Case Western Reserve Law Review

Volume 47 | Issue 4

1997

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PRESIDENTIAL POWER AND THE APPOINTMENTS PROCESS: STRUCTURALISM, LEGAL SCHOLARSHIP, AND THE NEW HISTORICAL INSTITUTIONALISM

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I. INTRODUCTION

Much of legal scholarship on presidential power has been confined to arguments for and against unitary versus non-unitary approaches to presidential power. This debate is based upon scholars' support of originalist or non-originalist interpretations of the presidential power in the Constitution and/or the practical effects of the unitary and non-unitary presidency on domestic and foreign policy, presidential power, and contemporary politics. This Article will review briefly the range of issues of concern to the most gifted of conventional legal scholars on the presidency and suggest how Gerhardt, Tulis, and Lowi seek to expand the horizons of this scholarship by studying a much wider context of political and legal institutional structure and historical conditions. It concludes with a discussion of how more "external" or "outside" factors than those discussed by Gerhardt, Tulis, and Lowi can be brought to the study of presidential power through the application of new historical institutional approaches and insights.

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II. CONVENTIONAL LEGAL SCHOLARSHIP ON PRESIDENTIAL POWER

At the core of much legal scholarship on the presidency and presidential power is a debate which centers on the degree to which it should be viewed as unitary. The legalist debate about a unitary presidency centers on two primary concerns. The first is whether an originalist interpretation of the Constitution requires a unitary presidency. Thus the debate about a unitary presidency is about whether one supports an originalist or non-originalist interpretation of the Constitution and one's approach to separation of powers. The debate about a unitary presidency also centers on whether significant changes in American government and institutions, especially the growth of the administrative state in the twentieth century, demand a unitary presidency whether or not an originalist interpretation requires it. Steven Calabresi and Christopher Yoo identify the following three major debates between unitarians and anti-unitarians: whether "the text and structure of the Constitution as originally understood created a strongly unitarian executive branch;" whether "changed circumstances of today make the unitary executive more necessary now than ever before"; and "whether normatively a strongly unitary executive is a good thing."[1] Calabresi and various co-authors support a unitary presidency on all three counts. They also argue for broad presidential power of removal and control over the execution of law,[2] claiming that the text and structure of the Constitution as originally understood created a strongly unitarian executive branch.[3]

Some scholars reject the view that an originalist interpretation of the Constitution requires a unitary presidency, instead arguing for a unitary presidency on other grounds. Lawrence Lessig and Cass Sunstein argue that according to the Calabresi and Rhodes view "the President must have the authority to control all government officials who implement the laws because the text, structure, and history of the Constitution . . . plainly require the result."[4]

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1. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1453-55 (1997).

2. *See id.* at 1453.

3. *See id.* at 1454; *see also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary* 105 HARV. L. REV. 1553 (1992); Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven Calabresi and Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 *Yale L.J.* 541 (1994).

4. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*,

They argue that it is "just [a] plain myth" or "creation" of the twentieth century to say that the Framers constitutionalized a unitary view of the executive; rather the Framers envisioned "a large degree of congressional power to structure the administration as it thought proper."[5] Lessig and Sunstein argue in favor of a unitary executive because it promotes "accountability, coordination, and uniformity in the execution of the laws."[6] They must choose between what they call "a compelling non-historical argument supporting a strong unitary design" and an originalist argument against a unitary executive. They choose support for a strong unitary executive because changed circumstances since the eighteenth century require them to "accommodate the framers' design within this changed constitutional context."[7] The rejection of the nondelegation doctrine by the Supreme Court and the rise of a powerful discretionary administrative state requires that administrators not be "immunized from presidential control" if we are to be "faithful to the original design."[8] Lessig and Sunstein's argument for a unitary executive is based on what they call "a large measure of pragmatic judgement and historical understanding" not in the "mandates of history" which all too often are based on "ahistorical claims about a unitary executive."[9]

Steven Calabresi and Saikrishna B. Prakash disagree with Lessig and Sunstein's approach because it "focuses far too much on what they think the Framers must have '*imagined*,' while overlooking the original meaning of the words of the constitutional text that the Framers actually *wrote*."[10] Calabresi and Prakash claim that the Lessig and Sunstein piece is "mythologically flawed" because they give "dispositive weight to an incomplete rendition of the relaxant history over the legal text itself." In so doing, "Their arguments against the theory of the unitary executive should fail to persuade anyone who considers herself an originalist (or a textualist)."[11] For Calabresi and Prakash, Lessig and Sunstein fail

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94 COLUM. L. REV. 1, 2 (1994).

5. *Id.*

6. *Id.*

7. *Id.* at 3; *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (presenting an interesting argument concerning changed readings of constitutional text).

8. Lessig & Sunstein, *supra* note 4, at 119.

9. *Id.*

10. Calabresi & Prakash, *supra* note 3, at 546.

11. *Id.*, at 546.

to place the Article II debate in the relevant pre-1789 history and the relevant post-ratification history and "they fail to gain the moral force of an originalist argument that overwhelmingly supports a hierarchical executive branch under the control of the President."[12]

Calabresi and Yoo's contribution for this Symposium continues the argument for a unitary executive through documentation of development of the unitary executive over the course of the first fifty years of our constitutional history. They argue that the tradition within the executive branch has always been "overwhelmingly unitarian" and that "for 208 years Presidents have vigorously guarded the powers the Framers gave them, even though Congress and the Supreme Court have not acquiesced in presidential claims of power over removals and law execution."[13]

The debate between Lessig/Sunstein and Calabresi/Prakash is really about what constitutes an originalist approach to constitutional interpretation and whether originalism compared to non-originalism and historical practice should be the normative basis for defining and evaluating presidential power. The primary issue in these important contributions is not whether a unitary executive is best for the nation.[14]

Other papers presented at this Symposium provide additional insights into the conventional debate between unitary and anti-unitary scholars. Louis Fisher, an anti-unitarian, asks us to reinvigorate Congress's war powers. He argues that Presidents violate constitutional mandates when they side-step Congress in military operations and act under the auspices of the United Nations or NATO.[15] By side-stepping Congress, Fisher argues that Presidents have diminished, if not extinguished, the role of Congress under its war powers.[16] Peter Shane argues for Congressional involvement in the most basic policy questions regarding military engagement in order

12. *Id.*, at 549.

13. *See* Calabresi & Yoo, *supra* note 1, at 1458.

14. *See also* Calabresi & Rhodes, *supra* note 3, at 1155 (arguing that theories of broad congressional powers over federal court jurisdiction strongly suggest limited congressional power to restructure the executive department and that theories of limited congressional jurisdiction-stripping power compel a unitary executive; *see also* Calabresi, *supra* note 3, at 23 (presenting arguments in support of a strong unitary executive, a listing of threats to the executive by the federal courts, the public interest bar, the Congressional committee system, and the congressional collective action problem).

15. *See* Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1239, 1240 (1997).

16. *See id.*

to counter pathologies created by the realities of executive branch organization and decision making. Shane concludes that "the War Powers Resolution was not a failure, but a success," because "the values of sound military decision making process are well served by preserving a state of ambiguity as to what the allocation of military decision-making authority is in all but the easiest cases."[17] He asks us to consider a new notion of rule of law defined as a context of bargaining between President and Congress caused in part by the War Powers Resolution.

