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Constructing Courts: Judicial Institutional Change Embedded in Larger Political Dynamics

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CONSTRUCTING COURTS: JUDICIAL INSTITUTIONAL CHANGE EMBEDDED IN LARGER POLITICAL DYNAMICS, OR THE IMPORTANCE OF NO LONGER CONSIDERING THE JUDICIARY AN INSTITUTION APART

Stephen M. Engel *

JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012). Pp. 312. Hardcover $35.00.

JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012). Pp. 400. Hardcover $35.00.

In 1962, legal scholar Alexander Bickel published *The Least Dangerous Branch*, which subsequently defined the boundaries of scholarship on the federal judiciary, particularly on the Supreme Court, for decades.[1] Bickel viewed the popular and elected-branch hostilities toward the Warren Court, which characterized the judicial politics at the time of his writing, as a consequence of the unelected branch's structural deviance in a democracy.[2] Indeed, *The Least Dangerous Branch* builds on a foundational supposition defining American political institutions, namely that they were designed so that, in James Madison's famous words, "[a]mbition must be made to counteract ambition."[3] Following the logic of separated powers meant to check and balance one another, a counter-majoritarian court—an institution

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1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

2. *Id.* at 18. On hostilities toward the Warren Court, see STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 285-323 (2011) and WALTER F. MURPHY, CONGRESS AND THE COURT: A CASE STUDY IN AMERICAN POLITICAL PROCESS (1962). The intensity and potential of these hostilities is disputed. Charles Geyh cites the failure of court-curbing as evidence that a norm of judicial supremacy had fully manifested in Congress, while Lucas Powe contends that the many Warren-era "anti-Court measures, though not as all-encompassing as the [Franklin D. Roosevelt] Court-packing plan, had come far closer to passage than Roosevelt's initiative." CHARLES GEYH, WHEN COURTS AND CONGRESS COLLIDE 109-10 (2006); *see also* LUCAS POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 133 (2000).

3. THE FEDERALIST NO. 51 (James Madison).

through which unelected judges might overturn the will of popular majorities or, at least, the will of politicians elected by popular majorities—was an unsettling potential from the start.[4] This possibility, which Bickel referred to as the Court's "counter-majoritarian difficulty,"[5] has been called the "dominant paradigm of constitutional law and scholarship"[6] by one scholar and "an academic obsession"[7] by another. Two superbly written and recently published books, Justin Crowe's *Building the Judiciary: Law, Courts and the Politics of Institutional Development*[8] and Jed Handelsman Shugerman's *The People's Courts: Pursuing Judicial Independence in America*,[9] challenge the counter-majoritarian framework that structures too much scholarship and popular understanding of federal and state judicial power.[10] Each author confronts and undermines assumptions of inter-branch conflict and static definitions of judicial independence. As such, they pursue an ongoing project in political science, particularly in the subfields of public law and American political development, to promote a fundamental paradigm shift in how scholars of law and politics should consider the power of courts and judges.

Ironically, the paradigm shift away from Bickel's elaboration of the counter-majoritarian difficulty—which was hardly a new claim when Bickel wrote it[11]—began before his book was published. While Bickel penned his book during his post at Yale Law School, political scientist Robert Dahl, whose office was across the street at the Yale Hall of Graduate Studies, had already published a brief article, *Decision Making in a Democracy: The Supreme Court as National Policy-Maker*, five years prior.[12] That article questioned some of the claims that would make Bickel so famous.

Bickel had sought a rationale for, and a recommendation to, judges that might curb the hostile rhetoric triggered by some of the more controversial Warren-era rulings. He settled on appealing to judges to exercise restraint by employing their "passive virtue" of deciding not to decide.[13] However, Dahl maintained that while Bickel's worry made theoretical sense, such counter-majoritarianism and the periodic "fury" it promoted, was, in fact, more likely to be short-lived.[14] Dahl conceded

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4. *See* Brutus, *The Anti-Federalist Essays, XIII* (Feb. 21, 1778), *available at* http://www.constitution.org/afp/brutus13.htm; Brutus, *The Anti-Federalist Essays, XVI* (Apr. 10, 1788), *available at* http://www.constitution.org/afp/brutus16.htm.

