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THE COURT'S CONSTITUTIVE ROLE

Shifting the Balance of Power

In 2011, President Barack Obama was met with acute disapproval from both sides of the political aisle when he sidestepped the congressional deliberative process and commanded military action against Libya without first procuring authorization. Obama insisted that the Constitution conferred on him, and him alone, the widest latitude—unbounded power—to manage the nation's foreign affairs. President Bill Clinton repeatedly claimed this power to bomb other nations unilaterally. And President George W. Bush maintained that his actions were unreviewable during the war on terror. When Congress attempts to force the president to cooperate with the legislative branch—citing the War Powers Resolution of 1973 and the Intelligence Oversight Act of 1980—the White House works hard to break the legal shackles that statutorily inhibit presidential war making. In fact, by the end of the Clinton administration, it was not clear what war powers if any, remained with Congress. And Donald Trump will walk in the same long shadow cast by past presidents who have claimed executive prerogatives, which are no longer emergency measures—these are now constitutionally and legally recognized presidential powers.[1]

The conventional view attributes this assertion of power to an aggrandizement of authority by the president, the acquiescence of Congress, and the state's capacity to act under exigent circumstances. Moreover, scholars[2] note that the Supreme Court has simply sanctioned this accumulation of power[3] and regard it as passive and constrained.[4] The courts are thus the least visible in international affairs.[5]

Whether Congress is outmaneuvered, bullied, or ignoring the assertion from a long line of executives claiming presidential prerogatives in foreign policy making, this unitary role has become commonplace.[6] What changed? Is it merely congressional acquiescence? Have executives simply marshaled power to such a degree as to claim they are beyond reproach? Is there any formal reasoning for contemporary executives to regard foreign policy as a presidential haven? And what role does the U.S. Supreme Court play in the transfer of power?

In principle, the Constitution establishes three distinct branches: the legislative, the executive, and the judicial. Each branch recognizes the metes and bounds of its powers and has the authority to check the actions of either of the other two. In practice, however, the limits of each branch's powers are vague or ambiguous, and the methods of exercising and checking authority have proven, at times, to be difficult to determine. This uncertainty is especially true in the management of foreign policy.

Pro-congressionalists argue that the Framers designed a Constitution that assigns to Congress the dominant role in the conduct of foreign policy. The Framers, pro-congressionalists assert, emphasized the long-term dangers to the Republic of concentrating foreign affairs in the hands of the executive, as doing so would leave the nation vulnerable to policy dictated by the impulses of one man. Instead, "to deter the abuse of power,"[7] they created a system that would foster discussions and debate to shape foreign policy and thus prevent exploitation. To support their position, pro-congressionalists cite the Supreme Court's early rulings favoring a strong legislative branch and regarding the president's involvement in the development of policy as secondary to Congress's.

In contrast, pro-presidentialists argue that the executive branch should be granted wide latitude in the management of foreign affairs and that in times of national crisis, the president should have the discretion to restrict individual rights. The executive branch is better suited, pro-presidentialists maintain, to meet the demands of a robust national agenda in international affairs. They also believe that the courts should be willing to endorse repressive governmental action that subordinates rights and liberties when the nation is threatened, arguing that such actions are within the president's "plenary and exclusive power."[8] In fact, pro-presidentialists maintain that the Supreme Court has enthusiastically sanctioned these claims. As Norman Dorsen maintains, "[N]ational security has been a graveyard for civil liberties for much of our recent history."[9]

Contemporary advocates[10] of unilateral executive power argue that presidential war making has occurred since the nation's founding.[11] John Yoo, for example, asserts that the bold decisions made by George Washington, Thomas Jefferson, Andrew Jackson, and Abraham Lincoln clearly demonstrate vigorous exercises of presidential power. These presidents, according to Yoo, acted

broadly precisely because the Framers deliberately left the Constitution vague regarding the limits of executive power.[12] Presidents thus owe their "privileged position in foreign affairs . . . to the Constitution and to our first President[, Washington, for] establish[ing] . . . that the executive branch would assume the leading role in developing and carrying out foreign policy."[13]

But Yoo's observations are misplaced[14] and serve only to bolster the legal arguments put forth by contemporary executives who wish to support their positions of taking offensive measures during wartime, which they have also extended to national emergencies. The historical evidence demonstrates not only that the founding generation created a Constitution that gives Congress sole authority to initiate war but also that early presidents adhered to this principle.[15] Moreover, as pro-congressionalists note, early judicial decisions adhered to the original constitutional blueprint, and the path followed by the Supreme Court did not deviate from the established constitutional order.[16]

The assertions made by both of these schools of thought are valuable, but they overlook the Court's reach in redefining the scope of presidential powers vis-à-vis Congress. The Court's institutional position has expanded the legal capacity for presidents after Franklin D. Roosevelt (FDR) to claim unilateral prerogatives. In fact, the Supreme Court has provided a legal solution to a political problem. Prior to 1936, the Court decided foreign-affairs cases in favor of a strong legislature—a deliberative body that could collectively make a decision. This support in turn undermined presidents' claims to executive unilateralism. Yet the Supreme Court heard and decided a case in 1936 that would forever change the course of constitutional and political development in the conduct of foreign affairs generally and war making specifically. The Court's *Curtiss-Wright* decision reasoned that the executive has plenary powers and that this authority is not contingent on congressional delegation. In fact, Justice George Sutherland asserted that the president is the sole organ of foreign affairs. Absent *Curtiss-Wright*, the imperial president[17] would not have the same kind of leverage when claiming unilateral prerogatives to conduct our nation's foreign affairs. Over time, presidential ascendency is institutionally entrenched, normalized, and thus made routine,[18] and then it continues as the rule of law for future executives.[19] Ultimately, the Supreme Court transformed power, shaped politics, and redirected history.

