

The Political Foundation of Judicial Supremacy

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(Professor Whittington received the Politics and History section’s 2008 J. David Greenstone Award for Political Foundations of Judicial Supremacy. We invited him to share his thoughts on his research).

I am grateful to have my work recognized by the Politics and History Section with the J. David Greenstone Award, and I appreciate the opportunity to discuss the work. As someone who came into the discipline with a substantial interest in American political history but no real idea of whether and where such an interest might fit within the discipline, such moments are particularly welcome.

I have long considered myself to be someone who studies American constitutionalism. This is really an excuse that allows me to range over a wide area, from normative theory to various aspects of empirical American politics. Broadly speaking, my work has been particularly concerned with the political underpinnings of constitutional maintenance and development. Constitutional practices, political values and interests, and the understood meaning of constitutional terms are all politically contested and change over time. Some of that contestation takes place in the courts, but the judiciary is only a part of constitutional politics. My hope is to integrate the concerns of constitutionalism and courts into the broader study of American politics.

Political Foundations of Judicial Supremacy is concerned with the judicial authority to interpret the Constitution. Building off my previous work, I take both the scope of institutional authority within the American constitutional system and the substantive meaning of particular constitutional provisions to be politically contested

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We welcome and encourage letters and submissions, especially for Book Notes and Work in Progress.

The deadline for Spring/Summer issue submissions is March 1. The deadline for submissions for the Fall/Winter issue is October 15. Please send all correspondence to:

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From the Editor

I am going to be fascinated by our members' efforts to place in the story of the 2008 election into broad narratives of American political development. The Obama administration may provide real time experience with the processes of political reconstruction. If this is a realigning moment for American politics, it is likely to be a realigning moment for the study of American political development as well. The implications of that prospect deserve reflection. We invite anyone with thoughts about the impact of the election on politics and history to share their ideas in *Clio*.

Many thanks to Richard Bensel and everyone in the section for their support, and for the outstanding gift of a 1934 National Resources Board report. It will be put to enthusiastic use. Particular thanks go to Jessica Curtis, this year's Managing Editor, who had to show considerable initiative because of the demand of election analysis and the occasional dramatic moment from the Illinois Governor's office. Thanks again to the staff of the political science department here at UMSL and to our chair, Eduardo Silva, who has shown strong support for our efforts.



Toward a Developmental Account of Judicial Power

Justin Crowe, Pomona College

(Professor Crowe was recipient of the Politics and History section's 2008 Mary Parker Follett Award for the best article or chapter in politics and history. He received the award for "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft" in the Journal of Politics 69: 1 (2007). We invited Professor Crowe to reflect on his research).

How did the federal judiciary in general, and the Supreme Court, in particular, become a powerful institution of American governance? It is, in my estimation, the central question at the nexus of public law and American political development, yet it is, in my estimation, also a question for which we lack a satisfying—a theoretically rigorous and historically rich—answer. We know, for example, that, when the Supreme Court convened for the first time at the Royal Exchange Building in New York in February 1790, it did so with only four of George Washington's initial six appointments presiding.* We know that, within the first decade of the Court's existence, its first Chief Justice—*Federalist* co-author John Jay—resigned to seek the governorship of New York, and several distinguished men refused appointment. We know that the Court languished without substantial business for several terms before and that its first substantively important decision—*Chisholm v. Georgia* in 1793—was immediately overturned by constitutional amendment. We know, in other words, that the Supreme Court—and, by extension, the federal judiciary at large—thoroughly failed to exert any measurable power in early America.

What we do not know—and what I am attempting to figure out—is exactly how the Court transcended these early limitations and this forgotten status to become a central actor in American politics. After all, few aspects of American politics have been more thoroughly transformed over the past two centuries than the role of the United States Supreme Court. Whereas the Court of the late eighteenth century lacked respect and importance, the Court of the early twenty-first century is

prestigious and revered. Whereas the Court of the late eighteenth century was thought a feeble institution, the Court of the early twenty-first century is, as evidenced by the battles over judicial nominations and the attempts to restrict jurisdiction over controversial issues such as flag-burning and gay marriage, clearly considered significant enough to warrant a political fight. Whereas the Court of the late eighteenth century had no building, a small budget, and was largely controlled by the other branches of government, the Court of the early twenty-first century hears cases in its own “marble temple,” has a sizeable budget, and is sufficiently independent from the other branches to govern its own affairs. How, to frame the question somewhat succinctly, did such a dramatic evolution occur? How did we get from the Court of John Jay to the Court of John Roberts—from a Court of political irrelevance to one of political centrality?

Wrestling with these questions has brought me to the puzzle of what I call “judicial institution-building”—the puzzle of understanding how the process of “building” the judiciary unfolded over the course of American political development. By “judicial institution-building,” I mean *the creation, consolidation, expansion, or reduction of the structural and institutional capacities needed to respond to and intervene in the political environment*. In particular, I focus on the construction, destruction, and renovation of three building blocks that are both common and essential to all political institutions: a set of discrete and specific *functions*, which are performed by a group (or variety of groups) of *individuals*, who are themselves aided by a collection of concrete operating *resources*. This tripartite foundation—functions, individuals, resources—encompasses several features of the institutional judiciary, including, but not limited to, jurisdiction, procedural rules, and judicial discretion (functions); expansion or contraction of courts, organizational structure, and formal institutional entities (such as the Judicial Conference or the Administrative Office of the Courts) (individuals); and budgets, buildings, and legal reports or books (resources). Together, these features allow courts to hear cases, craft and modify legal rules, and render authoritative judgments; in

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Member Awards

Victoria Hattam, New School University, received the Ralph J. Bunche Award for the best scholarly work in political science published in the previous calendar year that explores the phenomenon of ethnic and cultural pluralism for *In the Shadows of Race: Jews, Latinos, and Immigrant Politics in the United States* (University of Chicago Press, 2007).