5. BICKEL, *supra* note 1, at 16.

6. Erwin Chemerinsky, *The Supreme Court, 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 (1989).

7. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159 (2002).

8. JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT (2012).

9. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

10. CROWE, *supra* note 8; SHUGERMAN, *supra* note 9.

11. *See* Charles Beard, *The Supreme Court – Usurper or Grantee?*, 27 POL. SCI. Q. (Mar. 1, 1912).

12. Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), reprinted in 50 EMORY L.J. 563 (2001).

13. BICKEL, *supra* note 1, at 111-13.

14. For histories of public and congressional hostilities toward the Court during particular eras, see RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971); STANLEY I.

that judicial review, or the power of unelected federal judges to decide whether state or federal law conforms to the requirements of the Constitution, had undemocratic implications.[15] Nevertheless, the counter-majoritarian threat failed to materialize for any significant length of time precisely because of the way judicial nomination and confirmation were designed: "even without examining actual cases, it would appear on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[16] Furthermore, the Court, lacking power to implement its rulings without the support of the other branches, represents little threat to democracy.[17] Therefore, judges would not simply impose their own policy preferences dressed up as legal interpretation, but would instead rule strategically so as not to raise the ire of elected branches, fellow judges and the legal academy, or the broader public.

What has come to be known as Dahl's "regime" thesis, the idea that the three federal branches might act more cooperatively to achieve political ends, experienced a renaissance beginning in the 1990s.[18] Dahl's ideas spurred an agenda to research whether and how appointment and other aspects of the judiciary's institutional embedding in a multi-branch government might affect its rulings.[19] In short, would judges simply impose their own policy preferences as law? Or would they

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KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968); WILLIAM LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES (2007); MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL (2009); WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1993); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT V. THE SUPREME COURT (2010). On presidential-court relations, see KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

15. *See generally* Dahl, *supra* note 12, at 564-65, 567.

16. *Id.* at 578. For various criticisms of Dahl's empirics, see Jonathan Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 1, 50-63 (1976).

17. In *The Federalist No. 78*, Hamilton characterizes the Court as "the least dangerous" branch since it lacks the executive's power of the sword and the legislature's power of the purse. It has "merely judgment." *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (June 14, 1788). Gerald Rosenberg expands this "constrained Court" thesis. *See* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (3d ed. 2008).

18. *See* Matthew E. K. Hall, *Rethinking Regime Politics*, 37 L. & SOC. INQUIRY 878 (2012) (critiquing regime thesis literature).

19. On strategic approaches to judicial decision-making, see FORREST MATZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); Jeffrey A. Segal, *What's Law Got to Do with It: Thoughts from "The Realm of Political Science," in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 17 (Charles G. Geyh ed., 2011); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009); Lee Epstein et al., *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583 (2001); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1994-95); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 1, 28-44 (1997). For a discussion on historical institutionalist accounts that focus on the constraints that compel judicial decision-making, see THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); KEVIN MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004); POWE, *supra* note 2; Cornell Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385 (2006).

temper their aims, ruling strategically not only to appeal to fellow-judges on a multi-judge panel, but also to avoid backlash from the elected branches? But, as both Crowe and Shugerman point out, how judges decide need not be the central question animating public law and judicial research, particularly for scholars interested in evaluating how elected branches interact with the Court or even how the Court's power has changed over time.[20]

Crowe's focus "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."[21] Therefore, he is less concerned with examining rulings and doctrine, or with assessing their political or historical force as some constitutional development literature has done.[22] Rather, Crowe seeks to examine what he calls the "analytically antecedent matter of how [the federal judiciary] became structurally and institutionally equipped to exert power and authority across a range of areas."[23] In other words, he aims to describe and evaluate the processes through which federal judicial power as an institutional matter was deliberately constructed.

