KAHN AND THE GLORIOUS LONG STATE OF COURTS AND PARTIES

MARK A. GRABER[1]

ABSTRACT

This essay explores Ronald Kahn's work, the work he inspired, and the responses to that work in this symposium as explanations and products of the long state of courts and parties. The essay begins by examining what Kahn described as the social construction process, the ways justices make decisions by applying polity and rights principles to new social developments. The essay then discusses the political construction of judicial review, focusing on how different strands of that scholarship complement and challenge the social construction process. This combination of the political construction of judicial review and the social construction process offers valuable insights into how justices made decisions during the long state of courts and parties, a regime in which being a legal elite rather than having partisan identification or holding particular constitutional opinions was the main qualification for joining the federal bench.

KEYWORDS: *social construction, long state of courts and parties, judicial review, Supreme Court, judicial decision-making*

Ronald Kahn flourished in the aftermath of the long state of courts and parties. Kahn's student, Stephen Skowronek, coined the phrase "state of courts and parties" (1982, 39) to describe the American constitutional regime during the

1. Regents professor, University of Maryland Carey School of Law.

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late-nineteenth and early twentieth centuries, a regime in which courts made policy and parties distributed the spoils of government. That regime continued with important modifications until the last quarter of the twentieth century. In the long state of courts and parties, or long state of courts, parties, and agencies, courts made constitutional rules, presidents made foreign policy, administrative agencies and independent regulatory commissions made domestic policy, and parties distributed the spoils of government (see Graber 2016, 2018). Because, as Kahn (2006) always reminded students of courts and constitutions, judicial time differs from political time, courts during the late-twentieth century continued to function as they had functioned during the long state of courts and parties, even as the United States was transitioning into a different and more polarized constitutional regime. Kahn's social construction process captured important features of the twentieth-century American constitutional regime missing from both the dominant legal thinking and dominant political science thinking of that time.

Political scientists interested in American constitutional development flourished in the aftermath of the long state of courts and parties partly because Kahn flourished. Kahn inspired with his scholarly example and encouraged with his over-the-top personality a generation of younger scholars who were unhappy with the attitudinal model in political science (see Spaeth and Segal 1993; Segal and Spaeth 2002) as an explanation for judicial decision-making and as unhappy with legal scholarship (Wechsler 1959; Dworkin 1977) claiming that courts were a forum of principle above politics where justices made decisions entirely on the basis of some constitutional theory.[2] Kahn was reader, advisor, mentor, and fan of a cohort of political scientists who developed distinctive understandings of the evolution of free speech theory (Graber 1991), the influence of gender on the New Deal Constitutional Revolution (Novkov 2001; see also Novkov 2008), the complex path of civil liberties in the United States (Kersch 2004), the jurisprudential foundations of the freedom of contract (Gillman 1993; see also Gillman 2001), the constitutional fights over the meaning of Reconstruction (Brandwein 1999; see also Brandwein 2011), the origins of Rehnquist Court activism (Keck 2004; see also Keck 2014), the right to same-sex marriage (Gerstmann 2003; see also Gerstmann 1999), and many episodes in American constitutional development. Kahn's edited collection *Supreme Court and American Political Development* (Kahn and Kersch 2006; see also Gillman and Clayton 1999; Clayton and Gillman 1999) is one of the best introductions to new institutionalist work in political science.

2. Graber (2017) discusses the tendency of both political scientists and lawyers to divide the constitutional universe into law and politics.

Kahn was on the first panel that I participated in at the American Political Science Association. I was a graduate student at the time, just about to enter with great trepidation the profession. I remember being thrilled that a prominent tenured professor would actually be on a panel with a graduate student. Although I do not remember whether Kahn gave a paper or was a discussant on that panel, I remember his intelligence, charm, and good will toward all. Maybe I do not especially remember his intelligence, charm, and good will on that day. The truth is that in the hundreds of hours I have since spent with Professor Kahn, I have always been impressed by his intelligence, charm, and good will toward all, particularly the younger people in the field. That American Political Association Panel in fall 1988 was no exception to the general rule of his high character.

This essay explores Kahn's work, the work he inspired, and the responses to that work in this symposium as explanations and products of the long state of courts and parties. Part I examines what Kahn described as the social construction process, the ways in which justices make decisions by applying polity and rights principles to new social developments. Part II discusses the political construction of judicial review, focusing on how different strands of that scholarship complement and challenge the social construction process. Part III explains why a combination of the political construction of judicial review and the social construction process offer valuable insights into how justices made decisions during the long state of courts and parties, a regime in which being a legal elite rather than partisan identification or holding particular constitutional opinions was the main qualification for joining the federal bench. Part IV wonders whether the social construction process will survive the more polarized polity of the present or the possible partisan takeover to come in the very near future.

I. THE SOCIAL CONSTRUCTION PROCESS

Kahn's seminal contribution to constitutional scholarship is the social construction process as an explanation for judicial decision-making (2006, 2015). He insists judicial decision-making has internal and external dimensions. Academic lawyers, he complains, focus too much on the internal. Political scientists place too much emphasis on the external. In actual practice, Kahn steadfastly maintains, judicial decision-making is a function of the interaction between the internal and the external. Any attempt to isolate one or the other will miss crucial features of Supreme Court practice.

The internal dimension of judicial decision-making consists of polity and rights principles. Polity principles concern the basic structure of governing institutions

and how those institutions interact with each other. They form the core of what Charles Black (1969) called structuralism. Federalism, nowhere mentioned in the Constitution, is a polity principle, as is efficiency. Rights principles concern the foundations of and relationships between various constitutional rights. They form the core of what many scholars describe as aspirationalism (Graber 2013a). John Hart Ely's (1980) democracy-reinforcing theory of judicial review is one such rights principle, as is James Fleming's (2006) claim that the constitution should be interpreted in light of a textual commitment to reflective autonomy.

The external dimension of judicial decision-making consists of how justices interpret social practices and developments. Justices who once regarded traditional gender roles as natural come to regard restrictions on the public life of woman as inconsistent with human flourishing. Marriage transforms from an institution for procreation into an institution for companionship (see *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 [2015]). The external factors that influence Supreme Court decision-making are such social phenomenon as industrialization and the gays rights movement, not such political factors as realignment and elections. Kahn (2015) rejects what he calls neo-Dahlian claims that the Supreme Court follows election returns. Supreme Court judges are independent actors who interpret the external world as they think best. They neither vote nor write as agents for extra-judicial political forces.