Thomas M. Keck, Syracuse University, was given the Houghton Mifflin Best Published Article Award, which recognizes the best journal article on laws and courts written by a political scientist and published during the previous calendar year for his work, "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?"

The Law and Courts Section presented its Law & Courts Lasting Contribution Award, which is given annually for a book or journal article, ten years or older, that has made a lasting impression on the field of law and courts, to **Mark A. Graber** of the University of Maryland for "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary Committee."

The Founders Award from the Presidency Research Section, which recognizes the best paper presented by a graduate student, was given to **Curtis W. Nichols** and **Adam Myers**, University of Texas, Austin, for their work "The Good, The Bad, and The Ugly: Exploiting the Opportunity for Reconstructive Leadership."

Martha Joynt Kumar, Towson University, received the Richard E. Neustadt Award, awarding the best book on the U.S. Presidency from the previous year, from the Presidency Research Section for *Managing the President's Message* (John Hopkins Univ Press, 2007).

The Career Service Award from the Presidency Research Section, which recognizes career service to the study of the Presidency, was awarded to **George C. Edwards III** of Texas A&M University.

Keith Darden and **Anna Grzymala-Busse**, University of Michigan, received the Gregory Leubbert Best Article Award from the Comparative Politics Section for their work "The Great Divide" *World Politics*, Volume 59, October 2006, 83-115.

Gerald Gamm, University of Rochester, and Thad Kousser, University of California, were given the SPPZ Award for best paper on state politics and policy from the State Politics and Policy Section.

Keith E. Whittington, Princeton University, received the C. Herman Pritchett award from the Law and Courts Section for the best book on law and courts, for his book *Political Foundations of Judicial Supremacy: The Presidency, the*

Supreme Court, and Constitutional Leadership in U.S. History (Princeton University Press, 2007). The book also received the J. David Greenstone Award.

Avery Plaw, University of Massachusetts, was the recipient of the Wilson Cary McWilliams Best Paper Award presented by the Politics, Literature, and Film Section for "Munich Revisited: Reevaluating the 'Wrath of God.'"

The Best Dissertation Award from the Race, Ethnicity, and Politics Section was awarded to **Daniel Wei HoSang**, University of Oregon, for "Racial Propositions: 'Genteel Apartheid' in Postwar California."

Daniel Deudney, Johns Hopkins University, was given the Jervis and Schroeder Best Book Award from the International History and Politics Section for *Bounding Power: Republican Security Theory from the Polis to the Global Village*.

The Best Article award from the Comparative Democratization Section was awarded to **Jason Brownlee**, University of Texas, Austin, for his work, "Hereditary Succession in Modern Autocracies," *World Politics* (July 2007)

Dan Slater and Erica Simmons, University of Chicago, were given The Sage Paper Award for the Qualitative and Multi-method Research Section for their work "Informative Regress; Critical Antecedents in Comparative-Historical Analysis."

Michael W. Hail, Morehead State University, received the *Faculty Member of the Year* award and the *Flying High Award*, which recognizes faculty for outstanding teaching and continual commitment to student success.

Alyson Cole, Queens College & The Graduate Center, CUNY was awarded *The President's Award for Excellence in Teaching* which recognizes outstanding teaching in the classroom.

Graham Dodds, Concordia University, received the *Award for Outstanding Teaching* for excellence in teaching, based on course evaluations and student testimonials.

Jasmine Farrier, University of Louisville, was awarded the *Kentuckiana Metroversity Award for Instructional Development* to encourage ongoing improvements of instructional development among full-time faculty of member institutions.

Rogers M. Smith, University of Pennsylvania, received the *Dean's Award for Mentorship of Undergraduate Research* which recognizes faculty members who have excelled in nurturing students' desires and abilities to conduct meaningful research.

The 2008 Mary Parker Follett Award
for the best article or chapter on Politics and History

to **Justin Crowe** for “The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft,” *Journal of Politics* 69 (2007), 73-87.

(Eric Patashnik, chair of the 2008 Follett Award Committee, read these comments in presenting the award. Julie Novkov and Jason Wittenberg also served on the Follett Award committee).

In this penetrating and important essay, Crowe offers an analytically grounded and historically rich account of the building of the federal judiciary as an independent and autonomous institution of governance. The empirical focus of the study is the enactment of key reforms bills in the 1920s that substantially enhanced the power of the federal courts, the Supreme Court, and the Chief Justice. This is a largely neglected episode in American political development, but one which has had far reaching implications for the subsequent evolution of the American polity. Crowe critically examines leading “preference alignment” and “judicial assertion” theories of judicial reform, and finds that neither captures the character of the reforms accurately. Building on Daniel Carpenter’s notion of bureaucratic autonomy, Crowe argues that Chief Justice William Howard Taft forged or constructed judicial autonomy through the building of reputations, the cultivation of networks, and

the pursuit of change through measured action.

Crowe’s elegantly written essay offers powerful insights not only into the evolution of the American judiciary, but into the role of dynamic and sustained political entrepreneurship in American political development more generally.

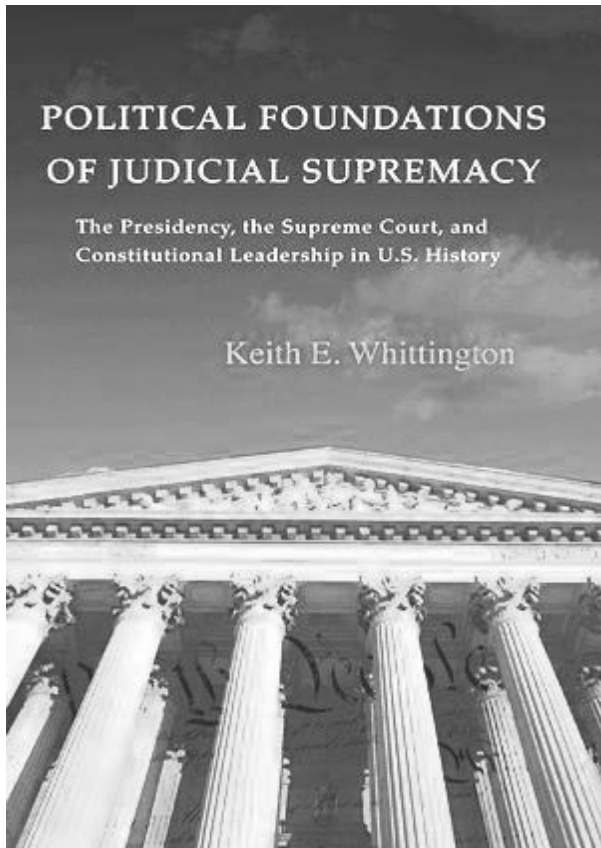


The 2008 J. David Greenstone Award
for the Best Book on Politics and History

to **Keith Whittington** for *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007).