Shugerman is interested in explaining change in judicial selection at the state level. For example, he is interested in why the process in many states has shifted from gubernatorial or legislative-appointed systems to popularly elected systems or to "merit" systems that combine committee selection, executive appointment, and retention via election. His answer focuses, in part, on the aims of variously involved interests. To that end, he shows how "political and economic interests drove each stage of judicial selection."[24] However, and perhaps more importantly in terms of theoretical contribution to the field of political development, Shugerman hones in on how specific ideas—here the idea of judicial independence—influence institutional reform. Far from a story about interests and strategic actors, Shugerman explores how ideas matter in the push for institutional change. Thus, his book is as much an analytical narrative of changing state judicial institutional design as it is "a history of an idea."[25] According to Shugerman, ideas have material force and consequences. Interests are always operating in a context of ideational constraint.[26] As such, successful reform requires a skilled entrepreneurial actor who can effectively reshape an idea, even a previously rejected one, into the very solution to the identified problem, Such maneuvering often exploits a crisis or situation in which the in-

20. *See generally* CROWE, *supra* note 8; SHUGERMAN, *supra* note 9.

21. CROWE, *supra* note 8, at 10.

22. *See* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004). On the myriad ways rulings may have socio-political and historical impact, see WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 3-28 (Jack Balkin ed., 2001). For an assessment of the limitations of judicial rulings, see MATTHEW E. K. HALL, THE NATURE OF SUPREME COURT POWER (2011); ROSENBERG, *supra* note 17. For strong critiques of Rosenberg's thesis and methodological assumptions, see Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC'Y REV. (2009); Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive…)*, 21 L. & SOC. INQUIRY 457 (1996).

23. CROWE, *supra* note 8, at 10.

24. SHUGERMAN, *supra* note 9, at 268.

25. *Id.* at 7.

26. *Id.* at 7-8.

stitution in question has suffered a loss of legitimacy.[27] Judicial independence functioned as a critical limit and objective for institutional reform, and it did so even as the meaning of that autonomy was continuously revised, precisely because of the array of challenges it was meant to solve.[28]

Both books are part of a burgeoning tradition in historical institutionalism and American political development that focuses less on explaining judicial behaviors and decision outcomes, and more on how and why the institutions and ideas that contribute to judicial power have changed through the concerted actions of elected politicians. Over the past twenty years, historical and institutional-oriented scholars have pointed not only to how recently electorally deposed political interests might entrench their aims through judicial appointment and expansion of judicial power,[29] or how politicians might openly push the judiciary to take on issues that proved too controversial and hazardous to the maintenance of party coalitions,[30] but also how politicians may intentionally design strong courts for various political and policy purposes.[31] Indeed, far from ambitious politicians attempting to weaken judicial power to accrue more power for themselves in a zero-sum game, political scientists exposed clear incentives for politicians to strengthen the judiciary to serve their own ends. Crowe and Shugerman build on the central idea at the foundation of the regime thesis, namely that judicial power is politically constructed or that judicial power is built not (or at least significantly not only) by judges (and not only or at all via doctrine), but instead intentionally by politicians seeking multiple and possibly overlapping goals.[32]

Crowe asks how the federal judiciary, and particularly the Supreme Court, could start as a body so weak that George Washington encountered great difficulty in convincing men to serve on it, and yet has become an institution that allegedly

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27. For more on the role ideas play in institutional reform, see THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); Robert Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697 (2002). For ideas as a constraint on strategic action, see Stephen M. Engel, *Organizational Identity as a Constraint on Strategic Action: A Comparative Analysis of Gay and Lesbian Interest Groups*, 21 STUD AM. POL. DEV. 66 (2007). On how crisis can be exploited by entrepreneurial politicians as an opportunity to reshape ideational constraints and push for reform, *see* William Sewell, *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. (1992). On how crisis can be used to reshape elected branch relations with the judiciary in particular, *see* ENGEL, *supra* note 2.

28. ENGEL, *supra* note 2.

29. *See generally* Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 138-68 (Ronald Kahn & Ken I. Kersch eds., 2006); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511 (2002); RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 43-44, 203-06 (2004).

30. *See generally* GEORGE LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2003); Mark A. Graber, *Federalist or Friend of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229 (1998); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

31. *See generally* NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); J. Mitchell Pickerill & Cornell W, Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPS. ON POL. 233 (2004); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 96 AM. POL. SCI. REV. 583 (2005).