FEAR OF UNBRIDLED EXECUTIVE POWER

It is well documented[20] that as orthodox republicans, the Framers inherited the well-established fear that the greatest danger to liberty lurked in the unchecked ambitions of the executive. Because of their deeply held fear of unilateral presidential power, the Framers embraced the principle of collective decision mak-

ing,[21] the belief that the combined wisdom of legislators is superior to that of a single executive. Accordingly, the Framers designed a Constitution that assigns to Congress the dominant role in the conduct of foreign policy and the sole authority to initiate war. This distribution of power is evidenced by the "unambiguous textual language, almost undisputed arguments by Framers and ratifiers, and logical-structural inferences from the doctrine of separation of powers."[22] And the Court's early jurisprudence reasserted the dual nature of collective decision making between the president and Congress in a variety of cases, leaving the path dependency of the executive largely unchanged.

Among the Founders,[23] distrust of the executive was pervasive. A number of Federalist papers allay concerns about an overly robust executive branch, and in *Federalist* No. 75 Alexander Hamilton explains why the Framers rejected unilateral executive control of foreign affairs:

> The history of human conduct does not warrant the exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced as would be a president of the United States.[24]

Steeped in English history, the Founders knew all too well, as James Madison stated, that "the management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government."[25] Seeking to attain the ideal of republican[26] government, the Framers[27] drafted a Constitution "that allow[s] only Congress to loose the military forces of the United States on the other nations."[28]

The delegates of the Constitutional Convention were committed to collective decision making, and their resolve to institute a system of shared powers in the area of foreign affairs would deliver, in James Wilson's words, "a security to the people."[29] Capturing the precise intent of the War Clause, Wilson stated that it "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large."[30] This sentiment echoed the Framers' regard for collective decision making in the legislature, the republican principle that the "conjoined wisdom of many is superior to that of one."[31] This republican tenet had to come, then, at the expense of unilateral executive power.

The Framers' fear of unilateral authority led them to emphasize limitations on the executive rather than expansions. Thus, as Madison explained, they "defined and confined" the president's powers to ensure "that power

not granted could not be assumed."[32] This decision was intended to "deter the abuse of power, misguided policies, irrational action, and unaccountable behavior"[33] of any one man. And the two branches, for constitutional as well as practical reasons, were expected to work in concert: once Congress declares or authorizes a war and provides troops, the president is then responsible for waging war and commanding the military.[34] The office, Hamilton asserts in *Federalist* No. 69, "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy."[35]

Article I of the Constitution consequently assigns "broad and exclusive powers" to Congress, including the power to regulate foreign commerce and to initiate all hostilities—skirmishes as well as full-blown, total acts of war, including letters of marque and reprisal. And the president, as commander-in-chief, may act in this capacity only "by and under the authority of Congress."[36] As Hamilton explains, the president's authority "would amount to nothing more than the supreme command and direction of the military and naval forces," but this power could be triggered only when war was "authorized or begun."[37] Essentially the title grants no war-making power to the executive.[38]

The Framers' preference for decision making with checks pervades the Constitution. In fact, there is no grant to the president of a unilateral policy-making power to conduct the nation's foreign affairs, nor is there any hint in the Constitutional Convention's records of an interest among the Framers to vest such authority in the executive branch. The Framers' fear of unbridled executive power ultimately led the convention, as Hamilton explains in *Federalist* No. 75, to withhold from the president the authority to conduct American foreign policy.[39]

THE COURT'S FIDELITY IN UNDERMINING PRESIDENTIAL UNILATERALISM

Early judicial decisions did not simply affirm the Framers' design for foreign affairs and war making; rather, they elaborated and explained the intricacies of war making between the two branches. In these early cases (*Bas v. Tingy*, *Talbot v. Seeman*, *Little v. Barreme*, *United States v. Smith*, and the *Prize Cases*),[40] the Court was constrained by the Framers' constitutional design and refrained from diverging from the established path.

Triggering several judicial decisions, the so-called Quasi-War[41] was one of the earliest sets of circumstances to clarify the prerogatives of Congress over war and the subsequent deployment of the nation's military force. The Supreme

Court determined in 1800 (*Bas*) and 1801 (*Talbot*) that Congress could authorize hostilities in two ways: by a formal declaration of war or by statutes that sanctioned an undeclared war. Military conflicts could therefore be "limited," "partial," or "imperfect,"[42] without requiring Congress to make a formal declaration. But, the Court asserted, Congress had the sole and exclusive power to declare either an "imperfect" war, understood as a limited war, or a "perfect" war, understood as a general war. The Court distinguished between the kinds of wars the nation could engage in but left it up to Congress to make the appropriate determinations, leaving the executive on the sidelines. And a year later, in the *Talbot* decision, the Court insisted that the Constitution vests war power in Congress.[43]

One must be cautious when reading either of these two cases, however. They do not suggest that "once Congress authorizes war, the President is at liberty to choose the time, location, and scope of military activities." Rather, "[i]n authorizing war, Congress may place limits on what Presidents may and may not do."[44] The Court took this opportunity to restate Congress's primary role in the authorization of war and to reaffirm the first constitutional order. The Court also addressed the role of the executive when called as commander-in-chief and determined that the president does not have the authority to govern the extent of military activities. These same points were reaffirmed three years later in *Little v. Barreme* (1804).

In *Barreme*, Chief Justice John Marshall concluded that President John Adams had acted illegally, because his orders to seize ships were inconsistent with an act of Congress. The plurality reasoned that when Congress announces policy "in a statute[,] it necessarily prevails over inconsistent presidential orders and military actions. Presidential orders, even those issued as Commander in Chief, are subject to restrictions imposed by Congress."[45] Essentially, the Court asserted that the president does not have "inherent authority" or "inherent powers" that allow him to ignore a law passed by Congress.[46] However, this constitutional foreign-affairs jurisprudence would not be sustained. Chapter 2 discusses how *Curtiss-Wright* repudiated Marshall's opinion by legally sanctioning an executive's claim to inherent powers and how Justice Robert H. Jackson's *Youngstown* concurrence did not exclude this kind of authority completely.