(Here are the award committee's comments on the J. David Greenstone Award. David Vogel chaired the committee, which included Marie Gottschalk and Evan Liebermann)

Whittington's book represents a major contribution to the study of American political development. His well-researched and comprehensive historical analysis demonstrates that the Supreme Court needs to be seen as a political institution interacting with other political institutions, especially the executive branch. Its leverage waxes and wanes depending on particular historical circumstances. A key insight of this book is its historically informed demonstration that judicial supremacy is politically constructed. Whittington convincingly argues that presidents are strategic actors when it comes to the Supreme Court, sometimes deferring to judicial supremacy when it serves their purposes and other times challenging it when it serves their political purposes.



Whittington has developed a deeply original argument about the emergence of the role Supreme court's authority, which weaves together a wide-ranging scope of historical episodes – from the early days of the republic to *Bush v. Gore* – into a convincing body of evidence. Although it is strictly about the American case, it develops its argument over a series of historical epochs, showing how power-hungry executives ironically vested increased power in the judicial branch at critical moment in American history. This is a book whose arguments and evidence anyone working on the role of the court in relation to the other branches of government will need to engage. We anticipate that it will lead to important comparative studies on the development of judicial power across democracies.

The Inaugural Walter Dean Burnham Award
for the Best Dissertation on Politics and History

to **Tomas Henrik Larsson** for “*Capitalizing Thailand: Colonialism, Communism, and the Political Economy of Rural Land Rights*,” Cornell University, 2007.

(Here are the award committee’s comments on the inaugural Walter Dean Burnham Award. *Theda Skocpol* chaired the committee, which included *Sheri Berman* and *Paul Frymer*. The committee reviewed 18 dissertations nominated by section members and after a first review whittled this down to six finalists. All were very strong, and several could have been winners in any competition of this sort.)

“Capitalizing Thailand” is a riveting analysis of the evolution of land rights in Thailand, examining changes from the global era of colonialism in the late nineteenth century through the Cold War period of the late twentieth century. The analysis addresses important theoretical issues in the political economy of development with detailed archival and field evidence from different eras of Thai history, supplemented by strategically chosen cross-national comparisons to other developing nations in Asia and Africa. Larsson’s thesis shows how geopolitical circumstances interact with domestic social structures to shape the choices of government rulers about the institutionalization of property rights — a matter widely recognized as crucial to economic development. The empirical findings are provocative and counterintuitive. Larsson shows that during the colonial era, the Tai state defended its sovereignty by defending local property rights in ways that that promoted social stability and blocked foreign economic penetration, yet also retarded economic growth. Only later, when communist insurgents threatened in the 1960s, did the Tai authorities find it in their interest to clarify private property rights and facilitate economic modernization.

Methodologically, this thesis uses an apparently anomalous case to challenge and refine received theoretical wisdom, showing how an historical-institutionalist approach sensitive to contexts and sequences can improve upon standard rational-choice models of state choices about property rights. Even though the issues seem at first glance arcane and Thailand is a country not familiar to most scholarly readers, Larsson writes in a crisp and quietly dramatic manner, allowing the stakes to become clear and the findings to gain credibility step by step.”Capitalizing Thailand” is a model work in international political economy and historical-institutionalist comparative politics, by a scholar who has shown a remarkable ability to synthesize primary fieldwork in a difficult language with archival investigations and secondary comparisons.



*King Chulalongkorn of Siam
(1853-1910),
the subject of the
nation’s first postage stamp*

Politics and History Section Business Meeting

Boston Sheraton

Friday, August 29, 2008, 6:15pm

Section President Kathleen Thelen began the meeting by thanking the members for their work. She asked the 2009 APSA program co-chair, Kimberley Morgan, for comments on section panels for the Toronto meetings. Professor Morgan said that the overall theme of the 2009 conference, change and complexity, is well suited to the strengths of the section. Want panels with historical methods, and we are interested in comparative and transnational studies.

Professor Thelen then reminded members that it was important to attend panels at the APSA meetings because panel attendance was a basis of determining the number of panels each section would be allowed to organize at the following APSA convention. She noted that member dues have now gone up. She has overseen an update of the section bylaws on the website, and the website itself has been updated. There are a number of resources for APSA Organized Sections at http://www.apsanet.org/content_4590.cfm?navID=157

The Social Science Research Council and Columbia University will have a conference in honor of the late Charles Tilly, the Joseph L. Buntin Professor of Social Science, at Columbia University October 3-5, 2009 (see the memorial website at: <http://www.ssrc.org/essays/tilly/>). Karen Orren, one of the co-editors of the *American Political Science Review*, shared comments about the journal and urged members to submit their work.