The social construction process examines how the interaction between these internal and external dimensions of judicial decision-making drive the path of American constitutional law.[3] The process of social construction is "bidirectional" (Kahn 2006), resembling what John Rawls (1999) described as reflective equilibrium, as justices on the Supreme Court of the United States attempt to harmonize their polity and rights principles with their perceptions of the world outside the Court. Judges do not apply fixed internal logics to perceived social developments. They adjust their polity and rights principles in light of the changes they perceive in the social world. The way justices see the social world is partly through the prism of their polity and rights principles. Justices who became more committed to privacy and autonomy as rights principles became more inclined to interpret same-sex sexuality as intimate behavior rather than as psychological deviance. Kahn (2006) explains, "legal principles and the world outside the Court become symbiotic and mutually construct each other" (67).

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3. Kahn has not considered at any length whether the social construction process describes constitutional decision-making in other constitutional democracies.

The transition from *Plessy v. Ferguson*, 163 U.S. 537 (1896) to *Brown v. Board of Education*, 347 U.S. 483 (1954) illustrates the social construction process. Changing understandings of race fueled the process by which a jurisprudence committed to separate but equal evolved into a jurisprudence committed to strict scrutiny. The *Plessy* majority (1896) assumed race was an important biological determinant of behavior.[4] The *Brown* Court treated race as a morally irrelevant characteristic (*Boiling* 1954). This change influenced categories of constitutional thought. Nineteenth-century constitutional doctrine emphasizing how legislative distinctions had to reflect real differences between the affected groups (see Gillman 1993) gave way to a jurisprudence of suspect classes that could be the subject of legislative distinctions only when the law was a necessary means to a compelling government end (see Fallon 2007). These new categories of legal thought then influenced how justices perceived other social phenomenon. Whether gender was also a suspect classification depended on the degree to which gender classifications resembled race classifications (see Mayeri 2011).

The course of constitutional law is determined by how justices interpret the law, basic constitutional principles, and sociological developments. The attitudinal model is wrong. Justices interpret the law and they interpret sociological developments. They do not base decisions on pre-political values. The Dahlian model (Dahl 1957) is wrong. Justices using the social construction process are the prime movers of constitutional law, not elected officials, political parties, voters, or such impersonal social forces as the structure of the economy.

Kahn's commitments to ideas and interpretation, as well as his remarkable scholarly generosity, played a major role in my career. He was the first senior scholar not on my dissertation committee who thought I had anything intelligent to say. Although my maiden American Political Science Association conference paper (Graber 1988) did not use the phrase "social construction process," my thesis was that ideas, constitutional ideas in particular, mattered. Leading proponents of the freedom of contract were conservative libertarians, committed to protecting the individual right to make productive use of human faculties. Guided by this principle, Thomas Cooley, John W. Burgess, and other leading jurists defended the freedom of speech and the freedom of contract with the same vigor. These judges and intellectuals did not simply champion naked values and certainly did not champion naked values that served the interests of an economic elite. Instead, for a great many judges and constitutional commentators, constitutional

4. "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences."

ideas had a powerful and independent influence on how they interpreted the U.S. Constitution.

Kahn waxed as enthusiastically about the studies that became the central works in American constitutional development. Prominent once-young scholars of the next generation, to Kahn's delight, insisted that judges and legal thinkers built their views on constitutional law traditions and did not simply make judgments on the basis of personal values or elite interest. Howard Gillman (1993) demonstrated that the justices who supported the freedom of contract were attempting to implement under new industrial conditions the framing approbation of class legislation. Ken Kersch (2004) detailed how the path of civil liberties law changed as legal thinkers moved their focus from businesses to bootleggers to African Americans. Julie Novkov (2001) explained how New Deal justices were able to sustain crucial features of the emerging welfare state by treating all workers as having the characteristics that early twentieth-century constitutional law ascribed to woman. Thomas Keck (2004) described how judicial commitments to activism formed in the mid-twentieth century help explain why when conservatives took over the Court during the late-twentieth century, they preferred engaging in judicial activism from the right rather than simply rolling back the liberal activism of the previous generation. Rogers Smith (1985, 1997) traced the influence of different understandings of liberalism on American constitutional development, and then considered how liberal, republican, and ascriptive theories influenced Supreme Court decisions on citizenship. Pamela Brandwein (1999, 2014) studied how notions of what constitute history influenced how Americans interpreted the Fourteenth Amendment and then examined how nineteenth-century conceptions of rights influenced the development of the state action doctrine.

These studies and numerous others rarely used Kahnian terminology, but they were united in their focus on the interaction of constitutional law, jurisprudential traditions, and sociological developments as determining the path of law. All eschewed pre-political attitudes, neutral principles, and electoral politics as prime movers of constitutional development. Gillman's *The Constitution Besieged* (1993) was a classic work in this tradition. Gillman insisted that Supreme Court justices at the turn of the century were neither agents for the powers to be nor imposing on the nation their personal notions of good policy. Two forces structured the rise and fall of the freedom of contract. The first was a jurisprudential tradition hostile to class legislation. The second was industrialization. Gillman's (1993) story is about how the rise of industrialization complicated the judicial effort to keep faith with the traditional hostility to class legislation and, over time, led to the demise of that jurisprudential tradition. Gillman neither used the phrase "polity and rights principles"

nor the phrase "social construction process," but his work and those of other scholars in American constitutional development play variations on Kahnian themes. The path of the law is determined by justices applying inherited legal traditions in light of new social developments. Readers of *The Constitution Besieged* (Gillman 1993) or, for that matter, *Transforming Free Speech* (Graber 1991), *Liberalism and American Constitutional Law*(Smith 1985), *Reconstructing Reconstruction* (Brandwein 1999), and the essays in this symposium that focus on the social construction process learn a great deal about constitutional ideas and cultural changes but very little about electoral politics during the time periods under discussion.