Rather than discussing the constitutional legitimacy, necessity, or normative goodness of a unitary and non-unitary presidency, anti-unitarian scholar Neal Devins explores the practical and political effects of a presidential line-item veto. He writes, "In the end, the line item veto is likely to add more nuance than substance to the elaborate stew of Congressional-White House power-sharing."[18] For Devins, political will may be as important as structural divisions of authority for understanding why the presidency is not unitary and for understanding the successes and failures of Presidents who seek control of executive and administrative policy-making.[19] In a similar vein, legalist Michael A. Fitts, a participant in the Symposium, argues elsewhere:

> [S]tructural changes that appear to enhance the power of the President under public choice approaches and unitary executive principles can, at the same time, actually undermine the President's reputation, his ability to resolve conflicts, and ultimately, his political strength. . . . The individuality, centrality, and visibility of the "personal unitary presidency," which is seen as an advantage in terms of collective choice and public debate, can be a disadvantage when it comes to conflict resolution and public assessment.[20]

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17. *See* Peter M. Shane, *Learning McNamara's* Lessons*: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1286 (1997).

18. Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1608 (1997); *see also* Neal Devins, *Political Will and the Unitary Executive: What makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 272 (1993) (arguing that congressional grants of the authority to litigate to independent agencies affect White House control over the operations of independent agencies).

19. *See* Devins, *Lost Chord*, *supra* note 18, at 1622.

20. *See* Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, U. PA. L.

Fitts's argument is self-consciously an extension of Theodore Lowi's argument in *The Personal President: Power Invested, Power Unfulfilled*, on the political weaknesses and inadequacies of modern Presidents. Fitts writes:

> Extending Lowi's analysis, I argue that while the presidency may have become a more complex and effective institution bureaucratically and legally, in many ways it has also become more individualized politically, which can undermine its political legitimacy and strength. The legal theory of the unitary executive, for which I am in sympathy, can be at war with itself.[21]

Thus, Fitts's primary objective is to "explore how the source of at least some of our frustration with the office of the presidency is a result of the structure of the position, rather than the personal 'mistakes' of its inhabitants."[22] A second purpose is to "suggest possible legal reforms and tactical approaches modern Presidents could follow . . . to help the chief executive, when appropriate, mediate conflict and avoid certain types of individualized scrutiny" in this age of weak political parties.[23]

III. 'INSIDE' AND 'OUTSIDE' PERSPECTIVES ON THE PRESIDENCY

Conventional legal scholarship on the presidency and presidential power has centered on issues of originalist and non-originalist interpretations of the Constitution, the legitimacy of a unitary presidency, the necessity and normative goodness of a unitary or non-unitary presidency today, and whether efforts to enhance the power of a unitary President have been politically successful. The contributions of Michael Gerhardt, Jeffrey Tulis, and Theodore Lowi seek to substantially expand the empirical base in scholarship on presidential power, while not eschewing important normative issues that remain central. Most important, these scholars are concerned about how the broader historical context informs

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REV. 827, 835 (1996).

21. *Id.* at 836.

22. *Id.* at 837.

23. *Id.*; *see also* Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737, 1739 (1992) (arguing that political patronage and executive discretion can be important elements of fiscal reform, not sources of inefficiency in government).

presidential power and how changes in the structure of the presidency and actions of Presidents may impact changes in political and legal institutions, the construction of political issues, and the wider society.[24]

Michael Gerhardt offers useful initial insights for exploring new directions in legal scholarship on the presidency and presidential power. Gerhardt notes that two perspectives, which he calls the "inside" and "outside" perspective, are crucial for explaining and evaluating presidential performance. The perspective from inside the process focuses on the President's organization of the process for making appointments and his interactions with the Senate. The inside perspective leads one to ask such questions as why or how particular nominations were made and why certain nominations succeeded and others failed, to review presidential-senatorial interactions within and among appointments, and to explore the relationship between appointment decisions and other presidential choices and senatorial activities.[25]

The perspective from outside the process "examines the external forces (i.e., the social, political, economic, historical developments or influences originating from outside the formal or constitutional structure) pressuring or constraining presidential decisions on appointments matters. The outside perspective is concerned with the multi-layered, complex contexts in which presidential appointments decisions are made."[26] The outside perspective leads one to ask how social, political, and economic developments have shaped the presidency and presidential performance in the appointments process, whether the relevant constitutional structure matters, permits accountability, produces competent appointments in terms of the fit between talent, ability, and experience and the particular responsibilities of an offer, and permits capture of the appointments process by factions.[27] Also, the outside perspective allows one to evaluate the quality of discourse between the President and the Senate and whether the President or the Senate wields too much or too little power on appointment matters. The development of an outside view of the presidency and presidential power would allow scholars "to develop standard for evaluating presidential contributions and

24. *See* Michael J. Gerhardt, *Putting Presidential Performance In The Federal Appointments Process In Perspective*, 47 CASE W. RES. L. REV. 1359, 1359-61 (1997).

25. *See id.*

26. *Id.* at 1360-61.

27. *See id.*

performances in the appointments process . . . . that cut across different historical periods."[28] By looking at both internal and external perspectives scholars can "consider the fundamental question of how Presidents restructure their offices in response to, as well as in anticipation of, social, economic, political, and other outside developments or changes."[29]

In the next three sections I will explore the contributions of Gerhardt, Tulis, and Lowi with regard to how they improve upon what I consider to be the limited perspectives on presidential power that are at the core of even the most sophisticated of the conventional approaches to presidential power, as discussed in the first section. I also will suggest that much more has to be done to develop what Gerhardt calls the "outside" perspective, particularly if important insights from new historical institutional approaches to the relationship of law, political institutions, and social change are to inform this perspective.

IV. PRESIDENTIAL CHOICES AND EFFECTIVENESS IN HISTORICAL CONTEXT

Michael Gerhardt offers the following statement of scholarly objectives of his project on the appointments process: (1) to define the relationship between the context in which the appointments process operates and our understandings of events within that process; (2) to identify the similar patterns and reasons that presidents and senators have tended to follow and offer in making decisions within the federal appointments process; (3) to identify advantages and (generally overlooked) limitations of evaluating and explaining presidential performance in the appointments process in conventional strictly personal terms; and (4) to understand "presidential performance in the appointments process in institutional terms . . . to illuminate the various factors cutting across different historical periods that have facilitated or impeded presidential dominance of the federal appointments process."[30] Gerhardt centers on an inside view of the process and explores the appointments process so he can "shed considerable light on their [Senators and Presidents] respective priorities, temperaments, political skills, allegiances, and

28. *Id.* at 1372.
29. Gerhardt, *supra* note 24, at 1361.
30. *Id.* at 1364.

personal values."[31] Gerhardt seeks to define a broader context in which to understand and to assess the process by which federal appointments are made, to tell the rest of the story by constructing a comprehensive portrait of the operations of the process), and to "ensure[] a comprehensive understanding and evaluation of presidential performance in the appointments process."[32]

Gerhardt admits that his objective of establishing an outside view of presidential power must wait for another day. He notes that the primary objective of his article is "to sketch the answers to some of the questions raised by the inside perspective. . . . I hope to lay some of the groundwork for understanding presidential performance in the federal appointments process, including the significance of the degree to which a President's exercise of his appointment power facilitates his achievement of certain constitutional and policy objectives."[33]

Contextual factors that inform presidential power for Gerhardt include the growth of the national government in the last sixty years with an accompanying increase in the number of offices that require need Senate confirmation. This growth adds to presidential control of administration, but also adds opportunities for Senators to bargain with the President and increase the number, not the percentage, of blocked appointments. For example, contextual factors that were central to Lincoln's need to work with Congress to satisfy Congress's and his interests in the appointment of Justice Miller were geographic suitability, loyalty to party, and preservation of the Union and Constitution.[34] In non-judicial appointments Lincoln followed the rule of expediency, using appointments to sustain loyalty through patronage or the political control of opponents.[35] We also see contextual factors at work in President Clinton's choices.[36] Clinton's substantial legislative agenda meant that, compared to his predecessors, Clinton could not afford protracted confirmation battles—a contextual factor that increased senatorial influence and clearance.