The dissertation award has been suggested by Dan Tichenor at meeting of section council in 2007, and the section approved it at the business meeting. Theda Skocpol agreed to chair the committee for the inaugural award, and Paul Frymer and Sheri Berman agreed to serve on it. A committee consisting of Tichenor, Dorian Warren, and Douglas Reed (with advice from Kathy Thelen and Richard Bense) considered proposals for a name, considered many outstanding scholars, and settled on two proposals: first, that the name of the award would have a 5-year duration, and second that the first name of the award would be Walter Dean Burnham. These proposals were approved

The awards committees then reported. Dissertation committee chair Theda Skocpol (reporting for fellow committee members Paul Frymer and Sheri Berman) announced that Tomas Henrik Larsson received the inaugural Walter Dean Burnham award for "Capitalizing Thailand: Colonialism, Communism, and the Political Economy of Rural Land Rights," Cornell University, 2007 (see page 7). Article & chapter award committee chair Eric Patashnik (reporting for fellow committee members Julie Novkov and Jason Wittenberg) announced that Justin

Crowe received the Mary Parker Follett award for "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *Journal of Politics* 69 (2007), 73-87 (see page 5). Book committee chair David Vogel (reporting for fellow committee members Marie Gottschalk and Evan Liebermann) announced that Keith Whittington received the J. David Greenstone award for *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007).

The section secretary reported that the section's financial situation is solid and thanked the members for supporting a dues increase. The APSA will do more management of short courses in the future, and is providing a number of new resources on its website. Thanks to Kim Casey for her work on Clio this year and for overseeing the update of the website. Kathy Thelen, Richard Bense and the section thanked Dave Robertson for his service and thanked him with the gift of a deeply valued published report from the National Resources Planning Board. Dave expresses the deepest gratitude to all.

Jim Mahoney and Adam Sheingate, Program chairs for the 2008 APSA section panels, reported the good news that they received 32 panel proposals and 168 stand alone paper proposals. The bad news is that the section was allocated only 13 panels (expanded to 20 with cosponsoring). 4. Panel allocations are based on attendance at panels; allocation of panels for the 2009 meetings will take into account some other factors.

The meeting then took up the nomination of officers. Kathy Thelen thanked outgoing council members Dan Tichenor, Eric Patashnik, Dorian Warren, and Adam Sheingate, and continuing members Joe Lowndes, Douglas Reed, Ruth Collier, and Andreas Kalyvas. The nominating committee included Kathy Thelen, Richard Bense, Sheri Berman, Robert Lieberman, and Cathie Jo Martin. The committee nominated Sven Steinmo as President-elect, and Richard John, Margaret Keck, Julie Lynch, and Evan Lieberman for two-year terms on the section council. The slate was approved unanimously.

New section president Richard Bense addressed the section. He watched over Kathy's shoulder during her presidency and watched her decision-making process. He thanked her for developing a list of things to do as president which will help all presidents in the future.

The section adjourned, and a reception followed in the Liberty C room of the Boston Convention Center.

Politics & History Papers & Abstracts from the 2008 APSA Meetings

“Political Entrepreneurs in the Early U.S. Army: Secretaries of War and Bureaucratic Autonomy”
William Adler, CUNY, Graduate Center

The early American state is often overlooked in discussions of state-building, relegated to the background as a period of “courts and parties,” in the famous words of Stephen Skowronek. Examining the Army, however, shows us instead an energetic state deeply involved in guiding the pattern and direction of economic development. The Army’s actions in this regard may be divided analytically into two general categories: coercive activities and socioeconomic activities.

This paper focuses on the Army’s socioeconomic dimension. In the early republic the Army fostered engineering expertise the nation lacked; surveyed the geography, geology and mineralogy of newly acquired territory; helped build a nation-wide infrastructure of roads, canals, and railroads; and led innovations in technology and administration that subsequently spread to the private sector.

These important measures were not, however, inevitable – rather, they were the result of contingent developments, based partly on the individual decisions of political entrepreneurs. As presidents generally lacked the institutional resources to closely monitor routine Army operations, and Congress demonstrated only episodic involvement, responsibility for determining the exact course of socioeconomic projects fell largely to the Secretary of War and the uniformed chiefs of War Department bureaus. Although not entirely independent of constitutional actors, these men were often able to exercise their authority as political entrepreneurs to either enhance or constrain the Army’s capacity to influence economic development. Bureau chiefs played a particularly important role, serving for long stretches of time (often decades) and gaining autonomy much earlier than suggested by previous studies of bureaucratic autonomy. The bureaus

were thus able to nurture specific types of knowledge that the state called upon as needed; for instance, the surveying capabilities of the Corps of Topographical Engineers were required in debates over where to locate a proposed transcontinental railroad. Led by Colonel John James Abert, the topographical engineers throughout the 1840’s and 1850’s consistently favored a southern route, further reinforcing the sectional divide splitting the nation.

“Subaltern Sovereignty Versus Settler Nationalism: Hierarchy and Hybridity in Late 19th Century North American Political Development”
Kevin M. Bruyneel, Babson College

“Not-So-Strange Stillbirth of the American Colonization Society”
David F. Ericson, SUNY, Albany

The African colonization movement has been treated as a largely upper-South movement (Egerton 1985) which never enjoyed more than marginal support from the federal government (Staudenraus 1961) or from the free African-American community (Burin 2005). In a revisionist vein, Portnoy (2005) argued that the movement enjoyed relatively broad-based, cross-sectional support into the 1830s, when it was marginalized by increasingly strident proslavery and antislavery attacks. My paper goes beyond Portnoy in arguing that the movement was only marginalized when slavery was finally abolished during the Civil War. Until then, the American Colonization Society (ACS) continued to enjoy federal support, from Democratic, Whig, and Republican administrations, so much so that Liberia was really an unofficial United States colony. However marginal its results, the movement filled a symbolic niche in antebellum culture. It symbolized the impossibility of a multiracial society and thus appealed to a broad spectrum of public opinion in white America. In this sense, African colonization was the perfect analogue of Native-American removal.

