

Out of the Past: Time and Movement in Making the Present

By Christine Desan*

The vocabulary of time is exhausted: from the “post-modern” to “Generation X,” it expresses fatigue with the sequence of our efforts. We have mapped our steps with any number of methods—millennial to scientific, Enlightened to romantic, Marxist to positivist, Whig to progressive, neo-Whig to neo-progressive, soup to nuts. History, however, may have escaped us long ago. This essay experiments by taking seriously the possibility that coherence is a temporal event, a movement that clarifies experience over time by sacrificing past uncertainty to a comprehensible present. Such an approach, developed in a concerted way, could reveal from a different angle the way the constitutional order of a community unfolds, endures, or changes.

The conventional approaches to time are familiar. As a matter of historical narrative, we debate a particular trajectory. Most frequently in legal histories, it is a national or state story, but it can also describe the experience of a group—women, the working class, the African-American enslaved. This narrative, which may be celebratory or critical, progressive or nostalgic, a tale of inclusion or exclusion and oppression, operates against a baseline, a shared memory of the way things were before. It maps out a later equilibrium; in the best accounts, we understand a set of debates about alternatives that will write a community’s future—as hewing to national or local power, libertarian or protective possibilities, communal or competitive theories. Contested as it may be, the equilibrium is implicitly unitary: a particular order prevails or, at least, predominates. In the standard account of the American system, for example, a constitutional design is formed in popular conventions, elaborated by legislatures, implemented by the executive, interpreted and adjusted by courts.¹ The resulting narratives may assume that government officials represent popular constituencies, or explore the myriad ways in which courts and legislatures reflect social forces, including the clash of interests, the power of ideas, and discrepancies in power.² Change occurs in these histories in a variety of ways: formalists at one pole

* Professor of Law, Harvard Law School. Many thanks for the insights and advice of Suzanne Desan, Zinaida Miller, Fernanda Nicola, Anna di Robilant, Brishen Rogers and Lucie White.

¹ See, e.g., Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, William N. Eskridge, Jr., and Philip F. Frickey, eds. (Westbury, N.Y.: Foundation Press, 1994).

² See, e.g., Charles Beard, An Economic Interpretation of the Constitution (New York: Macmillan Co., 1913); Bernard Bailyn, The Ideological Origins of the American Revolution (Cam-

may highlight moments of constitutional amendment while realists sketch the transformations effectuated in constitutional doctrine by judges in common law fashion.³ Many attend to the issue whether and how people participate in constitutional formation.⁴ In each case, the issue remains to identify the underlying design of government, put into place by the relevant authorities in exchange with others around them. Agency, the act of decision and its distribution, obsesses author and audience alike. Time, in this account, is a shared record of those determinations, a path of steps that traces the life of a community.

The structure of these histories comports with our current theories of constitutional decision-making. The mainstream approaches from rights theorists and utilitarians alike manage past and future as a positivist sequence, running through the present moment. In that alternative, the character of change is imagined in common instants. We are invited to consider or participate in ideal worlds of deliberation, individual exchange, or preference evaluation.⁵ Decision is the focus there, as opposed to movement, in the sense of experience, learning, or reaction. Decision is, of course, dramatic—institutions, patterns of authority, practices, worlds change with states of mind. Reason chooses, and an imagined politics—an applied process of agency or will—replaces the contextualized processes recorded in the historical narratives. That politics transforms the program, here as there. Time, again, maps a decisional sequence along an axis of past to future.

On closer look, the passage of time in these accounts has a curious quality. As suggested by the motif of the graph, it appears as a series of moments. When we contemplate the past, it is as if we seek to confront and ordain the reality of those points. In turn, we seek to understand something about the path of our community.

The present essay suggests, although very speculatively, another approach to the problem. It argues that, at least for this moment, we should conceive time within constitutional experience quite differently. Rather than conceiving time as a series of points, we should think of time as movement, the creative manufacture of the present out of the past. Rather than considering the path that may be created by a series of points, we should consider the qualities that might attach to a phenomenon of movement, to our

bridge: Harvard University Press, 1967); Jackson Turner Main, The Antifederalists, Critics of the Constitution, 1781-1788 (Chapel Hill: University of North Carolina Press, 2004, 1961).