Several essays in this symposium play variations on the social construction process and scholarship in American political development. Evan Gerstmann, a former Kahn student, details how the Supreme Court's jurisprudence in gender cases combines doctrinal commitments to intermediate scrutiny with an understanding of how different classifications influence the "lived lives" of women. Justice Ruth Bader Ginsburg was interpreting both the Equal Protection Clause and social practices when her opinion in *United States v. Virginia*, 518 U.S. 515 (1996) ruled that the Virginia Military Institution (VMI) had to admit women. Gerstmann (2019) notes the judicial recognition that "[g]iven the importance of the military in [the South] and the prestige of [VMI], the impact of the exclusion on gender equality went far beyond the handful of women who wished to apply to the school at that time" (102). Sara Chatfield, another former Kahn student, examines how the social construction of gender influenced judicial decisions at the turn of the twentieth century in freedom of contract cases. Chatfield (2019) details how the justices "attempted to balance two competing social constructions of female workers: (1) women as vulnerable victims . . . and (2) women as independent economic actors" (107). The triumph of the latter influenced the path of American constitutional law long after the freedom of contract was moribund in ways that inhibit gender equality (see Novkov 2001) and highlight, as Julie Novkov (2019) writes, how the social construction process may not always lead to more rights-protective and rights-expansive outcomes.

Novkov's (2019) essay provides another, more contemporary example of the social construction process weakening commitments to some progressive rights, while valorizing others. Her essay details how "the Court's successive readings of [*San Antonio Independent School District v.*] *Rodriquez* (1973) separated and erased poverty from equal protection analysis, while freeing some other rights for more searching consideration under rational basis review" (Novkov 2019, 69). Late-twentieth-century justices engaged in the social construction process interpreted poverty as a consequence of individual decisions and as presenting the same kind

of social and economic problems that inherited constitutional doctrine, compelling the justices to sustain any government regulation that passed a toothless rational basis standard. The "issuing or withholding of government largess," Novkov (2019) observes, became "a legitimate tool for social design" (72). This social construction process denied that economic inequality has much to do with those racial, gender, sexual orientation and privacy issues that warranted far more heightened judicial scrutiny. Novkov (2019) concludes that the Supreme Court

> created a grammar that separated poverty from other equal protection concerns and placed inequalities stemming from poverty outside of the scope of national constitutional remedy. The compartmentalization of poverty has muted it and discouraged constitutional activism around it, even as debate and litigation has swirled around racial inequality, abortion, gay rights, and other issues. (84)

Ken Kersch (2019) more directly tackles what he perceives to be the liberal bias of Kahn's social construction process. Kersch enthusiastically endorses Kahn's scholarly framework. What makes courts worth examining, he agrees, is how they differ from other governing institutions. "[T]he study of courts is valuable," Kersch (2019) writes, "because they are distinctly themselves—that is, they are their own type of institution that do court-like things" (33). The social construction process helps us to understand why courts are different and why the Supreme Court matters for American politics. Kersch (2019) praises Kahn for "recogniz[ing], and put[ting] front and center, the Court's major role in *constituting* the American polity" (40). Kersch questions Kahn's application of the social construction process, which Kersch claims too often focuses on progressive success stories rather than conservative success stories. Kersch notes, "There are no conservative facts that are ever validated and then constitutionally vindicated" (41). Kersch challenges Kahn to consider "the construction of individual rights in a conservative age" (42), exploring how the social construction process explains conservative decisions declaring unconstitutional laws regulating campaign finance, gun ownership, and commercial development that trenches on the environment.

The foundational premise of Tom Keck's (2019) essay in this symposium captures the logic of the social construction process as an explanation of judicial decision-making. Keck, another former Kahn student, explores whether Donald Trump's 2016 election marks the end of the Republican regime that began with the election of 1980 or the descent of that regime into a more authoritarian form of constitutionalism. Both Keck (2019) and Kahn (2015) agree that Americans have

been living in the Reagan Republican regime since 1980. If Reagan is the central figure in American electoral politics over the past thirty-five years, then elections do not explain crucial Supreme Court decisions, most notably the judicial decisions to maintain a constitutional right to abortion (*Planned Parenthood of Southwestern Pennsylvania v. Casey*, 505 U.S. 833 [1992]), declare a right to same-sex intimacy (*Lawrence v. Texas*, 539 U.S. [2003]), and declare a right to same-sex marriage (*Obergefell v. Hodges* 2015). The judicial practice of interpreting the law and interpreting social practices seems a far better explanation for these developments than the famous aphorism that "the Supreme Court follows the election returns" (Dunne 1901, 26). The Supreme Court is a counter-majoritarian institution and judicial decisions are best understood as outcomes of a distinctive judicial mission to protect individual rights from popular majorities (Kahn 1997; Keck 2007a). "Nowhere are the[] insights" offered by the social construction process "more visible and valued," Novkov (2019) notes,

> than in Kahn's analysis of the social construction process that underlies major Court precedents like *Roe v. Wade* (1973) and *Bowers v. Hardwick* (1986), enabling him to explain why conservative Courts staffed primarily by Republican appointees have nonetheless advanced the rights of same-sex couples and continued to uphold a right to choose abortion. (66)

II. THE POLITICAL CONSTRUCTION OF JUDICIAL REVIEW

The serpent in Kahn's Garden of Eden was "The Non-Majoritarian Difficulty" (Graber 1993). After writing a series of works asserting that constitutional law could not be understood without understanding constitutional ideas, some members of my generational cohort began investigating the political construction of judicial review (see Graber 2005, 2008, 2005; Lemieux and Watkins 2018). "The Non-Majoritarian Difficulty" was the first in a series of works claiming that judicial review existed because powerful political actors favored giving justices the power to declare laws unconstitutional. Judicial review enabled national majorities to police jurisdictions where they were sectional minorities, to foist political hot potatoes off on judges, to promote presidential power, and to take the side of elites in cultural struggles. Kahn was less happy with this literature than with our previous adventures in American constitutional development. Although he was remarkably supportive of all our efforts, he consistently argued that the literature on the political construction of judicial review lost sight of the fundamentally legal nature of courts. Our early writings were steeped in legality, but the newer

material seemed to Kahn (1994b, 2015) to reduce constitutional decision-making to raw politics in ways reminiscent of the judicial behaviorialists we purported to scorn.