“Race, Politics, and the American State: Creating Administrative Capacity for Federal Agenda-Setting in Relations with American Indian Tribes”
Ruth French-Hodson, University of Oxford

“Beyond Institutions and Ideas: The Political Politics of Affirmative Action”
Robert Lieberman, Columbia University

The development of affirmative action in the United States poses a challenge for both standard historical-institutional accounts of the development of American race policy and the conventional understanding of American state building and policy development more generally. The politics of race in the United States inherently involves conflicts of both interests — institutionally embedded disputes over the allocation of power and resources — and ideology — clashing commitments to color blindness and various forms of group consciousness. In the case of affirmative action, the Civil Rights Act of 1964 seemed to rule out group-based, race-conscious policy instruments to combat discrimination and provided very little coercive power to the Equal Employment Opportunity Commission (EEOC), the agency it established to enforce an antidiscrimination law. And yet, within a decade, the EEOC had spearheaded the development of affirmative action, a set of race-conscious practices backed by the coercive power of the state. How did this development occur in an environment that was hostile to its success, both institutionally and ideologically? The answer lies in a strategic alliance between the EEOC and civil rights organizations that exploited institutional openings in the American policymaking system to reorient the ideological framing of antidiscrimination policy. This case suggests that neither institutions nor ideas is sufficient to account for patterns of policy development and offers a glimpse of an explanatory approach that combines institutional and ideological elements into a single, comprehensive explanatory framework.

“Turning American Political Development Inside Out: The Empire of Liberty and the the Dream of Liberia”
Joseph E. Lowndes, University of Oregon

“What’s So Hard about Sex Equality?: Men, Women, and Social Cooperation”
Linda McClain, Boston University

My lecture this evening takes up a fundamental problem: social cooperation is assumed by leading political theorists to be a basic requirement for a well-ordered society, but is social cooperation between women and men on terms of equality possible? Social cooperation between women and men in various domains of society — especially within the family — is assumed to be a fundamental and necessary building block of society, but it proves hard to secure. Equality, in particular, proves to be a further problem. On the one hand, women’s equal citizenship, today, is a basic constitutional principle, a commitment of legislative policies such as anti-discrimination and equal opportunity laws, as well as an international human rights norm. On the other hand, sex inequality persists.

“Women’s Political Leadership: A Policy Feedback Model”
Eileen McDonagh, Northeastern University

American women attain more professional success in medicine, business, and higher education than do most of their counterparts around the world. An enduring puzzle, therefore, is why the U.S. lags so far behind when it comes to women’s political representation. In 2008, women held only 16.8 percent of seats in the House of Representatives, a proportion that ranks America behind 83 other countries. This research addresses this conundrum. It establishes that equal rights alone do not ensure equal access to political office. Also necessary are public policies representing maternal traits that voters associate with women. Such policies have feedback effects that teach voters that the maternal attributes they associate with women signify a location not only in the private sphere of the home,

but also in the public sphere of the state. Most democracies have policies that represent women's individual sameness with men and women's maternal group difference from men, but those of the United States represent only individual equality, thereby accounting for its laggard status.

“Educational Pioneer or Laggard? The Development and Decline of American Institutional Capacity to Expand Access to Higher Education”
Suzanne Mettler, Cornell University

While slow to extend many forms of social provision, the United States long led the world in developing institutions of higher education and expanding access to college to its citizens. From the Morrill Act of the 19th century, enabling the development of the land grant universities, to the GI Bill and Pell Grants of the 20th century, key policies forged this path. By contrast to European models, American higher education thrived because of a vibrant blend of mutually conducive private, state, and federal efforts. Public institutions—from the community college level through universities—expanded dramatically after World War II and continued to do so even after the economy slowed in the 1970s and federal efforts contracted in the 1980s. Over the past decade and a half, however, such institutions have been increasingly challenged to do more with less as states have failed to maintain their budgets and the federal government has neglected to respond effectively to changing circumstances.

This paper considers how changes in institutional capacity led to both the past successes of the American system of higher education and its recent stagnation. It examines how American federalism, under some circumstances, fostered a vibrant marketplace of quality institutions and facilitated access whereas under different circumstances, it has led to a schism in quality and resources. The paper assesses the role played by federal and state policy initiatives and the provision of resources by each level of government over time.

Particular attention is given to the impact of competing demands for resources faced by states by the 1990s, as K-12 education, incarceration, and Medicaid consumed increasing percentages of their budgets while funding for higher education, being discretionary, was readily sacrificed. The paper aims to help explain how it is that institutions that previously helped to ameliorate social and economic inequality are now contributing to the widening of gaps between different groups, with serious implications for American democracy.

“Prostitutes, Coolies, Slaves and Citizens: Gender, Race, and Class in Constructions of American Citizenship, 1875-1925”
Carol Nackenoff, Swarthmore College

Gender played a vital role in the federalization of immigration law and in processes of state building in the late 19th and early 20th centuries. Gendered struggles over citizenship included issues of immigration, naturalization, and deportation, and are linked to the emergence of a stronger national government and the rise of the administrative state. Gender also figured in the Court's engagement in citizenship struggles, and thus in the role of the Court in facilitating greater federal control over borders and criteria of fitness for membership.

“Of Pirates and Presidents: The Southern Borderlands and the Origins of the War-Making Executive, 1800s-1830s”
Jason Opal, Colby College

Historians and political scientists often ponder the war-time powers of Abraham Lincoln, Woodrow Wilson, and Franklin D. Roosevelt, asking how or if these presidents surpassed their rightful authority in the name of security or necessity. Such inquiries are especially valuable in the current era of the “unitary executive.” Yet they inevitably focus on the ways people *inside* the polity—Copperheads, pacifists, Japanese immigrants, etc.—were (mis)treated by executive power. During the early nineteenth century, by contrast, the key source



of presidential aggrandizement was a fundamental shift in the legal and cultural definition of America's external foes, especially the Indians, pirates, and assorted "banditti" along the southern borderlands of Florida, the Gulf Coast, and the Caribbean.

Early republican jurists, statesmen, and theorists routinely declared that the United States would abide the so-called "law of nations" when dealing with enemies, not least because it lacked the firepower to insist otherwise. Together with the Constitution's careful division of war-making powers, this deference to international law effectively contained the military options of the President, as Jefferson, Madison, and Monroe discovered while trying to seize Florida from the Spanish and protect American shipping in the Caribbean.