Just as the Supreme Court affirmed the constitutional blueprint outlined by the Framers, the lower courts were also establishing the first constitutional order through judicial decree. *Smith* (1806) was just one of many cases heard by the federal courts dealing with violations of the Neutrality Act of 1794. The courts defined congressional authority and restricted presidential action. Justice William Paterson—who wrote one of the serial opinions in *Bas*—held that the power to initiate hostilities was solely vested in Congress.[47] The Court stated

resolutely that "the power of making war . . . is exclusively vested in [C]ongress."[48] Of course, if the United States were invaded, Paterson concluded, the president would have the constitutional authority and obligation to resist with force. There is, however, a "manifest distinction" between responding to a sudden invasion and going to war with a nation at peace. In the second instance, "it is the exclusive province of [C]ongress to change a state of peace into a state of war."[49] The president is not authorized to commence hostilities abroad on the basis of an executive assessment of the security of the nation, as the Court's *Smith* decision determined—this is a congressional prerogative. Moreover, the executive's power of self-defense does not extend to foreign territories.

Sixty years later, the Supreme Court once again addressed a president's exercise of military power "without first obtaining" congressional approval. In April 1861, with Congress in recess, President Lincoln was faced with an extraordinary situation, but his conscious frame was to favor preserving rather than observing the Constitution.[50] Addressing Congress in 1861, Lincoln asserted that the "war power" rested with the executive branch to suppress the rebellion. There was no other option, Lincoln claimed, "but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation." He did note that it was with the "deepest regret" that he was put in a position to draw on the "war power in defense of the Government forced upon him."[51] But when Lincoln asked for ad hoc legislation, he reminded Congress that the president "ha[d] . . . done what he had deemed his duty," adding, "You will now, according to your own judgment, perform yours."[52]

By invoking the "war power"—a union of executive and legislative powers—Lincoln effectively preserved the Union. Congress supported his resourcefulness, as did the Supreme Court in what are commonly known as the *Prize Cases*.[53] Yet even though the Court sanctioned Lincoln's initiative, Justice Robert C. Grier prudently limited this prerogative to internal defensive actions.[54] Even in these circumstances, the Court was unwilling to diverge from the established path.

Justice Grier's opinion, for a sharply divided Court, held that although the president "does not initiate the war," as that authority is reserved for Congress alone, he is compelled "to accept the challenge."[55] The Court thus justified the blockade imposed on southern ports by Lincoln. However, the president has no discretion, Grier cautioned. He must meet the crisis in the form in which it presents itself, "without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[56] However, Grier cautiously constrained the executive's power to defensive actions only.[57] During oral arguments, the executive branch actually took this same position. Richard

Henry Dana Jr., who represented the president, acknowledged that Lincoln's actions had nothing to do with "the right *to initiate a war; as a voluntary act of sovereignty*. That is vested only in Congress."[58]

The *Prize Cases* Court legally sanctioned presidents' taking the initiative during emergency situations, against the law or in the absence of it, but with the requirement that they seek retroactive legislation from Congress at the earliest opportunity, as Lincoln had.[59] In this regard, the concrete effect of allowing ex post facto declarations is that executives in the future might feel liberated to act if they believe they can count on Congress to authorize their actions retroactively.

These early judicial decisions illustrate how the Court affirmed the Framers' principles of undermining presidential unilateralism and the constitutional design for the War Clause: Congress alone may "initiate hostilities, whether in the form of general or limited war, and the president, in his capacity as commander-in-chief, is granted only the power to repel sudden attacks against the United States."[60] As is evident, the Court left "little doubt about the limited scope of the President's war power."[61] These early decisions have never been overturned, but the *Curtiss-Wright* Court at a critical juncture significantly altered the trajectory of the executive's role vis-à-vis Congress in the management of foreign policy and war powers.

Without a formal declaration of war or statutory authority,[62] presidents have consistently used force against other nations to protect life and property. They have defended these decisions on the grounds that they have a duty to protect the nation that is inherent in the Constitution.[63] The constitutionality of this defense came before a circuit court in *Durand v. Hollins* (1860),[64] and it upheld the commander's actions, asserting that the duty of necessity "rests in the discretion of the president." When there is a threat of violence to the nation's citizenry or its property that cannot be anticipated, it might "require the most prompt and decided action" by the president to provide protection.[65]

When war has commenced, the reservoir of executive power fills up very quickly, as the legislature may delegate a variety of new responsibilities to the president, but the Supreme Court's fidelity remained with the constitutional order in these early judicial cases. The Court undermined presidential autonomy, favoring instead a strong legislative role. It took a formalistic or originalist approach and was thus not constrained by the political timing or external factors present in each case under review. These cases served two purposes: (1) the Court defined unambiguously Congress's role in war making and formally affirmed the first constitutional order, and (2) when the executive acted contrary to the first constitutional order, the Court served as a check.

Although the constitutional design is laid out in clear terms, the very fears held by the Framers have been realized. We have reached a time in our nation's

history when the power of the presidency resembles the power of the British monarchy. This trend represents a sharp departure from early constitutional foreign-affairs jurisprudence and threatens the Republic.

CURRENT LITERATURE

Current studies generally focus on the legislative and executive branches or agencies to explain foreign-policy development.[66] Most credit FDR with ushering in the swift growth of presidential power and an ever-increasing presence in world affairs: the United States moved predominantly from a non-interventionist state[67] before World War I to a world power and global hegemon following it.[68] As the nation continued to become embroiled in armed conflict and to face national emergencies of varying kinds, the development of foreign policy took a more prominent place on the national agenda. While the political arena grappled with settling rising concerns (e.g., which branch is better equipped to effectively respond to emergency situations, war making, and foreign policy making more generally), the Supreme Court had a number of opportunities to address these uncertainties on constitutional grounds. These studies have therefore failed to include the instrumental role of the judiciary in reformulating the division of powers between the two branches in this area and how this allocation has influenced constitutional and political development over time.[69]

The first doctrinal shift acknowledged by legal scholars dates to either Justice Sutherland's decision in *Curtiss-Wright* (1936)[70] or President Harry Truman's assertion of unilateral authority to seize the steel mills in a time of war (1952).[71] The conventional view explaining this shift focuses primarily on either the internal or doctrinal world of the Court. Legal scholars simply note that a shift in power occurred and explicate how this change affected a president's authority to act unilaterally in foreign policy making. These studies generally focus on the role of the executive to claim broad inherent powers and largely regard the Court as passive and constrained.