Gerhardt also demonstrates how long term concerns, such as a nominee's political philosophy about the role of national govern-

31. *Id.* at 1372.
32. *Id.* at 1363.
33. *Id.* at 1361-62.
34. *See* Gerhardt, supra note 24, at 1366-68.
35. *See id.*
36. *See id.* at 1385.

ment in American society and the relationship among the branches, and short term concerns such as a nominee's political party, chances for confirmation, domicile, age, and supporters, have depended on such political circumstances as the state of presidential-Senate relations, Presidents' and Senators' other priorities, and ambitions for the federal office being filled. Thus, Presidents have been disposed to be guided by grander rather than baser political concerns, such as objective merit, commitment to a particular constitutional philosophy or vision, or the long term relationship between the state and federal governments or among federal institutions.

Within this set of grander concerns, Gerhardt tells us that Presidents have been guided by pragmatic concerns such as ease of confirmation, popularity, party loyalty, and the need to appease certain constituencies.[37] Therefore, in contrast to scholars that view presidential power as having and carefully using chits or as a conflict between public interests and the need for private political gain, Gerhardt emphasizes that long and short term and grand and baser concerns are not necessarily in conflict. Thus, simple definitions of vote and/or strategic political optimization by Presidents will not explain the process of choice. Only by the analysis of political context can data be provided about which concerns and the relationship among concerns come to the fore in specific appointment cases and over time. Moreover, Gerhardt emphasizes the importance of the ability of the President and Senate to frame the debate over a confirmation, sequence events, and make comparisons among different confirmation battles.[38]

Another important insight by Gerhardt about the inside view involves his questioning whether scholars should emphasize the personal nature of the confirmation process. Scholars who emphasize a President's close ties to a candidate or measure presidential performance in terms of personal qualities such as intelligence, popularity, charisma, strength of character or conviction, loyalty, stubbornness, ambition, or political acuity will not get at the historically contingent and institutional or structural factors that inform presidential appointments.[39] Gerhardt also does not advocate personalization of the appointment process through the application of game theory, which evaluates strategies used by candidates and

37. *See id.* at 1378.
38. *See id.* at 1381.
39. *See* Gerhardt, *supra* note 24, at 1372-74.

Presidents in terms of "games of chicken" to get the votes required for confirmation. The problem with game theory is that the appointment process is too complex to fit the construction of a single game, especially in light of the role of a multi-membered Senate in the process.[40] Most important, personalizing the system of appointments does not allow one to explain historical patterns of presidential and senatorial decisions. Presidents who manage institutions in different historical periods are subject to different social, political, and historical events or developments. Non-personal criteria for evaluating presidential performance for Gerhardt include the following: "intelligence, popularity, charisma, strength of character or conviction, loyalty, stubbornness, ambition, or political acuity."[41]

Presidents' short- and long-term objectives have institutional ramifications for marshalling resources of their institutions to ensure "successful blending." Gerhardt concludes, "The measure of a President's performance is largely based on how well he has managed—or has marshalled the powers of his office to control—the particular combinations of challenges confronting him in the course of trying to achieve certain long- and short-range objectives."[42] Thus, the relationship of appointments to a President's broader legislative agenda and to the long term direction of governmental power and authority is key to Gerhardt. Following Skowronek's important insights on Presidential power and its evaluation, Gerhardt emphasizes that success of a President must be evaluated in terms of his effect on constitutional change—not simply the percentage and absolute numbers of successful nominees. Gerhardt emphasizes that "institutional organization or support or associating a nominee with some potential danger to the public or something problematic with the President constitutes the strongest trigger for mobilizing public support for or against a nomination."[43] Therefore, as the importance of a nominee to the President's vision for change increases, so too do the costs of supporting or opposing a nomination, thus adding to Senate-Presidential conflict and greater chances for the failure to nominate. If this is so, then at the core of presidential power and the appointment process is not the specific skills of the President or nominee or their political philoso-

40. *See id.* at 1376-79.

41. *Id.* at 1374.

42. *Id.* at 1378.

43. *Id.* at 1396 (citing previously STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: FROM JOHN ADAMS TO GEORGE BUSH 28 (1993).).

phies, but rather how senators and the opposition view what is at stake to the President in terms of their policy and political objectives in a particular historical context. Gerhardt notes, "It is possible to identify different levels of Presidents' success depending on the breadth of their vision or the scope of their ambition for the nation (and subsequent success in fulfilling it). . . . Indeed, if success was measured strictly in terms of the percentages of a President's confirmed nominations, the figures would be misleading."[44]

Thus, the analysis in Gerhardt's contribution to this Symposium is an inside, not an outside view of the presidency and political change. We see important insights on how the evaluation of presidential success and failure must be made in terms of the difficulty and importance of a President's policy objectives—and their relationship to a restructuring of government. Gerhardt's major contribution is to extend Skowronek's insights on the analysis of presidential power and its evaluation to the appointments process viewed from the inside.

V. POLITICAL CONFLICT, DELIBERATIVE DEMOCRACY, AND SUPREME COURT APPOINTMENTS

Jeffrey Tulis asks us to think more systemically about presidential and senatorial power over the process of appointment to the Supreme Court. His primary concern is about what he views as the constitutional abdication by the Senate to the President on Supreme Court appointments, an abdication that results in the failure of the appointment process to provide our nation with the opportunity to deliberate about the nature of our constitutional regime today in light of the past and our nation's future needs. Tulis argues that the health of our nation will be improved if the Senate would not abdicate to the President its role. Deliberation and accountability will secure debate and decisions about which standards of evaluation are needed for a Presidential nomine to the Supreme Court are appropriate at a given point in the history of our nation.

Tulis argues that when comparing the Supreme Court appointment process in the nineteenth and twentieth centuries there is an

44. Gerhardt, *supra* note 24, at 1380. Therefore, the relationship of appointments to policy objectives is central. For example, Gerhardt reports that Eisenhower's attempt to constrain legislative expansion of the New Deal succeeded for a short time, but the cost of that objective was his failure to reshape the federal judiciary. *See id.* at 1389.