By contrast, Andrew Jackson and his followers advanced a new view of national right that relegated any foe beyond the southern borders to the category of *hostes humani generis*: enemy of all humankind. After his invasion of Florida in early 1818, Jackson ordered summary executions of Indians and other "desperadoes"; as a Senator during the 1820s, he pressed to allow American naval commanders to bombard or blockade Puerto Rico and Cuba in pursuit of pirates. Entire islands could be "chastised," one of his congressional allies argued, because pirates were "the common enemies of the human race, towards whom there can be no neutrals." When Jackson became President, he repeatedly and overtly made war without declaring war, as by ordering a naval reprisal against a Sumatran village after an American vessel selling opium was attacked nearby. In this way, he empowered the President by asserting the sovereignty of "the people," not so much over the workings of American government as over the stateless others who lived beyond the nations' boundaries.

"The Privatization of Social Dependency: Work-Family Balance and Gender Equity in the United States"

Gretchen Ritter, University of Texas, Austin

"From Historical Institutionalism to Discursive Institutionalism: Explaining Institutional Change in Political Economy"

Vivien Schmidt, Boston University

To explain change in comparative political economy, a 'discursive institutionalist' approach focused on ideas and discourse is a necessary complement to older 'new institutionalist' approaches. Historical institutionalist approaches have difficulty explaining change, tend to be static and equilibrium-focused; and even where they get beyond this through accounts of incremental change, they are more descriptive than they are explanatory of change. The turn to rational choice institutionalist approaches for agency, for 'micro-foundations' to historical institutionalist 'macro-patterns,' also does not solve the problems of historical institutionalism. A turn to discursive institutionalism could. Using examples of reforms in national political economies and welfare states, the paper illustrates how ideas and discourse help explain the dynamics of change (and continuity).

"A Scholar and a Statesman: Woodrow Wilson's Conception of "Responsible" Opposition in Theory and Practice"

Jeffrey Selinger, Bowdoin College

Wilson remarked in *Constitutional Government in the United States* that "We are ready to study new uses for our parties and to adapt them to new standards and principles." What new standards and principles did Wilson have in mind? And was Wilson himself "ready" to see them in action once he made the transition from scholar to statesman? This paper

will assess Woodrow Wilson’s attempt to redefine the role of parties in American politics, and consider how his theoretical insights (and blind-spots) might inform our contemporary understanding of the merits (and risks) of organized opposition.

“American Political Development, Space, and Citizenship”

Bartholomew Sparrow, University of Texas, Austin

“American Political Development, Space, and Citizenship” argues that the United States has restricted, and continues to restrict, U.S. citizenship on account of geography. The paper questions why, in the aftermath of the Civil Rights era, women’s movement, and the effective *de jure* equality of persons on the basis of ascriptive characteristics, the United States added the Northern Marianas to its possessions as a “unincorporated territory.” The paper further questions why the United States continues to hold the Northern Marianas and the other island territories, despite the fact that these peoples are not equals as U.S. citizens under the Constitution, under federal law, and as members of a constituent unit of a federal United States. Although U.S. citizenship has been (in)famously curtailed and denied to women, African Americans, American Indians, Mexican-Americans, and Chinese and other Asian Americans, citizenship has also been and continues to be compromised for reasons of national security and strategic ambition—reasons that may intersect with race, ethnicity, and religion, but are analytically distinct.

“Institutional Analysis and Evolutionary Theory”
Sven Steinmo, European University Institute

This paper examines evolutionary theories developed in the life sciences and explores the ways in which specific concepts and insights from these theories can be successfully applied to social and political institutions. This paper is not intended to present its own research, but instead offered as an introduction to evolutionary theory and some of its implications for political science. We argue that

endogenous institutional change should be seen as an evolutionary process. Viewing history in this way, however, suggests a different ontological perspective than that which is typically found in political science. We highlight Darwin’s fundamental insight that evolutionary change depends on the variation between every individual within a population or species. Because all individuals are different, they will sometimes respond or adapt to environmental stimuli in unique ways. Secondly, we examine some of the ontological positions underlying evolutionary theory and demonstrate why they are appropriate for studying issues of interest to political scientists and institutionalists in particular. Finally, we attempt to use some of the insights drawn from evolutionary theory to help offer insights on two current issues in political science theory: 1) where do preferences come from and 2) how can we explain institutional change?

“Status and Rights in Women’s Citizenship”

Kathleen Sullivan, Ohio University
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“The Reality of Rights in the Postcolonial State: Equality, Recognition and Land Claims in South Africa”

Jennifer Terrell, New School for Social Research
jyt360@gmail.com

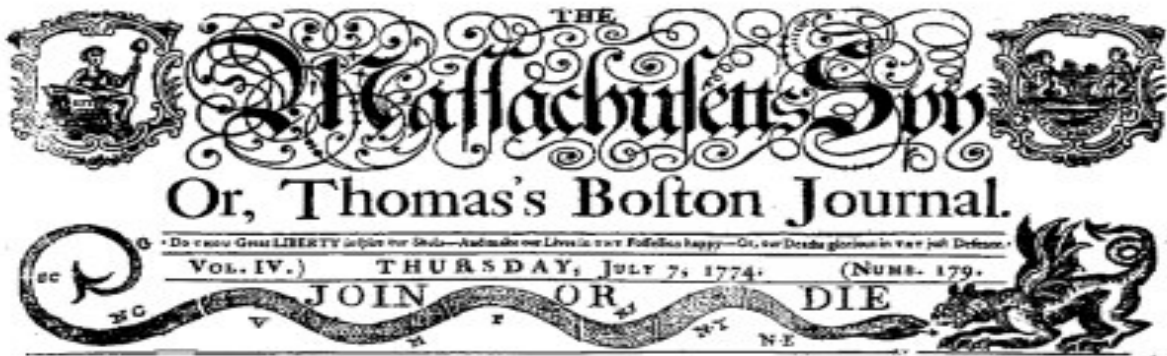
“Contextualizing Presidential Prerogative and Freedom: Agency, Structure, and American Philosophical Traditions”