Legal theorists model the *Curtiss-Wright* decision in the following ways. Attitudinalists[72] contend not only that the Court acts as a policy-making institution but also that each justice votes according to his or her policy preferences. But Justice Sutherland voted contrary to his typical behavior. In addition, without the Court's continued adherence to this new order in subsequent cases, *Curtiss-Wright* might be chalked up simply to one man's whims. Legal realists,[73] on the other hand, maintain that the Court is governed by legal rules and doctrines.[74] But in foreign affairs, the first constitutional order and the Court's fidelity (precedent) established in early judicial rulings did not hem in the Court.[75] Alternatively, the strategic model[76] asserts that when the

Court is trying to make good policy, it weighs the impact of its decisions against the interests of its audience, which was, in part, the case in 1936. The *Curtiss-Wright* Court weighed heavily in favor of the geopolitical impact of an encroaching and impending war over the defendant's claim that the embargo was an unlawful delegation of legislative power. Its evaluation of the geopolitical concerns (starting in 1936) raises questions on how precedent, polity, and individual rights inform judicial decision making.

Scholars bridging American political development (APD) and judicial decision making[77] show how these models and current studies do not accurately account for judicial decision making and how jurisprudence affects the world outside the Court. These approaches—attitudinal, legal, and strategic—overstate external influences over internal, and vice versa. Judicial decision making is not just about the attitudes or strategic behavior of the justices, the law, or political context; it is a more complex amalgamation of all these factors.[78] Simply put, we cannot treat "law as simply 'there' to be discovered by judges."[79] Utilizing the law and APD literature, I reexamine foreign-affairs cases to illustrate how the Supreme Court created a new constitutional order[80] in 1936 and redistributed the balance of power between Congress and the executive. As an agent of change, the Court successfully carved out and sustained a new path for the executive in this area, which better explains the developmental path of the imperial president.

A significant amount of work has been done to trace the Supreme Court's engagement with constitutional and political development,[81] yet the focus of much of this research has largely been on domestic issues,[82] with little discussion of foreign affairs.[83] Scholars evaluating foreign policy making[84] have limited their examination to Cold War civil liberties, which leaves the developmental narrative of foreign affairs only half told. While the political branches of government more overtly govern policy outcomes, the role of the Court is no less important. Countless foreign-policy questions concern constitutional interpretations, primarily regarding which branch is dominant in developing policy. Consequently, justices are presented with a constitutional moment;[85] the Court determines when the timing of a case necessitates or permits a possible redefinition of the existing constitutional order or whether fidelity to the current law should be maintained. As such, the Court constantly offers legal answers to political challenges.

Historical institutionalists assert that "legal doctrines had to be grasped as expressions of broader political ideologies, institutionalized in ways that constrained judges but also empowered them to give specific meaning to more general political outlooks,"[86] and this is true of judicial decision making in international affairs. Because legal doctrines are "expressions of broader political ideologies," when the conditions are ripe (balancing institutional needs while

deciding whether to arbitrate politically controversial cases),[87] the Court can alter the developmental narrative of the executive branch.

By employing the theory of historical institutionalism, I show how significant "politics in time" is to understanding the trajectory of development; timing and sequence matter when examining the development of a particular policy area. Institutional politics "comprise multiple orders and patterns of intercurrence that often create unintended consequences, paradoxes[,] and disjunctures."[88] Before the Supreme Court renders a decision on the merits, there is a constitutional moment or space in which it has a number of power plays it can make. If the Court chooses to alter or overturn precedent,[89] it does so with the knowledge that the trajectory of the previously established course or path taken by the actors involved in the dispute might be forever changed; the political debate and actions taken may either have the legal backing to proceed or may progress without the Court's sanctioning.

The Court is institutionally advantaged to challenge the primary commitments of the governing elite, but not all judicial decisions are in direct conflict with the various institutions that constitute the dominant collective body.[90] And at times, collaboration with this ruling coalition can be quite difficult, especially if there is a divided national order. Essentially, the Supreme Court makes constitutional choices and selects between two alternatives. On the one hand, the Court can challenge the primary obligations of the majority coalition and the major political institution of the executive and vote against it in pursuit of its own political agenda;[91] see the Chapter 3 discussion of *Youngstown* for an example.

Alternately, the Court can choose a particular moment in which to partner with an institution—in this instance, the executive branch—and legalize the construction and stabilization of an asserted political order. Understanding when the Court chooses between these two options exposes the existence of a transforming relationship between law and politics. The Court is in a preferred institutional position to carve out its own path and ultimately become a self-governing lawmaker, at times aligning itself against the preferences of others.[92] When the Court hears foreign-affairs cases, certain conditions allow the justices more latitude to act. These conditions, which are not exhaustive, include exogenous factors—a compelling national interest in a perceived emergency, foreign policy making that does not encroach too severely on the domestic sphere (*Youngstown* [1952]), a direct challenge to judicial authority (detainee cases), and individual rights (Japanese internment). They also include endogenous factors, such as personal judicial bias and strategic positioning on the bench. Under these conditions, justices have the capacity[93] to institute a new constitutional order (*Curtiss-Wright*) as they balance claims to certain rights against their own policy preferences. Ultimately, the Supreme

Court, as a decision maker, does not operate independently from the political system.[94]

Examining development in the context of history and institutions assists in (re)conceptualizing the timing and options available to presidents who utilize the power and authority sanctioned by the judiciary and the impact that this newly defined role has on the formulation of foreign affairs. When action in the political arena is transformed into a constitutional issue, it is constrained by the norms and institutional boundaries of the judicial branch. However, a legally sanctioned assertion of unilateral executive power and authority facilitates the growth of presidential power and shapes future claims of presidential prerogatives.