Neither Kahn nor I fully understood what "The Non-Majoritarian Difficulty" was really about when that work was first published in 1993. Kahn (1994b) worried that that study and the works that followed were converting justices into agents of the dominant regime, a worry exacerbated by some later scholarship (e.g., see Pickerill and Clayton 2004) that converted the political construction of judicial review into regime theory. My concern was with why other political actors tolerated judicial review. I was not explaining the particular decisions justices made but merely why political space existed in the United States for justices to make constitutional decisions. The political construction of judicial review and the social construction process, in my view, coexisted. My dispute with Kahn, if there was a dispute, was over whether elected officials tolerated a counter-majoritarian practice for reasons of legality or a non-majoritarian practice that more often than not advanced the interests of at least some crucial members of the dominant national coalition. Over time, however, I came to realize that "The Non-Majoritarian Difficulty" better described a particular American constitutional regime, constitutional politics in the long state of courts and parties from the late nineteenth century to the late twentieth century, than the American constitutional regime. Reworking variations on the political construction of judicial review over a twenty-five-year period, in part because of prodding by Kahn and his students, I concluded that while the political construction of judicial review captured important dimensions of the American constitutional regime throughout American history, the primary way in which the "The Non-Majoritarian Difficulty" maintained judicial review was constructed was a product of what I came to call "the long state of courts and parties."

"The Non-Majoritarian Difficulty" was written against Alexander Bickel and legal literature he inspired that sought to justify the undemocratic nature of judicial review. The central argument of the piece is that judicial review rarely if ever presented the classical counter-majoritarian problem. Bickel (1962) insisted that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now" (16–17). This claim, as "The Non-Majoritarian Difficulty" and subsequent works on the political construction of judicial review maintain, does not accurately describe the general practice of judicial review or most exercises of that power. The general practice of judicial review is not undemocratic because the elected representatives of the actual people of the here and now want an institution

that declares laws unconstitutional.[5] No national party has ever gained a national majority and no person has ever been elected president running on a platform that calls for abolishing the Supreme Court or appointing only justices who never declare laws (or federal laws) unconstitutional. Judicial review exists because the national legislature and national executive consistently make decisions that foster judicial review, from appointing activist judges to funding support systems for constitutional litigation to expanding federal jurisdiction. Few particular instances of judicial review are undemocratic because in virtually every instance when the Supreme Court has declared an important law unconstitutional, the justices have done so with the blessings of at least some people in the dominant national coalition. The Truman and Eisenhower Justice Departments lobbied the Supreme Court to declare segregated schools unconstitutional ("Brief for the United States" (1954/2017). The Senate during the 1980s refused to confirm justices who might cast the fifth vote to overturn *Roe v. Wade*, 410 U.S. 113 (1973) (Graber 1993). An antilabor Republican Party has recently successful packed the Supreme Court with antilabor justices who then declared state-mandated union agency fees unconstitutional (*Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 [2018]).

"The Non-Majoritarian Difficulty" challenges claims that judicial review exists because Americans respect the counter-majoritarian tendency of the Court. Both Kahn (1997) and Keck (2007a) take this position. Their position has a strong foundation in common sense. Most Americans favor an institution that protects individual rights threatened by popular majorities (Tushnet 1999). The Senate Judiciary Committee Report rejecting Franklin Roosevelt's court packing plan spoke of "the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself" (Senate Committee on the Judiciary 1937). This abstracted support for judicial review does not, however, capture the reasons for judicial survival in American history. Politics matters. Kevin McMahon (2003) points out that the southerners on the Senate Judiciary Committee were more concerned with preventing Roosevelt from packing the courts with racial liberals who they feared would protect the rights of African Americans than with protecting individual rights per se. Presidential candidates from Abraham Lincoln to Ronald Reagan successfully attacked courts during their campaigns. What saves judicial review, the evidence suggests, is that important factions within political movements with the power to abolish judicial review upon

5. Mark Tushnet's (1999) classic attack on judicial review concludes by noting the relative popularity of the practice in the abstract.

gaining power soon learn that their constitutional visions will be better advanced when fashioned by a supportive judiciary than by neutering the federal courts, even if that means tolerating some contrary judicial decisions (Lasser 1989). In short, the notion that judicial review serves concrete political goals is more consistent with both the historical evidence and general assumptions about political behavior than claims that people in the United States and other regimes want a republican schoolmaster who corrects them when they go wrong.

Claims that judicial review has political foundations quickly and unfortunately were translated by some friends and many critics into regime theory. The strong version of regime theory contends that justices are agents of the dominant national regime (see Gillman 2002; Clayton and Pickerill 2006). Justices, in this view, advance the policies preferred by the dominant national coalition. When Ronald Reagan said jump, Supreme Court justices respond, "how high."[6] Kahn and his supporters easily refuted this strain of constitutional thinking. Keck (2007a, 2007b, 2014) wrote several fine articles and a major book demonstrating that the justices were not following election returns in any simple sense. The Supreme Court's decisions in *Casey v. Planned Parenthood of Southeastern Pennsylvania* (1993) and *Lawrence v. Texas* (2003) cannot be derived straightforwardly from previous elections. Elections are a poor explanation for Supreme Court decisions declaring unconstitutional the Religious Freedom Restoration Act of 1993 (*City of Boerne v. Flores*, 521 U.S. 507 [1997]) and crucial provisions of the Voting Rights Act (*Shelby County, Ala. v. Holder*, 570 U.S. 2 [2013]), both of which had been approved by overwhelming legislative majorities.