"altered relationship" between the President and Congress, one that constitutes a "remarkable institutional rupture in American political development."[45] Supreme Court nominations in the nineteenth century "were a frequent occasion for conflict between the executive and legislature over the composition of the Court, the power of competing partisan objectives, and the character of the constitutional order."[46] In the nineteenth century only one in three presidential nominees made it to the Supreme Court; in the twentieth century only one in ten presidential nominees did not make it. Tulis abhors the fact that the Senate has rubber stamped most presidential choices for the Supreme Court because opportunities are lost for deep discussion on constitutional questions. For Tulis the appointment process becomes a "useful window on the changed character of our constitutional order, on the transformation of separation of powers in institutional politics over the course of two centuries."[47] Tulis prefers the nineteenth century approach because "institutional politics were agnostic, constitutional perspectives were contestable, partisans were institutionally loyal, arguments were rhetorically sophisticated, and inter-branch conflict was relatively symmetrical. In short, the nineteenth century national public arena appears highly politicized."[48] Tulis criticizes the present century:

> [The Senate has been] deferential to the President on Court appointments, indeed supinely deferential. The Senate (and President) appear bereft of a constitutional understanding of their roles. Partisans are increasingly disloyal to their institution. The political relation of President and Senate is politically asymmetrical. In short, the twentieth century national public arena is, in many important ways, markedly apolitical.[49]

Thus, while Gerhardt seeks to explore the presidential appointment process to explain the changing nature of presidential power, Tulis's objective is to look at the Supreme Court nomination and confirmation process as a window into important changes in the quality of our constitutional regime, with particular regard to

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45. Jeffrey K. Tulis, *Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. L. REV. 1331, 1331 (1997).

46. *Id.*

47. *Id.* at 1332.

48. *Id.*

49. *Id.*

whether deliberation about that regime occurs. The scholarly objectives of both Gerhardt and Tulis are not to engage in a narrow debate, as that between unitarians and anti-unitarians over whether "the text and structure of the Constitution as originally understood created a strongly unitarian executive branch," or whether "changed circumstances of today make the unitary executive more necessary now than ever before," or "whether normatively a strongly unitary executive is a good thing."[50] Tulis, in analyzing the Supreme Court nomination process, is "less concerned with explaining the causes of this alteration of American politics than with diagnosing its character, to understand its meaning, and to articulate its significance."[51] His goal is to explain the politics of Supreme Court appointments, with a concern for the effects on the quality of deliberation and communication that informs and is informed by citizens and opinion leaders in the nation. Tulis's aim is to use this case study to explore the nature of institutional change historically in the American regime, not to explain the causes of the change. Tulis views his objectives as not primarily to explore what he sees as a "decayed constitutional order."[52] Rather, he seeks to document the decline in conflict over the Supreme Court appointments process and to understand the causes and institutional effects of such a decline. Tulis's analysis supports the notion that our nation is becoming unitary in terms of presidential power over appointments to the Supreme Court, both as an empirical phenomenon and against the wishes of the Founders. Tulis does address the question as to "whether normatively a strongly unitary executive is a good thing," and answers no, primarily because a unitary presidency in the Supreme Court appointment process undermines deliberative democracy. However, his argument is not primarily directed at the legalist debate about "the text and structure of the Constitution as originally understood created a strongly unitarian executive branch," or whether "changed circumstances of today make the unitary executive more necessary now than ever before."[53]

Tulis's arguments about the need for a stronger senatorial presence and robust debate in the Supreme Court appointments process are based on a rejection of the neo-Wilsonian theory of

50. Calabresi & Yoo, *supra* note 1, at 1461.
51. Tulis, *supra* note 45, at 1332.
52. *Id.* at 1334.
53. Calabresi & Yoo, *supra* note 1, at 1461.

separation of powers, which viewed American politics as too conflictual, especially as compared to British politics. Tulis views conflict as good and its decline as hurtful to the American regime. Tulis views more open conflict as helping in the production of Supreme Court Justices of stature to the Court. For Tulis, the problem with the present confirmation process is not the presence of political conflict, but that it is "conflict conducted under the auspices of a regime of deference;" in the nineteenth century "conflict legitimately induced and self-consciously nurtured" a more substantive appointments process.[54]

According to Tulis, a politics of conflict, rather than deference, would create an arena "in which the criteria of choice themselves can be responsibly established" rather than one in which a specific value or objective imposed on the process by a scholar from without will occur.[55] Therefore, for Tulis, an appointments process that will produce excellent Justices cannot be oriented to maximize one virtue or a hierarchy of qualifications—such as those defined by scholars, many of whom see political conflict as a negative which keeps us from securing on the Supreme Court Justices who fit the characteristic defined by scholars not the people. For Tulis, the qualities sought in a Justice at a specific time should be defined in terms of a consideration of the specific make-up of the Court in light of thoughts about what new directions in constitutional law are required of the nation—as defined by the process of deliberation at the time of appointment. Tulis wishes to bring "balance" to "a body [the Supreme Court] whose collective capacities and qualities are themselves the subjects of continuous political dispute."[56] Thus for Tulis, the confirmation process should create the standards of evaluation at a specific point in history and ensure a debate about who best can fit those values. There are to be no litmus tests of qualities and political values for Court nominees which are to come from outside the conflictual political process he desires. The American Bar Association, legalist scholars' definitions of judicial competence, notions of apolitical judging, or the objective of securing the best person in terms of individual qualities should not alone or even primarily determine the standards for evaluating Supreme Court appointees.

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54. Tulis, *supra* note 45, at 1336.
55. *Id.* at 1338.
56. *Id.* at 1337.

At the core of Tulis's model is a deep trust of the political system. If allowed to be truly conflictual, the quality of debates and deliberation will improve and the nation will be reeducated on the problems facing our nation and the role of the Court and Congress in meeting those problems. Tulis sees the confirmation process as a "fit occasion for the polity as a whole to revisit the terms of its composition—the most basic, politically constitutive questions."[57] The confirmation process is a "periodic political reeducation." Under this view, the Thomas and Bork hearings served the positive purpose of providing for robust discussion rather than the usual politics of deference to the President in appointments to the Court—a deference that robs our constitutional system of an important period of rethinking central questions of the regime and problems facing the nation.

In support of the anti-unitarian position, Tulis reads the debates at the Constitutional Convention as highlighting a concern by the Founders that conflict, not deference, between Senate and President should be the rule. "The structural properties of the Presidency (principally his singularity) would ensure that a debate would occur, that choices would be made. The structural properties of the Senate (principally its plurality) would ensure that the choice that was made occurred after public debate."[58] The choice of Supreme Court Justices is political. The debate in the Senate extends the range of considerations about the choice.

Tulis argues that because twentieth century debate is limited, in most cases to legal competence, moral turpitude, and financial improprieties or conflicts of interest, the debate does not get to larger questions of constitutional discourse and separation of powers. In modern confirmation processes opposition to a candidate takes the form of personal moral qualities and conflicts of interest—not larger issues of constitutional discourse. Instead of talking about a candidate's approach to constitutional interpretation, we talk about conflict of interests, as in the Haynesworth nomination. Political conflict is personal—not about directions our constitutional regime should take. For Tulis, "the politics of deference reversed the logic of constitutional discourse."[59] The Bork nomination is

57. *Id.* at 1338.
58. *Id.* at 1341.
59. Tulis, *supra* note 45, at 1345.

the exception to the politics of deference that proves Tulis's rule on how the confirmation process should operate.