Daniel Tichenor, Rutgers University, New Brunswick
tichenor@uoregon.edu

“Ideas, Organizational Conflict, and the Problem of Institutional Change”

Margaret Weir, University of California, Berkeley
mweir@berkeley.edu





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turn, they make it possible for judges to settle political, legal, constitutional, and policy disputes that have concrete effects on citizens, corporations, government, and the nation as a whole

My goal, and the task of the book manuscript I am attempting to complete, is to un-cover both the causes and consequences of the institutional development of the federal judiciary—especially, but not exclusively, the Supreme Court—from the Founding to the present. I approach this project by asking three broad questions about judicial reform from the commencement of the new government in 1789 through the close of the Bush administration in 2009. First, *why* was judicial institution-building pursued? Who were the important actors, and what goals were they seeking to attain? Second, *how* was judicial institution-building accomplished? What challenges presented themselves, and what events or actions were needed to surmount them? Third, *what* did judicial institution-building achieve? What were the concrete and enduring changes in the exercise of judicial power?

In answering these questions, I draw on three concepts: the *goals* of politicians seeking change, the *constraints* militating against such change, and the *catalysts* that can overcome those constraints. My argument relative to these concepts consists of three sequential claims. First, in answering the contested questions of institutional design and delegation that surround judicial institution-building, politicians are driven by three goals—satisfying substantive policy interests, consolidating partisan strength and preserving electoral support, and maintaining a functionally efficient judicial branch. Second, while minor housekeeping initiatives are usually uncontroversial, occurring often and easily, more significant attempts at institution-building face a combination of practical obstacles and political constraints that often inhibit reform. Third, the constraints upon transformative action can be overcome—and reform made possible—by elections that result in a new governing coalition or, in their absence, by the cautious and strategic action of political entrepreneurs, provided their identity, ideas, and tactics are each carefully tailored to the task at hand.

My general approach to illustrating this theory in action embeds case studies of fifteen to twenty landmark or transformative episodes within a more deeply contextual understanding of the process in the historical period under consideration. (My empirical chapters cover the early republic, the eras of Jeffersonian and Jacksonian democracy, the Civil War and Reconstruction, the Gilded Age and the Progressive Era, the inter-war and New Deal years, and modern America.) For each institution-building episode or set of episodes, I utilize a range of primary source materials (legislative histories, judicial decisions, personal correspondence between relevant individuals, media coverage) to reconstruct the politics of institutional development—the opportunities seized and wasted, the obstacles overcome and stumbled upon—as it occurred at the time. In so doing, I aim for a historically rich narrative that not only describes the institutional development of the judiciary but also offers analytically grounded explanations of how it happened, why it happened when it did, why it happened in the form it did, and why—from the perspective of American constitutional democracy—it mattered at all.

Unlike much of the extant literature on the Supreme Court in American political development, my focus here is less on what the judiciary does vis-à-vis other political institutions than on what is done to the judiciary both by external actors and by its own members; my interest is less in how the judiciary wields power and authority in any particular jurisprudential or policy area than in how it gradually became structurally and institutionally equipped to exert power and authority across a range of areas. That is to say, I am concerned first and foremost with the politics of institutional development—more specifically, with the place of the judiciary and the construction of judicial capacity in narratives of institutional development. Judicial capacity, I argue, grows from more than simply constitutional decisions or the exercise of judicial review; indeed, it more commonly and more foundationally derives from interaction with political elites, from empowering legislation, and from public, media, and interest-group support. The judiciary does, of course, act upon politics, but it is equally and was shaped by politics and policymaking at various points in American history.

acted upon by politics; it is created by politics and, thus, simultaneously a participant in and object of it. The judicial branch is, of course, a producer of legal change, but it is equally a product of political change; the power it wields not simply an independent variable but a dependent one as well.

Given the role of the American judiciary in, among other things, spurring the growth of an industrial economy, constituting national citizenship, and advancing certain forms of individual rights and liberties at the expense of others, understanding the historical development of the institution—understanding the process by its power was constructed—has obvious substantive import. As a result, one might expect that scholars of American political development—a field that, from its inception, has exhibited acute concern with the building of political institutions—would scrutinize the judiciary. Yet, to the extent that such scholars speak of the judiciary at all, they do not often speak of it as an institution that was, in any meaningful sense, “built.” More often, courts are taken as a pre-developmental given in American political history. For federal courts, this assumption is demonstrably untrue: the limited federal judiciary of 1789 would hardly have been equipped to take action as the federal judiciary did in the 1890s, 1920s, 1960s, or 1990s. In other words, for the federal judiciary to become powerful and active, it first had to be built.

For those who study institutions from the perspective of politics and history, this may seem an obvious statement. After all, we already have developmental accounts of Congress, the presidency, and the federal bureaucracy. For each of these institutions, we know how and why it acquired the role, structure, and powers it did. We know why certain actors delegated specific powers to particular institutions at precise times and how those actors overcame constraints and seized upon opportunities for transformative action. The result is more than isolated conceptions of why the House of Representatives reformed itself, when presidential power is at its greatest, and how the Post Office became autonomous; rather it is a more holistic and macro-level understanding of how the growth and evolution of governmental power—how the expansion and refinement of “the state”—shaped

Yet while this dynamic is well understood with regard to other institutions, we know relatively little about the historical processes contributing to the building of the federal judiciary (or even just the Supreme Court) as an independent and autonomous institution of governance in the American political system. Part of the problem is that, with a few exceptions, political scientists—including those who study American political development—ostensibly think of courts as both institutionally separate from, and institutionally thin as compared to, other political institutions. There are doubtless important differences between courts and other institutions, but it is nonetheless true that the process of constructing legitimate governing authority is similar, though certainly not identical, across American political institutions. Accordingly, while taking care not to obscure important differences, we can learn a great deal by looking at the ways in which the institutional development of the judiciary resembles the institutional development of the legislature, executive, and bureaucracy. Moreover, many political scientists think of courts as lacking the complex institutional features—actors, structures, and rules—that make legislatures, executives, and bureaucracies worth studying. While the legislative branch has a hierarchical system of committees and sub-committees and the executive branch has a vast bureaucracy comprising layers of political appointees and civil servants, the judicial branch has only some courts, some judges, and some clerks—or so the lack of attention to the institutional context of the judiciary would have us believe.