This book demonstrates that although the timing and options available to the executive and the judiciary operate in two different spheres, they can influence, in profound ways, each other's developmental path; an interpretive turn or feedback mechanism exists between the branches. Feedback loops support the recurrence of a particular path, illustrating that the Court does not work in linear terms. Stephen Skowronek suggests that the executive branch experiences institutional thickening[95]—an institution having "shorter periods for successful innovation"—but this is not the case with the Supreme Court. In fact, successive benches have shaped—and at times broadened—presidential authority (see Chapter 5), which does not rest on party alignment or unified government. As such, presidents now have a "repertoire of powers . . . at their disposal"[96] that allow them to assert dominance in foreign policy, which rests on the legally justified reasoning of the Court in *Curtiss-Wright*.

THE COURT'S CONSTITUTIVE ROLE

The institutional prowess of the Supreme Court and how it embeds a new constitutional order that centers on unilateral executive prerogatives demonstrates that decisive moments can create conditions or constraints that generate or sustain a path or depart from a proceeding path of law. When we speak of moments, I refer to exogenous shocks[97] that can shift the debate from the political to the legal sphere when a constitutional question is raised. As such, the presidential narrative is reconfigured when we read the Court into the executive's development. As an agent of change, the Court challenges or collaborates with an institution in the construction and stabilization of a major political order.

Sutherland's opinion in *Curtiss-Wright* lays the foundation for executive ascendancy in the management of international affairs against the backdrop of the first constitutional order and the Court's original jurisprudence. There are several ways to evaluate why the Court would render such a decision. I

posit two likely scenarios. First, it was simply a political choice on the part of the Court, to promote a united front between the legislative and executive branches to utilize an embargo. Second, it was the result of Justice Sutherland's advancement of his own political or attitudinal[98] agenda. Yet Chapter 2 demonstrates why neither of these scenarios accounts for the decision rendered. And if neither of these explanations is true, how do we construe change?

Path dependence is the development and permanency of institutions along a particular path that is either hard to break from or resilient to change. Individuals or groups generally design policies and institutions with the goal of permanence. To safeguard these policy goals, political actors set in place rules that make preexisting arrangements difficult for anticipated incoming rivals to reverse, because political uncertainty exists when regime change takes place.[99] Path dependence primarily employed in economics has been extended to political science to examine the process of increasing returns.[100] Paul Pierson notes that once a particular course of action is introduced, it may "be almost impossible to reverse."[101] Once policies are passed and implemented, they can be resilient,[102] and when the policy arrangements are wide-ranging, they can influence the motivations and resources of political actors.[103]

Four pathways that are essential to political environments typify the positive feedback or increasing returns of an entrenched path. In each of the pathways, any and all decisions over time can initiate a self-reinforcing response. In other words, longevity in a particular direction increases the costs of switching to some alternative path. Two barriers—the short terms of political actors and the status-quo bias[104]—inherent in the political sphere therefore "make path dependent effects particularly intense,"[105] which complicates increasing-returns processes in politics. These pathways therefore increase the complexity of trying to change the course down which political actors have already started. Moreover, Pierson's theory is conditioned by how institutions behave to safeguard increasing returns as the world outside the institution changes.[106] But Pierson provides no examination of how institutions might be influenced by external forces, such as judicial decision making. Instead, he offers only an assertion of anticipated and expected institutional reactions to the external world.

Although "entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice" of a path selected,[107] Margaret Levi suggests that there are moments during which a path may be changed. In an increasing-returns process, the likelihood of additional steps on the same path escalates with each and every move along that path. However, although the executive may experience a high cost in attempting to change the trajectory of this institution, the Supreme Court can facilitate a shift when it legally redefines the very path in question. Over time, this newly established path

becomes entrenched when successive Courts legitimate the switch in paths through judicial decree. In this respect, the process of increasing returns is therefore self-reinforcing: a positive feedback loop or interpretive turn reinforces a new path.

Another aspect of path dependence is Pierson's notion of "branching points." He suggests that particular factors bolster the "paths established at those points."[108] If we regard the Supreme Court as part of the broader political process and agree that its justices are not hemmed in like the president, then the Court has discretion and latitude when deciding cases. The Court, restructuring the political debate, closes off certain possibilities while opening up others. The path is essentially redefined and altered over time by successive benches (see *Dames*). Consequently, the theory of path dependence cannot satisfactorily account for the process and impact of judicial decision making in the management of foreign affairs and war making.

Karen Orren and Stephen Skowronek assert that if junctures are explained in terms of "exogenous shocks that disrupt established patterns," then path dependence is reduced to the unhelpful claim that "politics follows a particular course until something happens that changes the course."[109] Furthermore, path dependence works on the assumption that formerly viable options may be closed once a constant period of positive feedback has been established. And increasing commitments to an existing path change become problematic, as they "condition" the configuration in which any new divergence can emerge. But if path dependence is so difficult to reverse, how do we account for the Court's instituting change? Ronald Kahn suggests that a unique association exists between the "temporal sequencing" of judicial decisions and the course of a path.[110] Paths are thus far from clear, coherent, or even predictable, because the Court is in a favorable position to alter the direction of policies and actions taken.