Tulis likes the Bork nomination because it involved "explicit and profound conflicts over interpretative posture, doctrinal understanding, and ideological presupposition" rather than discussion of ethics and competence.[60] It was about Bork's writings and views on the Constitution. Tulis does not like the fact that scholars such as Stephen Carter want to avoid similar confrontations in the future, because the most talented men and women will not allow themselves to be placed in nomination.[61]

The problem is that we have lost our political culture of conflict in favor of a politics of deference; in so doing we have either stopped conflict over constitutional questions and issues of change or have covered over real conflict on questions of constitutional interpretation and institutional role by over-emphasizing nominee competence and morality.

Jeffrey Tulis offers an original and forceful argument that opposes the conventional wisdom of many scholars who oppose a robust politics of Supreme Court appointments. At the core of Tulis's argument is a faith in conflict as central to greater deliberation about big issues of constitutional law, theory, and change. However, there is little argument about why we should have faith in more robust, conflictual politics as a good. The Founders were not so whetted to open conflict as indicated by the fact that the selection of the Senate was not to be as democratic as that of the House. The debate in the Senate was expected to be less prone to the negatives of "faction" than in the House where the smaller constituencies might produce Federalist 10 problems. What does it mean to say the Senate and the President "appear bereft of a constitutional understanding of their roles," or that "partisans are increasingly disloyal to their institutions," or "the political relation of President and Senate is politically asymmetrical" or "the twentieth century national public arena is, in many important ways, markedly apolitical?"[62]

For Tulis, there is conflict today, but it is "conflict conducted under the auspices of a regime of deference" which is unlike the conflict "legitimately induced and self-consciously nurtured," as he

60. *Id.* at 1353.
61. *See id.* at 1356.
62. *Id.* at 1332.

sees in the nineteenth century.[63] Therefore, it is the debate about individuals rather than larger questions of rights and political system principles that bothers Tulis. Debate should be about the past and future constitutional order, not individual Court nominee foibles. The nomination process is "a fit occasion for the polity as a whole to revisit the terms of its composition—the most basic politically constitutive questions. . . . The purpose of the selection process extends beyond the selection itself to the polity's need for periodic political reeducation."[64] Tulis foists upon the selection process the remediation of the separation of powers system itself. He writes, "A deep defect in the separation of powers system is the lack of institutional support for the kind of constitutional education necessary for its best functioning."[65] Therefore the selection of the Justice is to do more than choose a Justice of ability, or to choose a Justice who will vote on constitutional questions in one way or the other; it is to rethink basic questions of institutional design—to rethink the balances of power under separation of powers.

It is not clear this was the will of the Framers; nor is it clear such an objective is possible in a choice of a Justice. I can see how the standards for evaluation can be part of the political process at a point in time—but that is far different from the idea that the selection process should be a point of total reeducation on the structural bases of our constitutional system. I can see one making the more general argument for a new constitutional convention which would think fundamentally about our constitutional system. It is not clear that Supreme Court selection is the proper or best forum for such a debate.

It is clear that Tulis is not for a unitary presidency, at least with regard to the selection of Supreme Court Justices. It is also clear that Senate and wider public deliberation about the nature of our regime, and the Court make-up, is what Tulis desires. However, how are we to square this longing for thinking about big questions of constitutional regime with the equally important value that the Court must be counter-majoritarian when fundamental rights and polity principles are questioned? It is true that Senate advice and consent is indicative that the presidency was not to be uni-

63. *Id.* at 1336.
64. Tulis, *supra* note 45, at 1338.
65. *Id.*

tary—at least with the nature of individuals (and policy concerns) that were to be placed on the Supreme Court. It is also clear that there is much evidence that counters Tulis's view of the glory days of the nineteenth century during which important issues of constitutional regime were discussed.[66]

If one asks why the Framers chose not to trust the House of Representatives with the power of advice and consent for Supreme Court nominees, one gets a different picture of the degree of robustness of debate (and democratic quality) than they expected in the confirmation process. According to Tulis, the President's nomination would ensure a nomination and debate and the plurality of the Senate would ensure a public debate.[67] The process would ensure that there would not be the selection of a simple "partisan" of the administration. "The Senate is an indispensable locus of deliberation and choice, not an appendage to a presidential 'regime.'"[68] Senate participation is to limit simple partisanship in Supreme Court selection. The key problem in the twentieth century is the deference to the President and the Senate's failure to raise large constitutional issues. Rejection is now based on legal competence, moral turpitude, and financial improprieties, rather than the "basis of their constitutional views," writes Tulis, "One must find an interest to serve as an excuse for a reason!"[69]

Tulis views Bork's selection process as raising high-minded constitutional questions. One may ask whether the Bork nomination highlighted important constitutional questions, as opposed to issues of how specific cases might be decided given the parity among conservatives and liberal/moderates on the Supreme Court. At one point Tulis admits that high-minded institutional regime questions were not central to many Court nominations in the nineteenth century. Tulis quotes Henry Monaghan's view that the Senate rejected or tabled Supreme Court nominations for virtually every conceivable reason, "including the nominee's political views, political opposition to the incumbent President, senatorial courtesy, and on occasion even a nominee's failure to meet minimum professional standards."[70] The evidence that Tulis himself draws upon sug-

66. *See, e.g.*, LAURENCE TRIBE, GOD SAVE THIS HONORABLE COURT (1985).

67. *See* Tulis, *supra* note 45, at 1343.

68. *Id.* at 1341.

69. *Id.* at 1343.

70. *Id.* at 1354 (quoting Henry Paul Monaghan, *The Confirmation Process: Law or Politics?* 101 HARV. L. REV. 1202, 1202 (1988)).

gests that the nomination process was never a forum for large regime questions in our nation's history. If this is so, then his argument must boil down to a love of political debate (not about the candidate's personal qualities alone). In this form the argument sounds less high-minded. Although it does suggest that even this debate is marginally better than the present debate, these are very different arguments. One can ask which is more important to Tulis—real political education or just less personal Court selection processes. If he wants to make the stronger argument for the selection process as forum for constitutional regime change, he will have to build this into an argument about originalism and non-originalism, both as an interpretive method in general and as an interpretive approach to separation of powers in particular. A positive (originalist) reading versus a dialectical (non-originalist) reading of the Constitution and separation of powers will produce answers to the question of the role of the Supreme Court selection process as varied as those about how to read the *Chadha* case.[71] The case for selection process as discussion of regime needs a far firmer (constitutional) theoretical base than is offered in this article. Moreover, the assumption that the Founders liked more robust politics and political debate generally, and in the case of the selection process, needs a wider grounding than presented here.

Tulis seems to have a fallback position. He admits that "it should be clear that not all confirmation battles were occasions for serious debate about the structure of the constitutional order or the proper principles of constitutional interpretation."[72] Political consideration such as region, party affiliation, ethnic representation, and others by both President and Senate did occur in the nineteenth century. However, "constitutive principles," in terms such as the relationship of national and state government, slavery, and government control of the economy, did inform such choices.[73] The nineteenth century, though not a golden age,

> was a political order in which the usual competition for partisan advantage was marked by the contention of insti-

71. *See* William Haltom, *Separating Powers: Dialectical Sense and Positive Nonsense*, *in* JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING (Michael W. McCann & Gerald L. Houseman eds., 1989) (presenting an excellent analysis as to how originalist and non-originalist scholars and Justices analyze the issues in the *Chadha* case and other recent separation of powers cases).