The political construction of judicial review differs from important versions of regime theory in exactly what each explains. The political construction of judicial review explains why political actors create and maintain a constitutional system in which justices have the right to declare laws unconstitutional. The behavior examined is that of members of the national executive and national legislature. Scholarship on the political construction of judicial review explores why some national constitutions have provisions authorizing judicial review (see Ginsburg 2003), why Congress often expands federal jurisdiction and provides support for constitutional litigation (see Gillman 2006; Crowe 2012), and why presidents appoint judicial activists to constitutional courts (see Yalof 1999). Regime theory explains judicial decisions. The behavior examined is that of members of national judiciaries. Scholarship on regime theory explores the extent to which

6. Thomas Keck (2007a, 2007b) and Matthew Hall (2012) have issued influential criticisms of positions that equate the political construction of judicial review with regime politics.

justices carry out the program of the dominant national coalition (see Gillman 2002; Clayton and Pickerill 2006). Proponents of the political construction of judicial review and regime theory agree that political actors may support judicial review because they support the decisions justices make. Martin Shapiro (1981) notes that judicial review often functions to bring national values into the hinterlands. Nevertheless, the original insight of the political construction of judicial review is that political actors have numerous reasons for foisting issues off on courts, some of which are independent of the decisions justices make (Graber 1993). If elected officials have political reasons for supporting an independent judiciary, then the political construction of judicial review and social construction theory are potential complements. Social construction theory explains the decisions justices made. The political construction of judicial review details the political reasons why elected officials do not interfere with justices, even when they do not entirely support the path of constitutional law.

III. THE LONG STATE OF COURTS AND PARTIES

The more serious problem with "The Non-Majoritarian Difficulty" was the paper's focus on the realignment cycle rather than on the structure of partisan competition. Realignments concern dominant political parties (see Sundquist 1983; Burnham 1991). Realignments occurred in 1860 and 1932 when a new majority party replaced the previous majority party. The structure of partisan competition concerns the nature of the coalitions that struggle for national supremacy (see Silbey 1991).[7] The structure of partisan competition changed during the late-nineteenth century when the ideological parties that structured American constitutional development for the previous sixty years were replaced by less ideological parties. "The Non-Majoritarian Difficulty" tied judicial review to a realignment cycle, breaking from previous scholarship by detailing why courts might be as activist during times of normal politics as during actual realignments (Graber 1993). The better view is that although judicial review was always politically constructed, how judicial review is politically constructed at any particular time is largely determined by the structure of partisan competition.

"The Non-Majoritarian Process" relied heavily on realignment theory when explaining why elected officials provide political foundations for judicial review. Previous scholarship (Funston 1975) observed that judges might declare laws

7. My work on the structure of partisan competition accepts Silbey's model, while offering a different periodization of American constitutional politics.

unconstitutional immediately after a realignment, as justices representing the ancient regime attempt to prevent the establishment of a new constitutional vision. That literature failed to explain why justices also frequently declare laws unconstitutional during times of normal politics, when the justices presumably are aligned with the dominant political coalition.[8] "The Non-Majoritarian Difficulty" remedied this deficiency by pointing out that politics consists of struggles over what issues should be on the political agenda as well as struggles over resolving those issues on the political agenda. "In two-party systems," as the essay notes, "mainstream politicians advance their interests by diverting difficult, crosscutting issues to such 'peripheral mechanisms' as the national judiciary" (Graber 1993, 37). Foisting potentially disruptive issues on to courts enables party leaders to keep electoral politics focused on the issues their coalitions are structured to resolve. "The Non-Majoritarian Difficulty" observed how "prominent elected officials consciously invite the judiciary to resolve those political controversies they cannot or would rather not address" (Graber 1993, 36). The next sections detailed the constitutional politics of slavery, antitrust, and abortion underlying the Supreme Court's decisions, respectively, in *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *United States v. E. C. Knight, Co.*, 156 U.S. 1 (1895); and *Roe v. Wade* (1973). Each case study highlights how prominent officials in both major parties provided the political foundations for judicial power by promoting courts as the proper forum for settling a crosscutting issue that was threatening the structure of two-party competition in that time period (Graber 1993).

That 1993 essay nevertheless missed important differences between slavery, on one hand, and antitrust and abortion, on the other, that might have suggested that *Dred Scott* had different political foundations than either *E. C. Knight, Co.* or *Roe v. Wade*. *Dred Scott* was an outlier. That decision was the only instance before the Civil War when the Supreme Court declared unconstitutional a major piece of legislation.[9] *E. C. Knight* and *Roe* were routine exercises of judicial authority. The Court that gutted the Sherman Anti-Trust Act in *E. C. Knight* also declared the income tax unconstitutional, promoted labor injunctions, and introduced the freedom of contract to federal constitutional law. *Roe v. Wade* was the culmination of the liberal judicial activism that took place during the 1960s and early 1970s (see Blasi 1983; Powe 2000). "The Non-Majoritarian Difficulty" pointed out how the

8. The literature also failed to explain why judicial activism spiked during some realignments (1932–1936, 1892–1896), but not in others (1832–1836).

9. The Supreme Court did declare minor pieces of federal legislation unconstitutional between 1803 and 1857 (Graber 2007; Whittington 2009).

political foundations of *Dred Scott* lay in why slavery was the only national issue on which the Taney Court voiced an opinion (Graber 1993). The essay's discussion of *E. C. Knight* and *Roe*, however, focused entirely on the distinctive constitutional politics of antitrust and abortion, only briefly touching on the more general political foundations for judicial activism in the eras when those decisions were handed down (Graber 1993).

Dred Scott was the product of the partisan political regime that structured constitutional politics in the United States from the late 1830s to the end of the 1880s (see Graber 1993, 2018). In that political order, the major parties divided and competed over almost all of the major constitutional issues of the day, with the exception of slavery, which crosscut the Democratic and Whig coalitions before the Civil War. Whigs campaigning for national office insisted that the national government had the power to incorporate a national bank, finance internal improvements, and impose protective tariffs. Democrats campaigning for national office insisted that these measures were unconstitutional. Both parties said little on slavery. Judicial review of federal legislation was largely moribund before the Civil War.[10] Most cases in which the justices declared state laws unconstitutional were of little political significance (Graber 2004). The judicial majority on the Taney Court were Jacksonians committed to Jacksonian views of government powers (Graber 2019.), but the justices did not participate significantly in constitutional debates over the powers of the federal government, with the exception of debates over national power to pass fugitive slave laws (*Prigg v. Pennsylvania*, 41 U.S. 539 [1842]) and ban slavery in the territories (*Dred Scott* 1856).