³ See, e.g., David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995 (Lawrence, Kansas: University Press of Kansas, 1996); Morton J. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge: Harvard University Press, 1977).

⁴ See, e.g., Bruce Ackerman, We the People (Cambridge: Harvard University Press, 1991); Gordon Wood, The Creation of the American Republic, 1776-1787 (New York, Norton, 1969).

⁵ See, e.g., John Rawls, A Theory of Justice (Oxford: Clarendon Press, 1972); Jurgen Habermas, The Theory of Communicative Action, trans., Thomas McCarthy (Boston: Beacon Press, 1984); Louis Kaplow and Steven Shavell, Fairness Versus Welfare (Cambridge: Harvard University Press, 2002).

own predicament as beings constantly losing a set of possibilities and always getting the present ground. The essay attempts in that way to change the focus of inquiry. The question is no longer whether or what has been chosen in a regime assumed to be unitary. Rather, the question is how the passage of time instills a sense of the present, how the experience it produces reiterates a particular conception of constitutional authority, and how the character of that order as coincidental should affect our assumptions about human action, including agency and consent.

A. Imagining coherence as movement

Historians generally write with a conviction that time matters; perhaps that commitment amounts to an assertion of social theory. Time may be conceived as making sense of the world. It is, after all, the dynamic that creates a present both out of the elements and at the expense of the past. The present, in this view, need only be the enterprise of existing, and in that sense producing or bringing forward the next day. Even in that bare definition, the enterprise would be complicated, a layered effort to achieve coherence—at the most basic level, survival; at cultural levels, social performance; and at constitutional levels, the orchestration of political life.

The idea that forms of order, knowledge, or authority follow from the constant effort of people, ranged in vastly different circumstances one to another, to shape and rationalize relations that will never come into lasting alignment is based on familiar themes. It depends most immediately on the critical tradition as the source of theory most driven by the conception that social order, as well as the meaning of social forms, follows from a clash of conflicting commitments. Equilibrium in such a world is neither static, neutral, nor comprehensive.⁶ Likewise, a historicized approach assumes the proposition of a century's sociology that the act of interpretation pervasively mediates the reality perceived by humankind.⁷ Finally, a wave of recent scholarship, informed by both sociological and critical traditions, elaborates the performative aspect of social reality by casting regimes of social and political order as platforms on which participants learn, act out, and contest their roles as well as their understanding of how they fit within a surrounding community.⁸

⁶ If a commitment to the social world assumes the subordination or suppression of alternative distributions of authority, reason itself takes shape only in the absence of a full view of the possibilities. It becomes an exercise in the internal logic of a system, a claim of superior legitimation, produced by the orchestration of relations and molded to articulate that form. See, e.g., Max Horkheimer, "On the Problem of Truth," in *Critical Theory: Selected Essays*, trans. Matthew J. O'Connell, et. al. (New York: Continuum Pub. Corp., 1982).

⁷ According to the theme of much of that literature, individuals who are located in particular traditions, and dependent on collective knowledge that is itself peculiar, form their sense of the world, including the definition of their interests and principles, by reconciling the forces they take to be true with their own place and possibilities. E.g., Max Weber, *The Protestant Ethic and the*

The approach here takes those insights and lays them down in time, emphasizing the dynamic aspect of these accounts—their common assertion that coherence for participants is produced by their actions. Interrogated for that aspect, the process of maintaining a constitutional tradition breaks down into streams of improvisation. We can understand each of these as a motion, personal to each participant, that produces coherence as time allows people to conceive their relation to the human world around them.