72. Tulis, *supra* note 45, at 1351.

73. *See id.*

> tutions structurally composed to represent different perspectives on democratic choice. It was a political order whose legislators were more self consciously political, more aware of the stakes involved in decision, more willing to contest the choices posed, or to challenge the poses presented.[74]

Tulis's original contribution raises the following additional questions for me, which either he fails to consider or adequately answer: Does the call for increased constitutional discourse and reeducation through the appointment process mean that litmus tests by the President or the Senate on particular constitutional questions should be applied to nominees? What does Tulis's term "the nature of constitutional regime" mean in specific terms? What discussions in past nomination processes would qualify? With what results in terms of the level of conflict and the constitutional health of the nation? What would qualify as "reeducation" and robust discourse? Does discussion about Bork as a key swing vote on the Supreme Court count? Would Bork's views on constitutional issues and constitutional interpretation be in order? Is a discussion about abortion rights and rights of defendants—a discussion of constitutional norms—proper, or must one debate visions of separation of powers or the role of the Court in our constitutional question? Does the fact that Justice Kennedy is now in Bork's seat on the Supreme Court, with key effects on constitutional doctrine, as indicated by the *Casey* and *Weissman* decisions, support the argument for or against more conflict and robust debate? In what ways?

I have serious questions about whether the call for more democracy and more deliberation regarding big issues in the nomination process, especially with regard to whether robust debate will make impossible the continuation of the Supreme Court's role as a protector of minority rights and as the key counter majoritarian institution in our constitutional structure. What effect will open and robust debate and possible encouragement of litmus tests have on pushing the Supreme Court to simply follow the will of the people and thus undermine key fundamental rights principles in the Constitution and the implied rights later defined by the Supreme Court as in the Constitution?

Also, if political conflict and reeducation is to be a core value of the confirmation process—that is, a major rethinking of large

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74. *Id.* at 1353.

constitutional questions—one can ask what is the role of the amending process and the Supreme Court as interpreter of the Constitution? Does the appointments process and Supreme Court as interpreter of the Constitution play a secondary role to the Supreme Court as a body which is to follow the will of the people when this will probably reflects the animus that momentary factions tend to harbor?

There needs to be integrated into Tulis's analysis a more filigreed interpretation of the concept of separation of powers and the specific role of each of the branches in our constitutional system. Did the Founders not seek a filtration process that would produce the best citizens for public life? Is an open, deep conflict during each Supreme Court appointment (and perhaps all major appointments) commensurate with getting the best person for the job or for ensuring that the will of the people in elections will be registered on the Supreme Court? As I indicated above, if the Supreme Court is to be counter majoritarian, why should we allow the choice of Justices to be a "majoritarian" process?

Is it necessarily bad for our constitutional system that the process of deference to Presidents and less conflict in the twentieth century has produced more moderate Court choices by conservative Presidents and more liberal or moderate court choices by liberal Presidents? Might not such results help sustain the rule of law and the autonomy of law as separate from everyday politics? Is that not a positive outcome? Would a nomination process that featured a politics of conflict negate that possibility? Might not more open conflict produce less thoughtful Justices? We need a much fuller discussion of what "constitutional discourse" is about. Will more discourse make it easier or harder for a President to place the views of his supporters into the decisions of the Court?

Are open conflict and the politics of deference the only two alternatives? Is there a possibility for something in between? Why so much faith in conflict? Tulis wants to link Court choices to wider changes in regime, such as a debate about Reagan's attack on big government in light of the administrative state. If Justices are chosen with this concern in mind, will we not get more backward looking Justices on the Court and a reproduction of the *Lochner* era? Finally, Tulis rejects the notion that a re-politicized process will produce mediocre Justices or choices by the most gifted possible nominees to decide not to enter the fray. Is the evidence so clear on this score?

Tulis's paper is more successful as a call for more deliberation than it is for a call for more conflict. Tulis has identified a problem—the decline of deliberative democracy—as have many contemporary scholars of American political and legal institutions, and of the role of law and politics. He is less persuasive when claiming that more conflict necessarily produces better deliberation or that the appointments process should be the central forum to achieve more deliberation in our constitutional regime, for reasons he and other scholars have identified in their analysis of the history of appointments. Nor is the evidence persuasive that a more conflictual appointment process results in a more informed Court.

I prefer the constitutive nature of Tulis's view of the confirmation process: let's study politics to see what we get in terms of Justices and standards of evaluation for Justices as opposed to looking at such questions as whether externally applied X and Y objectives for a good justice are met by the process of appointment. However, the assumption that politics and conflict will lead to more or better deliberation, without a consideration of the drawbacks with regard to values of our constitutional regime, leads to serious questions as to whether the Court can continue to be counter-majoritarian under such a system.

Politics for Tulis is about discussion of standards of evaluation, not about good and bad men. Therefore, we should not focus on the personal qualities of candidates. Why can't we focus on both and let empirical/historical analysis answer these questions? Tulis argues that the choice of Justices is politically contestable and that it is a fit occasion for the polity as a whole to revisit the terms of its composition—that is, its most basic constitutive question. What constitutes debating the terms of the composition of the polity needs to be more fully explored. Did the Thomas nomination allow a full discussion of the composition of the polity? Did it allow a full discussion of sexism and sexual harassment? Did it educate? To what degree did the debate help or hinder our understating of issues of race and gender?

Ascertaining the role of the Court is a key problem. To know standards for evaluation of the confirmation process we need to know Tulis's concept of the Supreme Court in our political legal system. We get little of this. Tulis presents a general argument for more conflict and debate about the nature of the regime. Yet, does more conflict allow the Court to protect rights and be counter-majoritarian more effectively? The conclusion that the political system should set standards of evaluation for Supreme Court Justic-

es in light of Court make-up and doctrine assumes that there are not a larger set of norms for a good Court (such as being counter-majoritarian and protecting rights). This larger set of norms—other than more debate about constitutional questions and reeducation of the populace—is needed as a problematic counter to the notion that more conflict is good.

In order to discover what is good or bad about the Bork nomination, we need to compare it to other open debates regarding Court make-up and regime. We need to test historically whether conflict has been good and bad compared to other regime needs—not just consider pluses and minuses as to good and bad Justices on standards we know little about.

For example, does conflict during the Supreme Court appointment process produce Justices of better quality? Does it produce a Supreme Court that is more or less independent of politics? What does a comparison among the confirmation processes (including their levels of conflict) prior to, during, and after the period of selection of Lochner era Justices tell us about the relationship of level of conflict and the degree to which Justices are out of touch with society when they get on the Court? Does more conflict and less deference of the Senate to the President in the appointments process lead the Supreme Court to be behind or in front of political institutions as forums of political change?

The value of more constitutional discourse, like the value of more deliberation as a good in itself, is too general as a standard of evaluation compared with the deeper notion of the role of the Court as counter-majoritarian. Does conflict produce real discussion about constitutional values? Cannot conflict produce good and bad results? How does the argument for more conflict and more deliberation relate to Theodore Lowi's duopoly argument? Does duopoly leads to more or less conflict over Supreme Court appointees? For starters, did duopoly lead to the rejection of Bork, the appointment of Justices Kennedy, Souter, Ginsburg, and Breyer? What do these selections tell us about conflict, the need for deliberation, quality of Justices, etc.?