The application of path dependence is therefore limited until the theory incorporates the interaction of the internal mechanisms (preexisting law and institutional norms) of the judicial decision-making process with external features—the "political process, institutional, cultural, intellectual, and social forces."[111] Evaluating how the Court weighs these internal and external forces reveals what constitutes transformation and how the Court plays a significant role in creating and sustaining change.[112]

The path dependency of the Supreme Court is very different from that of its political counterparts, so it is advantageously positioned to change the course of constitutional and political development for the political institutions and for subsequent courts. Why? Primarily because the Court does not experience the same costs associated with its political counterparts, it can act as an agent of change. One reason that the Court can behave in this dynamic

way is that it does not have to make decisions on the basis of the perceived actions or reactions of others. While its role in foreign policy making has been largely regarded as inert and inhibited when certain conditions are met, the Court is in a preferred position to alter or amend a path through the development of time.[113] Alternatively, the Supreme Court can decide to disregard a path previously established when it strikes a balance between rights principles and the Court's position on a contested policy or action (see *Youngstown*, in Chapter 4, and detainee, in Chapter 6).

Scholars merging judicial decision making and American political development examine the conditions that preserve or trigger a departure from a preceding path in the law and the Court's role in these departures. These scholars demonstrate that the course of action taken by the Supreme Court is frequently governed by the placement of a case in a sequence of related cases over time. In addition, the meaning of a contested issue may change over time, which then fundamentally shapes American political development.[114]

For Kahn, precedent cannot necessarily be traced along one linear path,[115] and, perhaps more importantly, he reveals how divergences exist within paths. When conflicts arise, the constitutive decision-making process[116] might move out of alignment to such a degree with the external world of the Supreme Court that the likelihood of even a landmark case being overturned increases. The Court therefore chooses whether to overturn case precedent. Established paths are usually followed, yet at momentous points in time, the Court makes constitutional determinations that at times challenge rather than cooperate with the major commitments of the dominant political alliance.[117] And with the progression of time, Kahn argues, these patterns become more principled, because justices of the Court, with different political and legal attitudes, consent to the idea that social construction is a natural part of judicial decision making.[118] When the world outside the Court adjusts, justices can target previous cases to influence the present contestation where the Court can sustain the path or overturn prior holdings.[119] The social factors involved in a case are therefore relevant in evaluating judicial choice and the maintenance or alteration of a path.[120]

The multifaceted interaction between the internal and external[121] explored in this book suggests that paths are not necessarily predetermined by the institutional demands of the Supreme Court, because the Court is also concerned about the world outside its walls. These conditions, which include the geopolitical concerns of our nation's foreign policy and/or the perceived national emergency, yield the constitutional space or interpretive turn that allows the Court to act more freely. This ability does not mean that the Court always takes into account changes in the external world or that it always participates in Kahn's mutual construction process (discussed below). Rather, the justices are

institutionally situated to govern more freely—having "fewer start-up costs"—than are political institutions when making constitutional choices and deciding whether to participate in the construction process[122] in international affairs. In this way, judicial decision making yields viable options for the broader political, economic, and social world.

Because the Supreme Court hears cases and controversies, it has a determinate set of "switching costs" for altering a path. As a case moves through the appeals process, those institutions and individuals outside the Court pose versions of what they believe the law says (detainee cases). But the Court can substitute its own interpretation of the law, thereby offering legal stability in its pronouncement. To draw this demarcation between the alternate readings of the law, the Court must participate in the construction and constitutive decision-making process.[123] In this sense, the Court does not hear cases unless there is the real possibility of a reversal of the present course or the necessity to reaffirm or broaden (*Dames*) earlier rulings.[124] Constructing and creating an avenue of legal alternatives is therefore part of the Court's regular business.

Paths are therefore "not preordained because of the complexity of Court decision making," and we cannot view change "as increasing returns because Court decision-making is neither simply a response to institutional needs from externalist factors, nor simply increasing returns for legalistic purity."[125] Instead, path dependency should be viewed as the outcome at a critical juncture that generates a feedback loop (a unique bidirectionality) supporting the repetition of a particular pattern in cases that are not contemporaneous.[126] This constitutive process can embed a divergent path, as the Court behaves in ways that are nonlinear.[127] This constitutive decision-making process was borne out in the resulting chasm in the early part of the twentieth century when the Court decided *Curtiss-Wright*.

Historical institutionalism regards public policy making and political change as a distinct process, typified by protracted or extended time periods of extensive stability, which is similar to path dependency. However, these time periods are interrupted by formative moments. Critical junctures[128] in the historical process expose many paths of development, and the Court may seize these junctures to define and redefine the executive's role in the conduct of foreign affairs. As Paul Pierson and Theda Skocpol demonstrate, feedback mechanisms are triggered by critical junctures, which in turn "reinforce the recurrence of a particular pattern into the future."[129] These feedback mechanisms sustain the Court's role as an agent of change.

Examining critical junctures—a feature of APD—exposes how and why the Supreme Court departed from the original constitutional order in the pivotal case of *Curtiss-Wright* and how the newly constituted order, and thus

the subsequent path carved out by the Court, became entrenched. Furthermore, it is during such formative epochs that public policy is ascribed a new purpose (see *Dames*, in Chapter 5, and detainee cases, in Chapter 6).[130]

Examining the Court in this way, we find that paths are malleable. The progression of negotiations between the Court and politics through developmental time leaves the direction of change itself open-ended.[131] The path is therefore penetrable by these negotiations. The temporal ordering of principles and law, combined with exogenous forces, significantly influences the trajectory of doctrine and the Court's position in the course of APD.[132] As Orren and Skowronek stress, development can occur when different institutions—in this case, the executive and the judicial branches—"come into conflict with each other or reinforce each other in new and transformative ways."[133] Although causality affects judicial decision making, I show that when political and legal time cross paths, change occurs.

The Court straddles the political world and a unique legal culture, and it must be sensitive to internal (legal norms) and external (political sphere) strategic concerns.[134] This intersection grants to the Court the constitutional space to insert its institutional prowess to reconstruct developmental time and, consequently, the path of another institution.

