



Why
this c
of or
polic
tel sh
affir
liber
eral g
Scho
dyna
from
scien
purp
exec
and
of th
ican
Alar
for t
A se
"law
or tr
the
of E
199

tific
poli
Cor
tion

2. S
Schee
U.S.
Cont
U.S.

K
T
—
—
—
—
is
o
w
g
g
U
in
id
h
p
in
—
3.
br
m
ex
ar
in
ye
ha
pr
ag
pa
bu
ar
no
co
ar

who is given
 ture is thus o
 are not colle
 pal-agent pr
 ability, and r
 control—a c
 command, a
 executives, th

Courts a
 putes betwe
 judge, sitting
 Shapiro set
 (1981), at th
 between to n
 in the contex
 legitimacy. I
 tion of a win
 the dispute r
 tution is thw
 authoritative
 (Shapiro 198

Courts)
 includes con
 For this reaso
 creates a rule
 that may ru
 1999). Given
 like that of t
 ward when a
 the applicati
 at least incre
 are perpetua
 As Alexande
 FORCE nor

4. See also Don
 1977); Laura N
 University Press
 Review 89 (1976,

KER:

and
focu
ates
it is
poli
the
tum
judi

stru
of
pro
dev
ple
rea

nev
fro
int
sel
cat
dis
len
Ka
Ra
nat
of
inv

stit
dir
wh
as
bo
(Se
sit
an
as

informed by diverse political visions, preexisting facts reframed by new norms, it fulfills its function and operates as a governing triad. In doing so, the Court becomes a political actor, as significant as its actions. In the meaning, the articulation of what White (1985) called a “public philosophy.” The Court’s preferences. There is more to this than what Kahn gets this and has taught it. The Court’s major role in *constituting* the polity (Greenstone 1988).

Contestation over where the principles—substantive commitments—meanings—is constitutive of that contestation in part because there is “no precedent” for a particular court decision.” These are the things the Court has to apply polity and rights in a dynamic, economic, and political environment. It is a matter of studying “the link between social, economic, and constitutional law and the

III.

My complete assent to Kahn’s proposal. I have particular problems in applying his general model to particular cases. The Court’s role in the case of an antiegalitarian conservative is to be a counterweight. The means by which Kahn has proposed are the means by which Kahn has proposed.

It seems to me that Kahn tells us that conservatives facing facts as they really are should be moving in the more liberal direction and, although the ride is not smooth, it is the best of all possible worlds.

Kahn’s assumptions concerning the role of the Court are resplendent in the bright light of

KEP

All
inv
ent

wit
the
wh
ing
to
200
cor

Th
G.
cor
do
pol
doi
alw
of
rig
his
leg

Bau
ton
Car
Chr
128
Dw
Pre
Gra
Rev

KERSCH | The Distinct

Plessy v. Ferguson, 163 U.S.

Roe v. Wade, 410 U.S. 113

Schachtel Poultry v. U.S., 297

U.S. v. Butler, 297 U.S. 1

Wisconsin v. Ioder, 406 U.S.

Supreme Court

935)