1954, 1965, and 2016. Ideas that form the basis for judicial reasoning have different implications: Free Labor had different implications in the Republican Party's formative years just before the Civil War into the Gilded Age. Herbert Croly and Franklin Roosevelt were right, at least, that Jeffersonism (and Hamiltonism) had different implications in the early Republic and in the first half of the twentieth century. Kahn's approach to judicial opinions has imposed a basic structure allowing us to capture the nature of these dynamics as they are reflected in triadic courts perpetually tasked across time with maintaining the legitimacy and authority of the triad through the appearance of passivity and consistency. To call this "doctrinalism" is too reductionist: what it seeks to do is to take full account of the fact that, in the Supreme Court, the discourses and logics of political and constitutional thought and law interact with each other perpetually and with a perpetually changing world. Courts are, in many ways, kaleidoscopic. As Kahn (1999) himself puts it, "Constitutive liberalism rejects the consensual values of instrumental liberalism and simple doctrinalism. Constitutive liberals view precedent, constitutional principles, and basic polity and rights principles as fundamental to Supreme Court decisionmaking" (179).

It is worth stating expressly that, in the spirit of his teacher Grant McConnell's understanding of the bureaucracy, Kahn has a strong belief in the Supreme Court as a steward of the public interest—in some Dworkinian sense as a "forum of principle," although he is less unidimensional on that score (Dworkin 1986).[6] Here, he does push back against the new orthodoxy positing a self-interested individualism by judges. For Kahn, the Court is not operating along a single-dimension. The Court operates by the core logic of its triadic structure: it is a crossroads, an entrepôt. In the context of a divided liberalism (Greenstone 1988), among other things, the court is a synthesizing institution. It asserts and checks government power. It validates the claims of the individual over those of the community, and those of the community as against the individual. And it does so across time, as

6. Dworkin analogizes the progress of precedent on the court to the writing of a chain novel.

informed by diverse political visions, assumptions, and theories, and new facts and preexisting facts reframed by new narratives, constitutional and otherwise—all as it fulfills its function and operates according to its structure as a dispute-resolving triad. In doing so, the Court both acts and speaks. And its speaking, Kahn recognizes, is as significant as its acting, because it involves the making of public meaning, the articulation of what Walter Lippmann (and Ted Lowi, too, following him) called a "public philosophy." This is much more than voting for one's policy preferences. There is more to this than an attempt to accurately predict a vote. Kahn gets this and has taught it. He has recognized, and put front and center, the Court's major role in *constituting* the American polity under conditions of complexity (Greenstone 1988).

Contestation over where the political power to make decisions lies (polity principles)—substantive commitments (rights principles), the relevant facts, and their meaning—is constitutive of that complexity. As Kahn (1999) writes, it is constitutive in part because there is "no preconceived policy or outcome desires that drive a particular court decision." These are conditions of a bounded dynamism. "The Court has to apply polity and rights principles in light of a changing social, economic, and political environment as it decides cases" (180). As such, it is well worth studying "the link between social, economic, and political changes in the outside world and constitutional law and theory" (Kahn 1999, 180).

III. APPLICATIONS

My complete assent to Kahn's project does not entail a complete assent to its application. I have particular problems with the causal attributions Kahn makes in applying his general model to particular cases, many involving the rights of subordinated groups under the Equal Protection Clause, as understood in the context of an antiegalitarian conservative age. This is no small matter, as these applications are the means by which Kahn has derived and explicated his theory of constitutional development.

It seems to me that Kahn tells too much of a "just-so" story, a story of conservatives facing facts as they really are, and thus deciding to move, against their first inclinations, in the more liberal direction that Kahn thinks (normatively) they should be moving. The facts, that is, push conservatives forward in a progressive direction and, although the ride is slow and bumpy, ultimately all is for the best in the best of all possible worlds.

Kahn's assumptions concerning the meaning of facts, hidden at first, and then resplendent in the bright light of day, are off-the-rack liberal and progressive. The

Supreme Court at long last comes to understand the evidence concerning the hazards facing bakery workers, and lo and behold, *Lochner* falls hard. There are no conservative facts that are ever validated and then constitutionally vindicated: Kahn has shown virtually no interest in any such vindications. It is not as if there aren't any good cases within constitutional law, or outside of it, many of which are not even all that controversial, such as the deeply problematic statism of the early New Deal (attacked by the Court in a 9–0 vote in the *Schechter Poultry v. U.S.*, 295 U.S. 495 [1935] case), the disasters of the design of public housing and urban renewal projects, Justice John Paul Stevens's factually refuted separation of powers decision in *Clinton v. Jones*, 520 U.S. 681 (1997) (presciently called out by Justice Antonin Scalia in his now-vindicated dissent). Kahn's concrete stories about facts are largely a story of how the scales fell from the eyes of the world, and lo and behold, they came to see things his way.

In his favored area of analysis, Kahn's understandings concerning what groups are subordinated are also conventionally (postwar) liberal. I wondered about William Graham Sumner's "Forgotten Man"—the hardworking, self-supporting taxpayer (C) whose money, at the behest of social reformers (A and B), is to be redistributed to the poor (D): Sumner's formula is "A and B decide what C shall do for D." Is Sumner's (1883) formulation false in a way that is subject to refutation by facts? I wondered how Kahn's formulations would apply to the religious liberty claims currently being advanced by certain Christians involving requirements that they contribute to the cost of contraceptive services, as in the Supreme Court's recent *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014) decision. As for "social facts," I wondered about facts concerning racial differences—current, not innate—that is, concerning levels of education, civic preparation, and cultural achievement that were used to justify segregation and the disparate treatment of African Americans for much of the twentieth century. Were these not, in some sense, facts?

It seems to me that, in that case, for example, the nub of the matter less often involved the apprehension of social facts than the determination, as a matter of principle, to *ignore those facts*—the determination that, on these matters, at least, these facts are irrelevant. It is probably more accurate to say that the situation concerning social facts is analogous to the ways that Kahn approaches the Court's use of polity and rights principles. Development involves not the apprehension of facts, or just the apprehension of facts, but rather decisions, made across time, by the justices *to apprehend some social facts and ignore others*, in ways that change across time and are patterned. The key criterion for doing so is *relevance*. Relevance to what? Relevance to the narrative—what trial lawyers call "the theory of the case."

All of these matters, Kahn rightly recognizes, although does not fully digest, involved both facts and the interpretations of narratives offered by powerfully influential interpretative communities.

Another way of making this critique is to observe that Kahn does not deal well with flipped cases, in which the interpretive community is conservative, and when the rights claim is conservative—a major shortcoming in a New Originalist era in which conservatives are actively and successfully championing rights claims involving free speech, free association, religious liberty, the Second Amendment's right to keep and bear arms, and the Fifth Amendment's Takings Clause (Whittington 2004). For someone seeking to explain the construction of individual rights in a conservative age, this is a serious problem.

IV. CONCLUSION

The late Ted Lowi, a mentor to both Kahn and to me, was fond of quoting G. K. Chesterton's dictum "A thing worth doing is worth doing badly." When it comes to studying American politics, the converse also holds. Much of the work done in the contemporary judicial politics subfield of American politics within political science is simply not worth doing. And a thing not worth doing is not worth doing well. What Kahn has done over the course of his distinguished career has always been worth doing. He asks the right questions and arrives at the right point of entry. His work is always stimulating and, on the fundamentals, in many ways, right. His insistence upon studying the Supreme Court as a court and studying it historically, and in light of facts and principles, is compelling. May his distinguished legacy be long.

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