As I attempt to illustrate, however, any view of the judiciary as simply a constitutional abstraction that does not itself develop over time is misguided. As an institution, the federal judiciary is built of far more varied and complicated components than simply the written opinions of judges; its structural architecture is at least as complex—and its historical development at least as dynamic—as that of Congress, the presidency, or the federal bureaucracy. Indeed, looking back at the indeterminacy of Article III of the Constitution, we see that the development of an active and interventionist third branch of government was far from a foregone conclusion. The American

judiciary, that is to say, was not born independent, autonomous, and powerful; rather, it had to become so, largely through a continuous process that was both politically determined and politically consequential. The story of judicial institution-building is not a single moment of revelation but a series of battles over law, courts, and the politics of institutional development. It is the story of how the judiciary, long outlined in pencil rather than pen, was built—piece-by-piece, from the ground up, as part and parcel of American political development.

* Robert Harrison preferred his job as Chancellor of Maryland (!), and John Rutledge declined to attend a session of the Court before resigning in 1793 to become Chief Justice of the South Carolina Court of Common Pleas (!!).

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The Carl Albert Congressional Research and Studies Center at the University of Oklahoma seeks applicants for its Visiting Scholars Program, which provides financial assistance to researchers working at the Center's archives. Awards of \$500-\$1000 are normally granted as reimbursement for travel and lodging. The Center's collections are described on the World Wide Web at <http://www.ou.edu/special/albertctr/archives/>. Additional information can be obtained from the Center. The Visiting Scholars Program is open to any applicant. Emphasis is given to those pursuing postdoctoral research in history, political science, and other fields. Graduate students involved in research for publication, thesis, or dissertation are encouraged to apply. Professional researchers and writers are also invited to apply. The Center evaluates each research proposal based upon its merits, and funding for a variety of topics is expected. No standardized form is needed for application. Instead, a series of documents should be sent to the Center, including: (1) a description of the research proposal in fewer than 1000 words; (2) a personal vita; (3) an explanation of how the Center's resources will assist the researcher; (4) a budget proposal; and (5) a letter of reference from an established scholar in the discipline attesting to the significance of the research. Applications are accepted at any time. For more information, please contact Archivist, Carl Albert Center, 630 Parrington Oval, Room 101, University of Oklahoma, Norman, OK 73019. Telephone: (405) 325-5835. FAX: (405) 325-6419. E-mail: channeman@ou.edu.

and subject to change over time. There is nothing particularly set in stone about the fact or scope of the judiciary's authority to interpret the Constitution and settle constitutional controversies, and politically it is somewhat surprising that a relatively weak institution like the courts would be able to effectively wield such a power. I argue in the book that the meaning and scope of the judicial authority to interpret the Constitution has not in fact been stable over the course of American history, and I am particularly interested in the incentives that other political actors have to either challenge or defer to the judicial authority to say what the Constitution means.

The book is largely structured as an examination of the relationship between the Supreme Court and the president, and it is thinking about the leadership task of the president that can help us understand how the president – as chief executive, as popular leader, and particularly as the leader of a political coalition – might bolster or subvert judicial authority. Developing Stephen Skowronek's analysis of the changing structural context of the presidential leadership situation over time, the book looks across American history to examine how the strategic context in which presidents find themselves shape their relationship with the courts and create more or less favorable contexts for judicial leadership in defining constitutional meaning. I argue that presidents frequently find that encouraging the active exercise of judicial review and deferring to judicial authority to resolve constitutional controversies help solve their own leadership difficulties.

The project grew out of several connected interests. I have long been a contributor to what has become known as the "constitution outside the courts" literature, but this project began with a specific interest in "departmentalism," or the claim that began with the Jeffersonians that each branch of government has an equal authority to interpret the Constitution. The book provides an extensive analysis of such claims as they have been asserted by the executive branch, concluding that such claims have a specific political logic that makes

flip side of departmentalism is "judicial supremacy," or the claim that the courts have a preeminent authority to interpret the Constitution. I take the establishment and maintenance of judicial supremacy to be a political puzzle requiring explanation, and ultimately akin to the broader problem of establishing and maintaining judicial independence within a political system. Like the internalist literature on judicial independence, the book is concerned with the circumstances under which elite political actors might find it in their own interest to support courts. (By contrast, externalist accounts of judicial independence emphasize the hostility of political actors to the courts but suggest that political actors are constrained by external forces such as mass public opinion.) This bridges naturally to the "neo-Dahlian" or "political regimes" literature on the exercise of judicial review, which is concerned with when and how the courts might exercise the power of judicial review. Judicial responsibility for interpreting the Constitution is not simply a default within normal politics but is actively constructed by political leaders as a desirable alternative to their taking responsibility for controversial constitutional decisions.

Connecting these interests together, *Political Foundations* argues that the courts and political leaders (or more specifically, the Supreme Court and the president) often have a mutually supportive relationship. Political leaders generally find that it is in their interest to support rather than resist an expansive judicial authority to interpret the Constitution. At the same time, the way in which the Court exercises judicial review is often consistent with rather than hostile to the political interests of presidents and other political leaders. I am exploring that issue further in my current project, which will include a book, *Repugnant Laws*. That project provides a political history of the judicial review of federal statutes by the Supreme Court from the founding era to the present, and it is particularly concerned with examining the extent to which the Court is an obstruction to or a partner with the political projects, ambitions and interests of political leaders when it exercises judicial review over federal law.

It IS a New Deal



Talburt cartoon,
Pittsburgh Press,
March 11, 1933

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