To get at these questions we must move from the level of a general argument for conflict and deliberation to a structural analysis about political institutions, history, and change—a form of analysis to which Theodore Lowi has dedicated his life—whose core values or premises might be applied to a reconceived legalist study of the presidency, presidential power, appointments, and regime change.

VI. CONTEXT AND THE DEVELOPMENT OF POLITICAL INSTITUTIONS

Theodore Lowi has been a pioneer of what Gerhardt has called the outside view of American political and legal institutions. Lowi's *The End of Liberalism*[75] is an exquisite examination of "external forces (i.e., the social, political, economic, and historical developments or influences originating from outside the formal or constitutional structure)."[76] For Lowi, these external forces changed our public philosophy from capitalism to pluralism to interest group liberalism, and resulted in political and legal system changes, many of which were pathological to basic constitutional principles. In *The Personal President: Power Invested, Promise Unfulfilled*,[77] Lowi again explores American political institutions, in this case the presidency, using both inside and outside approaches. Lowi explains why as Presidents and the government gained more power and responsibilities the presidency became weaker. In *The End of the Republican Era*,[78] Lowi has a more modest objective. Rather than a full inside and outside analysis of the overall political system or a part of it, Lowi seeks to identify the changes in public philosophies that have triggered the end of the Republic era that replaced Liberalism, but has not yet created a new definition of regime. One can also see inside and outside views on political institutions and change in his superb book on political change in New York.[79]

Lowi's contribution to this Symposium argues that originalism can never replace the effects of history and changing institutions in the analysis of presidential power. For Lowi separation of powers was saved by changes in the party system—the replacement of King Caucus with the convention as the presidential nominating system and the replacement of the probability of ultimate House election of the President with the undermining of the electoral college itself by the simple practice of pledging electors. Lowi writes, "These two developments took presidential politics completely outside of Congress and gave the presidency a popular base totally and completely independent of Congress. In the process the

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75. THEODORE LOWI, THE END OF LIBERALISM (1969).

76. *See* Gerhardt, *supra* note 24, at 1365-66 (defining the "outside" view).

77. THEODORE LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (19xx).

78. *See* THEODORE LOWI, THE END OF THE REPUBLICAN ERA (1995).

79. *See* THEODORE LOWI, AT THE PLEASURE OF THE MAYOR: PATRONAGE AND POWER IN NEW YORK CITY, 1898-1958 (1964).

Separation of Powers was saved by the very same institution reviled by virtually every framer, including Madison."[80] That is, separation of powers was strengthened by its relationship to a two-party system. Lowi concludes, "[T]he parties were not following any intent of the Framers. The presidency has simply strengthened in relation to Congress as a coincidental and accidental consequence of winning elections."[81]

Moreover, our nation moved from Congress being a dominant neo-Wilsonian institution in the nineteenth and early twentieth century to a Presidential-centered administrative state due to the Roosevelt revolution. For Lowi, the late twentieth century is not simply a period of divided government, it is a duopoly. Duopoly is "Absolute Separation of Powers"—"a situation of separate and independent branches."[82] Ironically, this is what Lowi envisions that the Framers wanted; for Lowi, it is unfortunate that we have to live with this pathological condition of government—that is, government without innovation, politics, robust, or meaningful debate. Dual party government with each party nested in and dominating one of the branches—duopoly government—is anti-innovation and enamored by cost/benefit analysis rather than political debate about the important issues that face our nation. It is a government in which each major party is happy with control of a piece of the action.

Here and in all of Lowi's scholarship, improving both deliberative democracy and the accountability to citizens have been primary objectives. Also, Lowi has sought changes in political structures, procedures, and governing ideas to enhance deliberation and accountability.[83] What is more, lurking behind these institutional concerns is a fervent belief in legal principles such as equal protection of the law and the separation between law and politics under the umbrella of a rule of law. Lowi's support of deliberative democracy and his lack of fear of conflict join Jeffrey Tulis and Theodore Lowi in their scholarly concerns and their evaluation of American political institutions. However, Theodore Lowi has not

80. Theodore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 CASE W. RES. L. REV. 1219, 1222-23 (1997).

81. *Id.* at 1223.

82. *Id.* at 1224.

83. One only has to explore his call for "juridical democracy" in THE END OF LIBERALISM, to see an argument for reform which is to deal with the pathologies of interest group liberalism. *See* LOWI, supra note 75, at 294-313.

only demonstrated his support for improving the quality of public deliberation and accountability and for the role of political conflict in securing these improvements. Unlike Tulis, Lowi has provided quite textured analyses of the effects of history, political institutions, and social and economic factors on the level of political conflict and quality of our nation's political deliberations. Lowi also began long ago the important task of providing an interpretation of how outside forces have influenced the inside workings of government. However, Lowi's vision of duopoly and its affect on separation of powers needs greater clarification of the relationship among outside (societal) and inside (government) factors as causes of the pathologies in government that he has identified in his keynote paper.

VII. GOING FURTHER OUTSIDE: STUDYING POLITICAL AND LEGAL INSTITUTIONS UNDER NEW HISTORICAL INSTITUTIONAL PREMISES

To help in the production of a more fully textured analysis of how government institutions resonate with social, political, and ideational changes in our nation, I want to introduce another layer of outside forces and scholarly problematics that none of the participants in the Symposium have explored. How can we understand more fully the relationship among institutions and between institutions and society? How can we explain persistence and change in political and legal institutions in a polity that is thickly populated with such institutions? Stephen Skowronek argues that in any complex society each institution is likely to have its own history. Thus, change in one institution is unlikely to run parallel to change in another, even though change in one institution may effect changes in others. Many different rules of legitimate action and many different systems of meaning will be operative in a polity at any moment. It is nearly impossible to synchronize the institutions of a polity to produce one coherent over-arching system because it would entail at the very least creating and recreating all institutions simultaneously. Thus, a genuinely institutional view of politics will adopt a multiple orders thesis. Its premise would be that any given polity is likely to be composed of very different and simultaneously operating institutional systems. The wellspring of change, Skowronek argues, would be the juxtapositions of these orders.[84]

84. *See* Stephen Skowronek, *Order and Change*, 28 POLITY 91-96 (1995).

In this introduction to new historical institutional analysis I ask that we think about the Supreme Court as an institution compared to the presidency and other institutions. Skowronek's vision of the historical institutionalism means that we can study the Supreme Court or any other institution, but we must be respectful of the different systems of meaning in the different institutions. We also must be mindful of whether a particular institution has a role in changing the meanings of other institutions. Do other institutions give the Supreme Court the legitimacy to declare what the Constitution means? If the Supreme Court's power is not seen as legitimate by another institution, what does this mean about the role of the Supreme Court in the American polity? Which order among the multiple orders has legitimacy? How does this inform a comparison of courts and elected bodies? Does this mean that there is a hierarchy of institutional orders? What role does the Constitution and the Supreme Court as its most legitimate final interpreter (other then through Amendment) play in a hierarchy of orders? Does the Constitution and the Court set boundaries on the orders of other institutions? What are the limits of this power?