The structure of partisan competition in Jacksonian America helps explain intense judicial activism on one and only one of the bitterly disputed constitutional controversies of the time. The Supreme Court from 1828 to 1860 remained largely outside the partisan fray not only because Jacksonian presidents vetoed contested constitutional measures, but also because Martin Van Buren, Abraham Lincoln, and the political founders of the second-party system believed that victorious political parties were authorized to settle constitutional disputes (Graber 2018). Jacksonian politicians who placed constitutional authority in political parties refrained from laying the political foundations for a general power of judicial review on those constitutional issues that divided the major coalitions. Neither Jacksonians nor

10. After as well. The justices after 1865 tended to declare limits on federal power only when the policy under attack was in the process of being abandoned or the coalition that passed the offending legislation was no longer in power. When justices plainly crossed the dominant national coalition by declaring the Legal Tender Acts unconstitutional, additional justices were added to the bench and that decision was swiftly overruled.

Whigs made efforts to empower courts to determine the constitutional status of the national bank, internal improvements, or protective tariffs. By contrast, both Jacksonians and Whigs engaged in a lengthy effort to empower and encourage the Taney Court to resolve the constitutional status of slavery, the one constitutional controversy that the Jacksonian party system was not structured to resolve.

E. C. Knight and *Roe* were products of the long state of courts and parties that structured constitutional politics from the 1880s to the 1980s (Graber 2018). In that political order, two relatively nonideological parties fought over the spoils of government but rarely were divided over or campaigned on the most hotly contested constitutional issues of the day. Such Democrats as John W. Davis and Alfred Smith were as committed to dual federalism as such Republicans as Calvin Coolidge and Herbert Hoover. Dwight Eisenhower's Republican Party claimed to operate New Deal institutions more efficiently than Adlai Stevenson's Democratic Party. Constitutional debates more often pitted populists, progressives, and, later, liberals in both parties against conservatives in both parties. With rare exception, Democratic and Republican party platforms either did not mention such issues as the scope of the Commerce Clause or the constitutional meaning of search and seizure or did not take very different positions on such matters.

Judicial power flourished during the long state of courts and parties. A process that began with the revival of *Marbury v. Madison*, 5 U.S. 137 (1803) during the late 1880s (see Clinton 2004) and culminated in *Cooper v. Aaron*, 358 U.S. 1 (1958) resulted in most influential political elites accepting the federal judiciary as the ultimate authority for resolving constitutional disputes (see Kramer 2004). The variety of constitutional disputes the Supreme Court resolved steadily increased (see Pacelle 1991), in part because of improved, often federally sponsored, support systems for litigation (see Gillman 2006; Epp 1998;Lawrence 1990) and in part because of congressional legislation expanding the federal court system (Crowe 2012). The path of constitutional law changed dramatically during the 1930s and 1940s, as constitutional liberals wrested control over the federal judiciary from constitutional conservatives. Nevertheless, the same basic features of the long state of courts and parties that provided the political foundations for the judicial activism of the White Court that decided *E. C. Knight* provided the political foundations of the Burger Court that decided *Roe v. Wade*.

The structure of partisan competition in the twentieth century gave justices the freedom to engage first in extensive conservative activism and then, after 1936, to engage in extensive liberal activism. The same internally divided political parties that could not pursue constitutional visions through electoral and legislative politics were alternatively supportive, uninterested, or incapable of resisting when

presidents with a constitutional agenda sought to staff the federal courts with judges who shared a common constitutional outlook. Walter Murphy (1961) detailed William Howard Taft's successful efforts to secure judicial majorities committed to the freedom of contract and dual federalism. Keven McMahon (2003) described how the Roosevelt, Truman, and Eisenhower Administrations successfully secured judicial majorities committed to racial equality. With few exceptions, presidents and their legal advisors committed to an activist judiciary consistently passed over proponents of judicial restraint for justices they believed to be committed to protecting fundamental rights. Learned Hand was considered the most distinguished judge on the lower federal courts during the long state of courts and parties (Gunther 1994), but he was consistently denied a Supreme Court nomination partly because he consistently deferred to governing officials on almost all rights issues (McMahon 2003). Badly divided parties sometimes cooperated with executive agendas by taking steps to remove internally divisive constitutional issues from electoral politics (see Lovell 2003). More often, parties lacked the unity necessary to respond when the Supreme Court made contested rights decision. Southern Democrats hollered every time the Supreme Court protected people of color, but Northern Democrats held the veto points necessary to ensure that all opponents of the Warren Court could do was make noise.

The judicial missions generated by the constitutional politics of the long state of courts and parties were remarkably underspecified. Justices before 1932 were expected to protect rights and limit federal power by working within a jurisprudential framework structured by commitments to the freedom of contract and dual federalism. Substantial disagreement nevertheless took place over the scope of the freedom of contract (see *Lochner v. New York*, 198 U.S. 45 [1905]) and of dual federalism (see *Hammer v. Dagnehart*, 247 U.S. 251 [1918]) as well as over what the principles underlying the freedom of contract and dual federalism entailed in cases that did not directly raise those matters (see *Frank v. Mangum*, 237 U.S. 309 [1915]). Justices after 1936 were expected to protect rights by working within a jurisprudential framework structured by commitments to free speech and racial equality. Substantial disagreement nevertheless took place over the scope of free speech (see *Minersville School District v. Gobitis*, 310 U.S. 586 [1940]) and of racial equality (see *Swain v. Alabama*, 380 U.S. 202 [1965]), as well as over what the principles underlying free speech and racial equality entailed in cases that did not directly raise those matters (see *Griswold v. Connecticut*, 381 U.S. 479 [1965]). The long state of courts and parties was incapable of generating any more specific mission. For most of the twentieth century, no party line existed on most rights issues that justices might hypothetically toe. Politics outside the Court did not generate a thick Republican, Democratic,

liberal, or conservative constitutional vision that justices have been committed to when joining the bench or that could provide guidelines for justices on the bench. Justices in the long state of courts and parties were responsible for delineating the content of conservative or liberal constitutional visions, receiving only the vaguest outlines from the rest of the political system.