POLITICAL AND LEGAL TIME

The Supreme Court's legitimacy and actions (Constitution, precedent, and public opinion, for example) situate it in a distinct position institutionally compared to the immediately politically answerable branches of government. Recognizing its institutional role, the Court shares space within the larger governmental sphere.[135] Consequently, it operates with "its own [set of] norms, dynamics, and institutional history"[136] and incorporates law (the Constitution and statutes) in the form of precedents, but external influences—politics in general, and political actors specifically[137]—also affect judicial decision making. This configuration of internal and external factors is unique to judicial decision making; the implications are such that when the Court decides questions of presidential authority to claim a unilateral role in foreign policy making, these decrees influence and change the trajectory of political and constitutional development.

Skowronek's theory of political time illustrates the institutional barriers (institutional thickening) that constrain the executive branch, but these constraints are not shown to bind the Court. Moreover, through the passage of time, there is "a waning of political time" that impedes a president's commitments, owed in part to the "thickening" of political institutions.[138] The

result is intensified demands for and the anticipation of political change by the president. At the very heart of this idea is the notion of path development, which regards the status quo as a waning of political time.

Evaluating debates and rhetoric advanced by the executive branch and key political actors in response to a perceived emergency (political timing or the geopolitical concerns) in international affairs and war making demonstrates how policies evolve from political deliberations and action to the legal sphere in the form of a case or a controversy. Once the Supreme Court decides to hear a case, a "contested interpretative space"[139] is exposed. In this moment, the Court determines the shape and scope of the developmental path as it balances competing concerns (internal and external forces).

Keith Whittington asserts that Supreme Court justices have had power forced upon them, because politicians benefit from the Court's taking an active role in interpreting the Constitution and statutes.[140] Although the Court has no institutional authority to say what the Constitution means, and the politically accountable institutions of our government have no obligation to accept the "Court's reading of the Constitution as being the same as" their own meaning and understanding, "presidents and political leaders have generally preferred that the Court take the responsibility for securing constitutional fidelity."[141] Although presidents at times disagree with the Court and attempt to "alter the trajectory of constitutional law," rarely is there, Whittington argues, a "crisis of, or challenge to, judicial authority."[142] This is not the case in foreign policy making, however. Modern presidents, in this area, often challenge the judiciary's authority and reading of the Constitution and assert an alternative understanding—the unilateral authority to make foreign policy free of oversight and checks (see *Youngstown*, in Chapter 4, and detainee cases, in Chapter 6). When the Court does not adopt this alternative understanding, it asserts its own institutional authority to interpret the Constitution. In this way, the Court challenges the political regime in place.

The Supreme Court is acutely aware that it cannot make "compromises with social and political pressures," because it lacks "plausibility [precisely] because [it is] viewed as unprincipled, [which] place[s] the Court in the position of being viewed simply as a political body, and thus illegitimate."[143] As such, this process "must be transparent, well grounded in principle, and 'sufficiently plausible' to be accepted by the nation."[144] At first blush, this appears to be true of foreign-affairs cases. Sutherland's support of a strong executive is "sufficiently plausible," because it finds solace in Hamilton's support of an energetic executive. And by today's standards, the pro-presidentialists' position has certainly gained in strength, as executives purport to require more authority to handle increasing threats to our nation's security. But there is more to this story (see *Curtiss-Wright*, in Chapter 2, and Japanese internment cases, in Chapter 3).

Legal time, Pamela Brandwein asserts, is more open-ended than political time, because it brings the external world into the decision-making process, which means that law is not just internal.[145] So legal time is fluid and complex and is defined by how the Supreme Court interacts with the external world.[146] Essentially, as the Court considers external factors with internal norms, it may be constrained to find in favor of the executive (Japanese internment cases, in Chapter 3, but not detainee cases, in Chapter 6).

When presidents challenge judicial authority, the Court reaffirms its place institutionally[147] by asserting that it is "the primary and final authority to arbitrate, circumscribe, and legitimate" executive branch actions "through its power to establish 'legal[ly] binding rules.'"[148] The rule of law over government and constitutional law means that the Court is in a position to "limit the abuse of government power," which yields to it the "incentive[] to question the action[s] of political institutions" rather than to merely accept them.[149]

As such, the Court is in a politically insulated position vis-à-vis the executive, who is limited by the thickening of the political system. As Kenneth Kersch asserts, legal time is far less thick than political time.[150] Legal time is more transformative:[151] institutional norms that incorporate "a mutual construction process, an interpretive turn, and the social construction process" grant to the Court the discretion to act. This is particularly relevant when the Court assesses individual rights with polity principles while taking into account geopolitical concerns.

In times of crisis—wars, internal rebellions, or terrorist attacks—governments are inclined to suppress the rights and liberties of those living within their borders, a trend that has also been extended to enemy combatants (detainee cases), because national-security and military "necessity" necessarily dwarf liberty if governments are to be guarded and preserved. However, the discretionary power of the judiciary provides the Court with an opportunity to shape the political debate as it assesses rights claims, without being subject to the political costs of doing so.[152] When the Court engages in this way, it fundamentally reshapes constitutional and political development.[153]

Legal time is distinct from political time, yet in examining patterns of intercurrence between the Court and the president in foreign policy making, as this project does, I show that the transformative space produced when political time and legal time cross paths allows for change to be instituted by the Court. These disjunctures emphasize the Court's constitutive and less-constrained role, thereby giving the Court, or what some would call the counter-majoritarian Court,[154] legitimacy under our democratic values.[155] Just as James March and Johan Olsen contend, "[J]udges, like other institutional actors, actively g[i]ve 'meaning to the values they espouse' in politically consequential ways."[156]