32. *See generally* CROWE, *supra* note 8; SHUGERMAN, *supra* note 9.

reigns supreme and seemingly definitively decides the major policy and political issues of our day. The traditional answer is that the Justices made it so through skillful use of their positions to announce first, the fundamental principle of judicial review in *Marbury v. Madison*, and later, the controversial position of judicial supremacy in *Cooper v. Aaron*.[33] However, by traversing over two hundred years of congressional legislation that designed, reorganized, refined, reconstructed, and expanded the institutional structure of the federal judiciary, Crowe illustrates that judicial power is politically constructed, that is, "political actors, rather than judges, were the ones who built the judiciary."[34] Indeed, this finding holds true until the entrepreneurial actions taken by Chief Justice William Howard Taft and his stewardship of what would become the Judiciary Act of 1925[35], a law which would establish a significant degree of judges' autonomy over the design, budget, and review capacity of their own branch. That law (together with some bureaucratic changes made during the 1930s) marks a clear developmental demarcation. Whereas prior to its passage, the Court's institutional structure was a prerogative of Congress per the terms of Article III of the Constitution,[36] "at the close of the 1930s, one thing was abundantly clear: with the prerogative and responsibilities of the institutional judiciary centralized in the hands of judges and coordinated by their judicial bureaucrats, the largely dependent (even if increasingly powerful) judiciary of pre-New Deal America was but a distant memory."[37] In short, if judges did actively participate in building the capacities of their branch—and Crowe certainly demonstrates they did over the course of the twentieth century—it was not by means of announcing their powers via the rulings that make up the canon of American constitutional law.

To illustrate the political process of constructing federal judicial institutions, Crowe has composed a book of remarkable architectural elegance. Guided by three questions—why was judicial institutional building pursued, how was this institutional building accomplished, and what did this institutional building achieve—he offers a comprehensive account of how Congress established, reorganized, empowered, and redesigned a federal judiciary whose shape and scope were left woefully unspecified by the constitutional framers.[38] Perhaps this insight into institutional development is less shocking to the degree that it follows the commands of Article III of the Constitution, but in light of the legal literature's overreliance on judge-made doctrine as a source of judicial power and capacity, this exhaustively researched account proves a necessary tonic.[39] Crowe contends that while the Congressional Record is littered with judiciary acts (some of which passed and many of which failed) such that judicial institution building "has been consistent throughout

33. Cooper v. Aaron, 358 U.S. 1 (1958); Marbury v. Madison, 5 U.S. 173 (1803).
34. CROWE, *supra* note 8, at 195.
35. Judiciary Act of 1925, Pub. L. No. 68–415, 43 Stat. 936 (1925).
36. U.S. CONST. art. III.
37. CROWE, *supra* note 8, at 237.
38. *See id.* at 8-16.
39. U.S. CONST. art. III.

American history,"[40] the developments he highlights have "largely been defined by a small set of transformative—and, for the most part, highly contested—reforms" which have been motivated by distinct political, policy, and performance goals.[41]

Through a set of case studies that begin with the establishment of the federal judiciary by the Judiciary Act of 1789[42] and span the additions, reconfigurations, and specializations made over two centuries, Crowe provides a rich analytic narrative. He provides the historic detail that elucidates the rationale, problematic consequences, and ultimate incapacity of a judicial system wedded to geographic expansion and norms of representation. He also compellingly illustrates how controversial rulings, far from securing judicial power, provided the fodder for members of Congress to keep the judiciary in a weakened, or at least far from an optimally efficient state. Contrary to the common story of Chief Justice Marshall building a nationalist Court, Crowe argues that the nationalist implications of Marshall's rulings from *McCulloch v. Maryland* and *Gibbons v. Ogden* to *Dartmouth College v. Woodward* and *Martin v. Hunter's Lessee* incentivized Congress to avoid meeting the needs of an ill-equipped judiciary.[43] Empowering an institution with ideas counter to many in the Jacksonian congressional leadership would be politically counterproductive despite how the federal judiciary, seemingly as every political figure of the time acknowledged, could not service the needs of the expanding country: "[T]hese expressions of judicial nationalism were significant not because they represented unilateral judicial action in the service of institution building—they did not—but because they altered the strategic environment within which such institution building was already occurring."[44]