This concept of multiple orders is key. It might work as a basis for comparison among institutions as well as between them. For example, in some doctrinal areas the Court might not be so different from an adjudicatory agency in a bureaucracy, such as in administrative law. In the areas of equal protection and First Amendment it will be less like other courts and bureaucracies. Historical institutionalism might have to be analyzed by groups of doctrinal areas if change is to be studied. The same is true with regard to the degree that the Court bases its choices on lower court or elected body choices.

What does it mean to study the Supreme Court under Skowronek's vision of historical institutionalism? It means the following: (1) different rules of order operative at any moment in a given polity are likely to grate against each another; (2) we need to study how ingrained and sustained asymmetries inform the construction of civic power; (3) in a historical institutional view, institutional politics is most significant when viewed as the arena in which different rules of legitimate order converge, collide, and fold back on one another. Skowronek writes: "Far from homeostatic, the picture of politics that emerges here is kinetic, featuring a stubbornly tenacious intercurrence of different standards of legitimate

action."[85] It is not accidental that among the examples of persistent incongruities and frictions among institutional ordering are "the incorporation in the Constitution of protection for the institution of slavery with a regime of individual rights," "the promulgation of the regime of individual rights in the context of the primordial norms of the patriarchal family," and "the emergence of a national economy based on the corporate organization of capitalism within the context of a decentralized system of economic regulation rooted in state judiciaries."[86] Therefore, the tension between institutional forms is at the core of change.

The new institutionalism is not the study of system, order, and regularity. Instrumental approaches to Supreme Court decision-making and doctrinal change are based on such values.[87] They do not place constitutional change within the context of wider change in society, and do not identify the institutional and ideational conflicts that have produced the change. The new institutionalism must study "institutional intercurrence where the pathways of change are negotiated in the pushing and hauling of several institutionally-grounded standards of legitimate action."[88] It is significant that Skowronek uses examples from constitutional law, including: the incorporation of ancient common law rules of work relations into the liberal, market oriented competitiveness of post-Revolutionary era; the incorporation into the Constitution of the protection of slavery within a regime of individual rights (and I might add the change in that part of the Constitution); and the promulgation of the regime of individual rights in the context of the primordial norms of the patriarchal family.

Historical Institutionalists see the juxtaposition of institutional orderings as the normal state of affairs. For example, they see conflicts between a new plebiscitarian presidency forms as layered over the original constitutional form. Again, constitutional power or law questions are at the core. Does this mean that there is a special role for the Court in dealing with different forms? In other words, what is the role and what are the sources of evaluative

85. *Id.*

86. *Id.* at 95-96.

87. *See* RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993 (1994) (discussing the nature of instrumental analyses of Supreme Court decision-making and why they have impaired our understanding of that body and the process of doctrinal change).

88. Skowronek, *supra* note 84, at 96.

criteria in a world of institutional change? Rogers Smith's view of a liberal teleology of political development in the United States, as including decidedly non-liberal traditions compared to the more traditional Hartzian view, suggests that conflict will occur as to how to define ongoing factors, ideas, and institutions.[89] Also, the Historical Institutionalists do not see order, change, and time as set or given. They "problematize the notion of time itself."[90]

A problem arises in conventional scholarship because we think of institutions as the Supreme Court, the Presidency, and Congress, not as orders, but as multiple orders. One gets the sense that orders are separate and distinct to a greater degree than they are. Are all orders as discrete and insular as is suggested by this language? Skowronek correctly argues that we need not view the concept of order as normative. Rather than supporting order as a value, we need to study the process of change in which order and legitimacy are part of the problem. This view seems valid to me with regard to the study of the power of different institutions and in its rejections of the pro-order concept deep within apologetic pluralist (Robert Dahl and David Truman) thought.

However, historical institutional studies must deal with standards of evaluation as to polity and rights principles in the Constitution up front, not in order to reify one value or the other, but to study the degree to which constitutional principles inform the process of institutional and policy change, and the nature of what constitutes "legitimate" action. Skowronek is correct in his call to get rid of homeostatic understanding of change and development. We need to replace the homeostatic image with "a picture of institutional intercurrence, where the pathways of change are negotiated in the pushing and hauling of several institutionally-grounded standards of legitimate action."[91] What does he mean by standards of legitimate action?

We can ask whether class structures appear in intermediate level institutions, such as the interpretive community. We should also ask whether the Supreme Court should be viewed as an intermediate institution such as the party system or the structure of economic interest groups, like unions, that mediate between individual political actors and national political outcomes. Institutional

89. *See* Rogers Smith, *Beyond Tocqueville, Myrdal and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993).

90. Skowronek, *supra* note 84, at 96.

91. *Id.* at 95.

comparison is required. It is clear that the Supreme Court does decide cases brought by advocates of individuals, groups, and institutions. It makes choices that are binding not only on the individual or groups who are before the Court, but in a special way in which legal theory, process, and grounds of legitimacy are emphasized. We can ask what is and is not special about the Supreme Court.

Historical Institutionalists seek to study how wider economic, political, and social changes inform the actions and role of an institution within the wider political system and how that wider system informs the impact of an institution on society. In addition to establishing methods of analysis that "explain" doctrinal change at the opinion level, we need to build out from this and study change in the societal role of the Court through measuring external changes that are made in response to Court cases and actions in response to cases, which may include the decision not to act, as Michael McCann has found in his research.[92] By having a quite unsubtle view of institutions and individual agency, law, and change, a Rosenberg type of analysis fails to place the Court in the historical institutional framework.[93] The scholar will have to be sensitive to the difference between changes in society caused by direct political processes like labor politics, by class and the social economic structure, and by doctrinal change. With regard to explaining change due to constitutional principles and doctrine, we are helped at one level because the products of the Supreme Court are written down, as doctrine. However, the way Court cases change the political and legal culture, and how citizens are to view each other and the government as a result of the cases, is not written down; rather is played out in actions—and inactions—as McCann has so artfully demonstrated. Yet, we need to see the impact of Court cases on law, other institutional actions, and on actions taken and not taken by elected and appointed public officials and by those in the private sector. In doing so, if we were to be tied to behavioral rather than interpretive methods of analysis, it would undermine the subtlety of analysis.

Since institutions are viewed as patterned relations, we ask how political institutions are structured. How do institutions constrain

92. *See* Michael W. McCann, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 227-77 (1994).

93. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

and refract politics—realizing they are not the only cause of change? With regard to the Supreme Court, since institutions structure political interactions, we likewise consider how the Court as an institution structures its choice system—what will be the role of the Supreme Court and the role of law as institutions structure legal interactions and in this way affect political-legal outcomes in cases. Yet it does so in a way that is not the same as by bureaucrats or by elected officials, such as the President. Thus, the study of presidential power and the presidency—as well as the constituent powers of that office—such as the appointments process, will have to be conducted in ways that inform how the appointments process and the presidency affect institutional orderings and how institutions are affected by wider changes in the social, economic, and political order outside government. Scholarship on the presidency, the Supreme Court, and legal and political change in the future will look very different than the conventional scholarship of today. The important contributions to this Symposium of Michael Gerhardt, Jeffrey Tulis, and Theodore Lowi inform these new directions. However, much more will have be done to develop the scholarly problematics of the new Historical Institutionalists and to apply them to the study of presidential power, the Supreme Court, and the relationship between law and politics. It is these primary issues that are explored in this Symposium.