Whittington's framework of regime theory[157] offers an alternate understanding of the fused process of legal and political time by uncovering which factors constrain judicial review and constitutional interpretation. Ultimately, reconstructive presidents, Whittington suggests, battle the Supreme Court over constitutional meaning. As drafters of "fundamental political change," Whittington claims, "reconstructive presidents appeal to the Constitution to help legitimate their enterprise."[158] This is not only a defining characteristic of reconstructive presidents (FDR and Ronald Reagan, for example) but also a commonly used tactic. These presidents "insist that theirs is an effort to save the Constitution from the mishandling of their immediate predecessors and the Court itself."[159] This argument suggests that as presidents define their own powers, they create an atmosphere of tension in which a challenge to the Court's authority is amplified. When reconstructive presidents—executives who put in place a new majority at a time when the regime is vulnerable to change[160]—are successful in their assertions, their interpretations of the Constitution prevail and ultimately legitimate present and future political practices. However, Whittington does not include a comprehensive analysis of foreign policy making, so this framework is not robust. For example, he maintains, affiliated presidents find allies on the Supreme Court.[161]

The Bush administration (2001–2009)—that of an affiliated president, or one who belongs to an existing regime—challenged the Supreme Court's authority by claiming to have the sole authority to determine the president's constitutional powers. Bush wanted to act unilaterally against the threat of terrorism and asserted that the Court had no power of review over the executive's actions (see the Conclusion). The Court, however, was not an ally of the Bush administration. In fact, it thwarted the executive's claims to unilateral foreign policy making, finding in favor of individual rights. Consequently, regime theory is complicated when we read the Court and its decisions in foreign-affairs cases into the narrative.

Skowronek asserts that regimes constrain executive decision making and that as each new regime is instituted (via critical elections), presidents have a tougher time effecting change (institutional thickening).[162] Fleshing out complicated periodizations shows how recurring patterns of behavior are "created by the past, alterable by the future and have a life of their own."[163] As fundamental shifts occur by way of critical elections, the political structure or party system determines whether the Court collaborates with the regime or is hostile to it. But this circumstance is not what we find with foreign affairs. Even though five (six, if you count the ideological realignment of President Reagan) critical elections—those that usher in new regimes—have occurred,[164] this study demonstrates that a stable period existed from 1800 to 1936 when the Supreme Court reaffirmed and defined the constitutional blueprint advocated

by the Framers in a series of foreign-affairs cases. The Court then instituted a new constitutional order in 1936 and maintained it until it heard the detainee cases (Chapter 6).

The role of ideas is central to the selection of policies.[165] For ideas and belief systems to influence the trajectory of a policy, they must be communicated in such a way as to be included in the political debate. Understanding how ideas come to be and how they evolve helps explain institutional change. As such, this perspective exposes how ideas espoused by the Court have evolved not just across spatial time but also across political and legal time, and how judicial supremacy has reshaped the trajectory of the executive branch.

A path is ultimately shaped by the constant interplay between the different institutions or political forces that come into conflict with one another. These patterns of intercurrences, defined as "independent institutions shifting in and out of alignment with one another," then "form patterns of entrenched structural enduring and constant change."[166] A change in policy is likely when a political actor can subjugate a prevailing perception or frame and then offer an alternate interpretation that is viable. In the area of foreign affairs, the Court's constitutive role determines whether this new frame is practical and sustainable as it balances competing rights claims with geopolitical concerns. Ultimately, the Court acts as the catalyst of that change when a shift in the frame is observed, which is not based on regimes, the political timing of the president, or the internal norms of the Court.

LAYOUT OF THIS BOOK

Each chapter of this book covers a particular temporal period. The universe of cases includes decisions from the Supreme Court from 1800 to 2015 (and secondary cases[167] that further entrenched the constitutional orders). In each of the empirical chapters, it might first appear that as the definition of principles (polity and individual) develop, the Court merely changes its behavior accordingly. However, I show that the situation is more complex than a mere assertion that rights constrain the Court's jurisprudence. These chapters identify and explain the significance and consequences of the Court's efforts to settle uncertainties arising under exigent circumstances.

Chapter 2 begins the empirical narrative with a consideration of *Curtiss-Wright*. The *Curtiss-Wright* Court instituted a new constitutional order, for the first time establishing plenary powers that were not dependent on congressional delegation. Chapter 3 examines the issue of Japanese internment. This set of cases is usually framed as "race based," but I demonstrate the entrenchment of the new constitutional order and how presidential ascendency became institutionalized; executive power undermined individual rights and

was given the widest of latitude to wage war successfully. The discussion of *Youngstown* in Chapter 4 illustrates that the Supreme Court was willing to check executive power and authority during a time of war. This case reaffirmed the Court's institutional prowess to draw a sharp distinction between foreign and domestic affairs as it assessed the role of the executive vis-à-vis Congress.

Dames and *Regan* are the next cases covered, in Chapter 5. In these instances, the Supreme Court insisted it was duty-bound to determine the extent to which the executive can make foreign policy despite various congressional attempts to rein in executive autonomy statutorily. Chapter 6 examines the detainee cases. Ultimately, the Court continued to operate within the newly established constitutional order as it handed down its initial rulings, but with political, public, and global backing, over time it rendered a more robust review of the Bush administration's detention policies as it weighed national-security concerns against the protection of individual liberty.

The Conclusion asserts that the Supreme Court is an unconstrained actor when it decides foreign-affairs cases. Through judicial decree, it can institute change—a move away from the established order. Over time, this ability has led to a comprehensive national acceptance "of the systematic legal entrenchment"[168] of an executive's acting autonomously in foreign policy making, which has come to include war making. The imperial president has been neither unchecked nor usurping power over developmental time. Rather, believing that the old constitutional order can no longer accommodate the practical necessities of our national foreign-affairs agenda, the Court has instituted and buttressed the recurrence of the sole-organ doctrine (executive autonomy) over developmental time. This chapter emphasizes the contemporary relevance of this study by speaking briefly to the Court's sanctioning of presidential unilateralism in *Zivotofsky* (2015).[169]

Courts are part of the broader political process.[170] Because the president is largely constrained by institutional thickening, the institutional costs of changing paths may be too high for the executive branch to attempt alone, but with the collaboration of the Supreme Court, these costs are minimized. Judges have interpretive leeway and actual power and authority to influence political questions, so not only are paths of development open to the Court; the judiciary can significantly change path trajectories and establish institutional change.