Nevertheless, in his understandable zeal to highlight how much more than doctrine matters when explaining the construction of judicial capacity, Crowe may overstate the point. For example, he follows the recent trend to diminish the standing of the *Marbury* ruling.[45] John Marshall barely authored any new conception of judicial review in *Marbury*, the fundamental idea having been voiced by Justices throughout the 1790s and by Hamilton in *The Federalist No. 78*.[46] Nevertheless, Crowe overreaches when he suggests, "[a]s purported episodes of institution building . . . the Marshall Court's decisions in *Marbury* and *Stuart* are hardly noteworthy."[47] Perhaps the rulings were strategic efforts merely to salvage judicial authori-

40. CROWE, *supra* note 8, at 14.

41. *Id.* at 15.

42. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350).

43. Gibbons v. Ogden, 22 U.S. 1 (1824); Dartmouth C. v. Woodward, 17 U.S. 518 (1819); McCulloch v. Maryland, 17 U.S. 316 (1819); Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

44. CROWE, *supra* note 8, at 94.

45. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 191-94 (2005); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 113-27 (2005); *see generally* WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000). *See also* Johnathan O'Neill, Marbury v. Madison *at 200: Revisionist Scholarship and the Legitimacy of American Judicial Review*, 65 MOD. L. REV. 792 (2002) (reviewing *Marbury* revisionism literature).

46. THE FEDERALIST NO. 78 (Alexander Hamilton).

47. CROWE, *supra* note 8, at 77 (citing Marbury v. Madison, 5 U.S. 173 (1803); Stuart v. Laird, 5 U.S. 299 (1803)).

ty in the face of Jeffersonian attacks, but the assessment that the rulings did nothing to shape the nature and scope of judicial power is only possible when the cases are torn from their context. Indeed, the rulings—seeming retreats and conciliations toward new Jeffersonian majorities in the elected branches—did not stifle the attacks. Also, Crowe oddly ignores what came in their wake, namely the impeachments of federal judges, most notably Justice Samuel Chase. Far from leaving the institutional capacity of the Court undisturbed, the impeachments shifted the meanings of judicial independence and the boundaries of the proper authority of the judge.[48] While the rulings and the impeachment battles they provoked did not, Crowe rightly notes, build capacity in and of themselves, they did shape the contours of future arguments about what the proper scope of judicial authority should be.[49] Considering development mostly in terms of institution-building and leaving under-explored the role of ideas in that construction process renders Crowe's account lopsided.

Crowe's discussion of ingredients necessary for successful institution building is a particularly useful synthesis of much of the American political development literature. He focuses on two mechanisms that are often highlighted in that field: significant events (what other scholars might focus on as critical junctures) and the actions of particularly skilled political entrepreneurs.[50] The discussion of significant events enables Crowe to integrate judicial institutional development within the broader contours of political development, or as he writes, his approach "to creating a developmental account of judicial power, then, embeds case studies of a series of transformative movements within a more deeply contextual understanding of the process in the historical period under consideration."[51] This intention is laudable and other American Political Development and historical scholars have called for this kind of contextual integration of judicial institutional change. For example, Ronald Kahn and Ken Kersch have called for inquiry into:

> [T]he relationship between law and politics by refusing to isolate questions involving legal doctrines and judicial decisions and the special qualities of courts as decision-making units from the consideration of developments elsewhere in the political system—be they in ideologies, elite and popular political thought, social movements, or in formal institutions, such as Congress, the presidency, state and federal bureaucracies, and state and federal court decisions.[52]

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48. KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 50-61 (2001).

49. CROWE, *supra* note 8, at 77-79.

50. *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004); *see also* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATIONS IN EXECUTIVE AGENCIES, 1862-1928 (2001); *see generally* FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING (Stephen Skowronek & Matthew Glassman eds., 2008); Adam Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 STUD. AM. POL. DEV. 185 (2003).