These political foundations for judicial power provided the foundations for a robust social construction process during the long state of courts and parties. The judicial mission from 1890 to 1932 was to protect rights analogous to the rights the Supreme Court protected in *Adair v. United States*, 208 U.S. 161 (1908).[11] The judicial mission from 1936 to 1980 was to protect rights analogous to the rights protected in the cases cited by the footnote in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938, 151–52, n. 4) and, after 1954, analogous to the rights protected by *Brown v. Board of Education* (1954). Justices performed this mission by simultaneously determining the legal principles underlying past paradigmatic cases and assessing whether the practice under constitutional attack resembled in crucial constitutional dimensions the practices declared unconstitutional in the paradigmatic cases. Justices employing the social construction process who interpreted constitutional criminal procedure as a tool for preventing rampant racial discrimination in southern police practices supported the exclusionary rule and *Miranda* warnings (Seidman 1992). Justices who interpreted sexually explicit works as literature restricted the constitutional scope of obscenity (Powe 2000). Justices who engaged in these rights-protective missions were not agents of the president who appointed them or agents of a political party. More often than not, their appointing president did not anticipate or care about issues that came before the Court a decade later. Neither Republicans nor Democrats before 1972 took distinctive stands on contested constitutional rights issues. A political regime that tasked justices with the responsibility for determining what constituted fundamental rights did not assign justices the task of determining the original meaning of constitutional rights, following precedent or reaching any particular result as long as the justices worked within a broad conservative framework before 1932 or a broad liberal framework after 1936.

Roe v. Wade illustrates the social construction process at work in the long state of courts and parties.[12] The justices who decided that the Due Process Clause of

11. All proponents of the freedom of contract on the Supreme Court were in the majority in *Adair*. Whether *Lochner v. New York* (1905) was a correct application of conservative constitutional principles was controversial.

12. This paragraph is my account of the social construction process at work. Kahn (1994a) offers a somewhat different account.

the Fourteenth Amendment protected the right to terminate a pregnancy were not nominated to the Supreme Court because of their preexisting opinions about abortion or, for that matter, about any issue from which an attitude about abortion rights could easily be predicted (see McMahon 2011). A fair inference can be made that no justice on the *Roe* Court, when they were appointed to the federal bench, anticipated they would strike down bans on abortion in forty-six states. The justices in the *Roe* majority came to their conclusion that abortion was a constitutional right in part because they were committed to a jurisprudence of fundamental rights and in part because changes in sexual practices and gender roles convinced them that abortion was a fundamental right. Politics mattered only in that presidents during the long state of court and parties consistently nominated justices who were highly educated legal elites. As the United States experienced changes in reproductive and gender politics, the elites on the Supreme Court interpreted those changes much as educated legal elites did off the Court (Powe 2000).

Kahn (2015) frequently criticizes "neo-Dahlian" approaches to explaining judicial review, but the social construction process is consistent with Dahl's (1957) famous claim that "Supreme Court Justices" are unlikely to hold "norms of Rights and Justice substantially at odds with the rest of the political elite" (291). Kahn (2015) interprets that claim as imputing agency to "the rest of the political elite" (282). The political elite through the appointments or some other process fashions a judiciary in their image. On a different interpretation, Dahl was simply pointing out that political elites in the long state of courts and parties were likely to have common reactions to social developments. He might have said "Ronald Kahn, a liberal Jewish academic who lives in Oberlin, Ohio, is unlikely to vote differently than Mark Graber, a liberal Jewish academic who lives in Silver Spring, Maryland." Neither of us causes the other to have similar beliefs on same-sex marriage, gun rights, and the scope of the Commerce Clause. Rather, as academics who share certain cultural affinities, we tend to think the same way about cultural matters and react in uniform ways to social developments. Supreme Court justices during the long state of courts and parties had similar affinities with other legal and educated elites. They were unlikely to hold opinions at odds with other members of their cohort because, as surveys taken in the mid-twentieth century found, Democratic and Republican legal and educated elites tended to agree with each other on major constitutional issues far more than they agreed with the more plebian members of their political party (McCloskey 1964; Graber 2013b).

Justice Benjamin Cardozo (1921) captured how the social construction process functioned during the long state of courts and parties when he observed how the "great tides and currents which engulf the rest of men do not turn aside in their

course and pass the judges by" (168). For much of the twentieth century, judges reacted to "great tides and currents" as did the rest of the legal and educated elite (Powe 2009; Baum and Devins 2010). When elites abandoned scientific racism, the Supreme Court began protecting the rights of people of color (Klarman 2004). When elite attention on matters of constitutional criminal procedure shifted from enforcing prohibition to racist law enforcement, the Supreme Court imposed greater constitutional restrictions on police investigations (Kersch 2004). When elites became more secular, the Supreme Court announced a stricter separation of church and state (Powe 2000). In none of these instances were Supreme Court justices acting as agents for either external political forces or for the legal and educated elite. Judicial majorities provided greater protections for people of color, people accused of crime, and secularism because they interpreted social developments in light of fundamental constitutional principles in ways similar to other members of the legal and educated cohort.

IV. WHITHER SOCIAL CONSTRUCTION IN THE STATE OF POLARIZED PARTIES AND POLARIZED COURTS

The constitutional order in the United States during the 1970s began transforming from the long state of courts and parties into the state of polarized parties and polarized courts. In this regime, ideologically polarized parties with distinctive constitutional visions encompassing almost all the political issues of the day struggle for dominance. The Republican Party is the coalition of choice of conservatives. The Democratic Party is the coalition of choice for liberals. In stark contrast to the semipolarized politics of the mid-nineteen century, twenty-first-century Republicans and Democrats fight over the entire national agenda. No issue remains analogous to slavery that crosscuts the parties. Geoff Layman and Thomas Carsey (2002) coined the term "conflict extension" when pointing to the increased tendency for elites and political activists to toe the party line on all the major political and constitutional controversies of the day. By the second decade of the twenty-first century, the transformation of the American constitutional order was complete. The most conservative Democratic in Congress is more liberal than the most liberal Republican in Congress (Devins and Baum 2016).