51. CROWE, *supra* note 8, at 15.

52. THE SUPREME COURT, *supra* note 29, at 13.

Nevertheless, Crowe's contextualization of the politics of debate, and passage or failure of the judiciary acts remains wedded mostly to the broad brushstrokes of the same regimes (Jeffersonian, Jacksonian, Civil War/Reconstruction, Progressive, and Modern) that characterize previous work on judicial-presidential interaction, presidential power, and party change over time, which have previously been assessed as potentially stifling.[53] As such, Crowe does not grapple sufficiently with how the interaction of separate institutional and ideational orders of governance and politics affect judicial construction; in other words, how might ideas about judicial independence or a political party change over time, thereby affecting why judicial reorganization is foreclosed or enabled, or how have institutional powers of the other branches shifted, thereby opening or closing space for the judiciary? Through a systematic focus on political identities, ideas, and tactics, he carefully explains why particular entrepreneurial actors (e.g., Ellsworth, Evarts, Taft, Cummings) are successful in securing the institutional reforms they seek while others (e.g., Randolph, Webster, and possibly Van Buren) are not. Nevertheless, he ultimately produces a narrative that suggests judicial power exists because Congress intended it to be so.

Members of Congress had multiple reasons to support judicial power—some were policy-oriented, some were political, and others were sincerely to enhance the performance of the institution—all of which Crowe details astutely. However, while Crowe draws attention to the contingencies at play, the end result is perhaps a bit unsettlingly functionalist given his intention to offer a developmental theory. Such a theory, by definition, should aim to showcase the limits of functionalist explanations.[54] Crowe's answer to the question, "[h]ow did the federal judiciary in general, and the Supreme Court in particular, transcend its early limitations and become a powerful institution of American governance?," appears to be that Congress purposively sought to build it so.[55] This claim remains a critical insight in light of the contention that judicial power is created solely by judges via rulings and the accumulation of doctrine. However, while Crowe contends that this idea dominates conventional legal literature throughout his first and last chapters, even he acknowledges that, for at least the last decade, American Political Development scholars have drawn attention to how the elected branches can construct and manipulate the Court to serve their own political aims.[56] As such, Crowe's synthetic text serves more as an erudite and encyclopedic final word on the matter rather than a provocative invocation of a new research agenda.

Jed Shugerman is also interested in explaining judicial institutional design. In contrast with the bulk of developmental research on judicial institutions, which examine the federal judiciary, Shugerman turns his attention to state judiciaries. The design of state courts has undergone multiple reforms over time, often in ways that

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53. *See* DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE (2002); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: FROM JOHN ADAMS TO BILL CLINTON (1997); JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (1983); Whittington, *supra* note 14.

54. On the limits of actor-centered functionalism, see PIERSON, *supra* note 50, at 105-32.

55. *See* CROWE, *supra* note 8, at 2.

56. *Id.* at 21-22.

seem counterintuitive if the motivating idea of judicial independence is considered central. Shugerman's explanation of this paradox explicitly connects institutional design with ideational development and change over time.[57] As such, he is not hemmed in by the limits of historical institutionalism, which has little room for the allegedly "softer" concepts of culture and ideas. Rather, he bridges this gap, which has often divided the field of American political development as either scholarship on institutions or scholarship on ideas and culture, but rarely both simultaneously.[58] Shugerman's account of how and why state courts were repeatedly redesigned over two hundred years is as much a tale of economic and political interest as it is a history of the dynamic idea of judicial independence itself.

Whereas many countries have looked to the United States for examples of functional legal institutions, Shugerman notes, "almost no one else in the world has ever experimented with the popular election of judges."[59] As such, a question naturally arises: "Why have Americans adopted such a strange practice, when almost no one else has done so before or after?"[60] Even more challenging, if the fundamental premise of judicial autonomy and neutrality rests upon the idea of severing judges from popular pressures, then the mechanism of election appears to do nothing except undermine the principle central to American constitutionalism of judicial independence. In a major advance in the understanding of the judiciary, in the accounting of institutional development, and in developmental theory more broadly, Shugerman resolves this paradox through both a clear argument and detailed evidence of how ideas shape and constrain the range of reforms entrepreneurial actors may advance.

In a relentlessly engaging work of immense scope and with significant attention to historical detail, Shugerman illustrates how the idea of judicial independence took on different meanings over time and was constructed by entrepreneurial politicians as a solution to a range of distinct problems.[61] In other words, judicial independence was always the overriding goal motivating judicial institutional reform at the state level, but the key question was always "independence from what?" That "what" changed significantly as politicians continuously identified new sources of corruption that threatened judicial capacity to rule impartially. Colonial judges might be tied too closely to the king, so the solution was to give appointing authority to the people's branch or legislature. The initial solution would later become the problem itself, as legislative appointment would later fall victim to accusations of cronyism.[62] Therefore, by the mid-nineteenth century, new calls for reform centered on liberating the courts from legislators and the governors and more directly

57. *See id.* at 7-12.

58. Brian J. Glenn, *The Two Schools of American Political Development*, 2 POL. STUD. REV. 153, 153-65 (2004). For recent work that highlights the need for more explicit emphasis on the interaction of ideas, culture, and institutional development specifically, see RACE AND AMERICAN POLITICAL DEVELOPMENT (Joseph Lowndes et al., eds., 2008); PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2007); *see also* ENGEL, *supra* note 2.

59. *See* SHUGERMAN, *supra* note 9, at 5.

60. *Id.*

61. *See id.* at 7-12.

62. *Id.*

connecting them to the people themselves via election.[63]

In other words, far from undermining judicial independence, Shugerman shows how the mechanism of election was meant to enhance that independence.[64] This counterintuitive notion becomes clear when judicial independence is not understood—as it is too often framed in the counter-majoritarian paradigm—as independence from the other branches *per se*, but instead as independence from corruption, regardless of the source. Therefore, judicial elections make perfect sense as a reform to ensure judicial power, particularly when embedded into the history of the new institution animating mid-nineteenth century American democracy, namely the rise of the mass-based political party. Indeed, as other scholars have argued, "party" was construed as the solution to all sorts of thorny political issues, ranging from empowering the presidency[65] to securing the durability of the Constitution against forces that might undermine it.[66] Shugerman's account integrates the changing nature of judicial design into these larger political dynamics. As such, his book is a much-needed advance in a literature that too often isolates judicial development from broader forces. Perry and Powe once lamented, "[f]ocusing on political parties is not something legal academics tend to do . . . . When it comes to constitutional analysis, they fall off the radar screen."[67] Shugerman's book lays that critique to rest.

As a matter of theoretical innovation, Shugerman explains how the meaning of a given concept depends on context; its meaning changes over time due to environmental shifts that may or not be related to the idea itself.[68] According to Shugerman:

> "Judicial independence" and "judicial accountability" are not abstract concepts with fixed meanings over time. They depend on context, and they have evolved in the flow of events and crises. Interest group politics, economics, and specific events drive these stories of judicial design at each stage, yet at the same time, ideas mattered . . . . At each stage, the goal of separating law from politics was a significant part of the campaign for each model of judicial

63. *Id.*

64. *Id.*

65. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2008).

66. GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS (2002).

67. H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 643 (2004).

68. A similar notion is examined as "situated rationality," in which what is considered rational action is not a static abstraction, but contextualized by particular institutional and ideational settings. *See* Elisabeth Clemens & James Cook, *Politics and Institutionalism: Explaining Durability and Change,* 45 ANN. REV. OF SOC. 441 (1999); Ira Katznelson, *Situated Rationality: A Preface to J. David Greenstone's Reading of V.O. Key's* The Responsible Electorate, *in* THE LIBERAL TRADITION IN AMERICAN POLITICS: REASSESSING THE LEGACY OF AMERICAN LIBERALISM 199 (David Ericson & Louisa Bertch Green eds., 1999). On ideas as constitutive of social reality, see MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS (James Tully ed.,1988). On contextualized or situated rationality as "thick rationality," see Victor Nee, *Sources of the New Institutionalism, in* THE NEW INSTITUTIONALISM IN SOCIOLOGY 9, 10-11 (Mary C. Brinton & Victor Nee eds., 1988).