Courts have fallen in line with the rest of the political system. The most liberal Republican appointee to the Supreme Court is considerably more conservative than the most conservative Democratic appointee to the Supreme Court. Neal Devins and Lawrence Baum note that "[s]ince 2010, when Elena Kagan replaced John Paul Stevens, all of the Republican-nominated Justices on the Supreme Court

have been to the right of all of its Democratic-nominated Justices" (Devins and Baum 2016, 301). Justice David Souter appears to be the last judge of the long state of courts and parties. All five justices appointed during the past twenty-five years have largely voted as would be predicted from the platform of the party whose president appointed them. With the retirement of Justice Anthony Kennedy, the Supreme Court will likely consist of five reliable conservative Republican appointees and four reliably liberal Democratic appointees.

A political order structured by competition between two polarized parties altered but did not remove the political foundations for judicial power. The appointments process is partly responsible for generating what some consider the "most activist court Supreme Court in history" (Keck 2004). Democrats and Republicans for nearly forty years have engaged in bitter struggles for control of the federal judiciary, with presidents of each party nominating judicial activists dedicated to advancing that party's constitutional vision. Tom Keck (2004) notes that the Supreme Court at the turn of the twenty-first century is staffed by liberal judicial activists and conservative judicial activists, with proponents of judicial restraint conspicuously absent. Divided government supplements the appointment process as a foundation for judicial power. With rare exceptions, both Democrats and Republicans from 1980 until 2016 controlled at least one institution that could be used to prevent national elected officials from too aggressively challenging Supreme Court decisions, whether those be liberal decisions declaring a right to same-sex marriage or conservative decisions declaring unconstitutional the preclearance provisions in the Voting Rights Acts. Justices in this political environment are free to engage in activism from the left, the right or both, knowing that proponents of their particular decisions and course of decisions occupy crucial veto positions in the elected branches of the national government (see Graber 2015). Donald Trump and the Republican Party are cementing some foundations for judicial activism by staffing the federal judiciary with conservatives committed to a right-wing constitutional agenda (Viser 2018). This strategy, however, may risk a major conflict between the courts and the elected branches of the national government should Democrats after 2020 control both the White House and Congress.

The Supreme Court, illustrating Kahn's (2006, 102–103) point that judicial time is not identical to political time, was slower than the White House or Capitol Hill to reflect the polarization of the general political system. Life tenure enabled justices appointed during the long state of courts and parties to remain on the bench while the constitutional order was transitioning and resist the tides pushing their elected counterparts toward greater uniformity in their constitutional

opinions. The remnants of the long state of courts and parties continued to exercise sufficient influence to obtain the appointments of such justices as Sandra Day O'Connor, David Souter, and, to a lesser extent, Anthony Kennedy,[13] whose behavior often resembled justices appointed in the long state of courts and parties more than recent judicial appointees. Voting blocs on the Supreme Court became more stable over more issues, but until 2018, at least one judge remained who did not hold views identified with one political party on all the constitutional issues of the day.

Judicial appointments nevertheless do a better job explaining the path of constitutional law in the state of polarized parties and polarized courts than in the long state of courts and parties. Carol Nackenoff's contribution to this symposium notes that while the justices have not (yet) overruled *Roe v. Wade*, Republican judicial appointees have substantially narrowed the scope of the abortion right. Outside of privacy, Nackenoff (2019) notes a wave of conservative judicial activism that reflects the constitutional agenda of the Republican Party. Affirmative action has been substantially curbed (e.g., see *Schuette v. Coalition to Defend Affirmative Action*, 568 U.S. 1249 [2013]), campaign finance reform has been undermined (*Citizens United v. Federal Election Commission*, 558 U.S. 310 [2013]), and federal capacity to protect voting rights is being eviscerated (*Shelby County, Ala.* 2013). The Roberts Court, Nackenoff (2019) suggests, instead of "protecting [liberal] rights under the Equal Protection Clause," may be "practicing a kind of LGBT exceptionalism" (59) with sex and gender issues being the only matters in which constitutional law is still moving in liberal directions. Conservatives may have gained control over the federal judiciary more slowly than some externalist models predicted, but that control and the resulting course of judicial decision-making seem secure, at least temporarily, at present.

Nackenoff (2019) observes that the Roberts Court majority may be engaged in a conservative social construction process, but that process differs from the social construction process justices engaged in during the long state of courts and parties. For most of the twentieth century, justices were responsible for determining the content of conservative (before 1932) and liberal (after 1936) constitutional visions. This distinctive role explains why the course of constitutional law, for almost one hundred years, was substantially independent from the course of legislation or developments in party platforms. Kahn offered the social construction process to explain why justices reasoned differently than elected officials and reached different

13. Yalof (1999, 135–42, 155–65, 190–92) details the constitutional politics that partly explain why Justices O'Connor, Kennedy, and Souter did not always behave as Republican partisans on the Court.

conclusions from party leaders. The literature on the political construction of judicial power in the long state of courts and parties explained why elected officials gave courts the freedom to engage in the social construction process. During the state of polarized parties and polarized courts, both parties articulate detailed constitutional visions. Each new judicial appointment toes the party line more firmly than the previous judicial appointment. In this political universe, justices are more often tasked with implementing a partisan constitutional vision than with developing one. Judicial decisions bear a close resemblance to presidential proclamations, particularly when the incumbent president's party has appointed the majority of the justices. The distinctions between politics inside and outside the Court that the social construction process explains are far fewer than was the case several generations ago. Individual idiosyncrasies matter. Nevertheless, the limited number of cases in which even one justice votes against suggests a far less independent role for federal courts than was the case during the heyday of the social construction process and the long state of courts and parties.

Kahn's influence has a better chance of surviving the state of polarized parties and polarized courts than the social construction process. The social construction process requires political foundations that free courts to decide questions of fundamental right in light of shared jurisprudential commitments and interpretations of the social world. That process does not function well when the Supreme Court is staffed with justices, liberal and conservative, who interpret all social developments in light of partisan constitutional visions. Kahn's influence also requires an academy and academics committed to truth-seeking, justice, and academic camaraderie. Judging by the essays that follow, such a community remains vibrant, in part thanks to Kahn's efforts and example. Kahn's accomplishments as scholar, mentor, and friend are likely to have a very long shelf life and perhaps even influence a future generation of scholars working in a differently constitutional order in which the political foundations for the social construction process can be revived.

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