> elections. But the notion of what "politics" judges were supposed to be independent *from* changed over time, in part because the notions of what kinds of politics were necessary versus corrupting also changed over time.[69]

In other words, Shugerman demonstrates how ideas matter neither solely nor primarily as rhetorical devices, but as real constraints on the entrepreneurial action politicians may take in attempting institutional reform.

Consider, for example, the move during the mid-twentieth century to shift control over the judiciary from the people themselves, via popular and partisan election, to specialized advisory committees and retention election. Shugerman draws attention to this "puzzling rise of merit" by pointedly asking, "[h]ow did elite judicial appointment by lawyers replace direct elections mainly in the regions that were most alienated by the appointed Warren Court, and during a broader cultural turn against intellectuals and professional expertise?"[70] In other words, why would people at the state level give up direct control over an institution and seemingly design it to be more removed when rhetorical hostilities against judicial activism by unelected federal judges, particularly the Supreme Court, ran so high? Before offering his own answer to this question, Shugerman incisively points out the flaws in existing alternative hypotheses, which range from the politics of partisan advantage, to Progressive-inspired good governance reforms, to the power of interest, particularly the American Bar Association and the American Judicature Society.[71] But, for Shugerman, the answer relies on the state's level of economic development, which configured the balance of power between labor and industrial capital: "Merit succeeded in states where business had grown powerful enough to support a campaign for merit selection, but also where labor and urban machines had not yet reached enough power to block those campaigns."[72]

But context is not cause, and so Shugerman attends to how supporters of merit selection exemplified entrepreneurship, or what Shugerman calls "opportunistic leadership,"[73] to frame the judicial reform as a necessary step toward solving particular problems, such as facing a crime wave in California, blocking an increasingly powerful African-American voice in pre-Civil Rights Alabama, or curbing union power in Kansas. As such, Shugerman, like Crowe, debunks the claim that the most prominent motivator for judicial reform is securing partisan advantage and entrenchment.[74] Crowe points to judicial reform motivated more by concerns with institutional efficiency and other performance aims than pure politicking, while Shugerman highlights a range of motivators at the state level.[75] While the particular policy motivations differed from state to state, merit selection itself was a success-

69. SHUGERMAN, *supra* note 9, at 5-6.
70. *Id.* at 208.
71. *Id.* 208-10.
72. *Id.* at 210.
73. *Id.* at 238.
74. *Id.* at 238-40.
75. *Compare* CROWE, *supra* note 8, *with* SHUGERMAN, *supra* note 9.

ful solution only in a particular economic context, namely "rural-but-industrializing states."[76] And, more broadly, the successful passage of judicial reform depended on always linking the reform itself to the enhancement of judicial independence. Shugerman offers comprehensive and rigorous validation of the need for political and legal developmental scholarship to attend to structure and agency, institutions and ideas, interests and identities.

Ultimately, Crowe and Shugerman convincingly contend that too much research to date has misguidedly set the courts as an institution apart. Doing so has only perpetuated the stifling paradigmatic dominance of counter-majoritarianism and confused normative claims for judicial neutrality and independence with the empirical reality of judicial dependence and purposive political action. Each author demonstrates how judicial power has changed over time via the concerted efforts of politicians seeking to address readily understood challenges, ranging from overcoming inefficiency to eradicating corruption to attaining political advantage. They deftly showcase the need to embed judicial development in the larger dynamics of political development, both institutional and ideational. And, as we confront new partisan dynamics affecting the judiciary at the federal level, such as the increasing use of the filibuster to stymie appointment and leave the courts woefully understaffed, and at the state level, such as increasing stores of cash being funneled to increasingly vitriolic campaigns in judicial retention elections, attending to the broader political dynamics affecting judicial institutions is more important than ever. To confront these new challenges, both Crowe and Shugerman's accomplishments stand as models for how and why researchers seeking to craft comprehensive and engaging legal, historical, and political scholarship must do exactly what Bickel and Dahl did not do when they wrote their path-breaking works: transcend disciplinary boundaries to show how judicial power and change is not merely a matter of doctrinal development but is deeply connected to broader political developments related to party, Congress, the presidency, partisanship, and changing notions of judicial independence.

76. SHUGERMAN, *supra* note 9, at 238.