The basic dynamic unrolls through everyday action. Participants locate themselves by hazarding a particular order, justifying it, and considering whether that proposal is validated by those around them. The movement is constant; it makes up the sequences that distribute authority. We find claims at every moment—initiatives that establish an order, represent it as right and proper, and elicit confirmation and rejection. We find just as many responses, launched from just as many participants. They are made up of the same stuff as the earlier claims: actions that accommodate or contest the order proposed, articulations that attempt to capture their reason, and effects that validate as well as await validation.

The ingredients for such an enterprise would be, at any moment, acquired from a wide variety of sources, all experiences. They would range from the physical to the social, the psychological to the political, and would include for present purposes, the constitutional. By “constitutional,” I mean to locate, out of all the efforts of ordinary life, the definition of public and private, and the distribution of political authority and lay action that gives a community (of any type) its most self-conscious or official form, including its boundaries, its speakers and its subordinated, its modes of political interaction. Broken down, each one of these assumptions would turn out to be elements in play in the creation of a present regime.

Each element in this effort would be received and deployed in a constant process of inheritance and projection. There would be a universe around every individual, one that seemed to her or him both intact and in play. It was, after all, formed far before, in a past peopled by whole throngs of others both related, tied in blood and human condition, and distant, untouchable and authoritative in their creative role. And in the present, each individual would act and react to those like her left the bequest of an existing order. Each person, working with his or her inheritance—patterns of power with familiar justifications used and accepted before—deploys them again from a particular place and facing a particular issue of authority; an audience proximate and relevant to that person responds.

Spirit of Capitalism (London: Routledge, 1992 reprint ed.); Peter Winch, The Idea of a Social Science and its Relation to Philosophy (London: Routledge, 1958).

⁸ See, e.g., Pierre Bourdieu, The State Nobility: Elite Schools in the Field of Power, coll. Monique de St. Martin, trans., Laretta C. Clough (Stanford: Stanford Univ. Press, 1989); Walter Johnson, Soul by Soul: Life Inside the Antebellum Slave Market (Cambridge, Harvard University Press, 1999); Kenneth W. Mack, “A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960,” 87 Cornell Law Rev. 1405 (2002).

The enterprise would be both, then, an individual experiment and a social phenomenon.

In this model, there is no such thing as clear determination, given the complexity of the constitutional world under design, the many different claims packed into any act, and the disagreements that result. But when (and it is a when) a participant sees a way to cast the situation, thrown into relief by the reactions of some particular others—at that point, the assertion that was tentative or ambiguous becomes coherent: an ordering, a conceivable intervention in the general chaos. In that way, actors working within particular communities of meaning incessantly hash out matters of constitutional dimension, perpetuating or changing patterns of power justified in a previous moment. From many such decisions, the present takes shape, and a constitutional tradition is projected forward. With all the ambition in the world or none at all, the revolutionaries and the unreflective, the reformers, the compliant, the alienated, and the apologists, all at bottom survivors who grope, fight, or sham their way into an uncertain future—the whole enterprise would be in that way revised, extended, and passed on each moment.

And at that point, the process begins again, because no assertion is final in a world made of individuals tied together but situated so separately. Each decision or ordering becomes another ingredient, an element passed on for use in the continuing dynamic: not the past with all its uncertainty, but an artifact that reflects only the temporary resolution of that uncertainty. Orchestrating a constitutional reality is an immensely complicated enterprise, constructed of countless claims and resolutions; where so much is in play, the possibilities not chosen fade and are left behind. The decisions, now artifacts, alone remain as evidence—clear, substantial, resolute. Ironically the past comes sharper and sharper into focus as it recedes; for the same reason, it becomes more and more fictional. At the same time, those chains of action and reaction, those exchanges over time that are now forgotten, allow practices of order to have a character that has been experienced or felt, registered at a level beyond abstraction.

According to this approach, then, there are two pasts, one that is experienced and one that is reconstructed. The first is lost each time its crowd of claims, its confusing clash of assertions is sorted and reduced to a determination with clear content. The second is recreated on the record left behind. The first is the past in the sense that it comes before and yields its possibilities to a subsequent moment. The second is the past in the sense that it explains, on the basis of the markers established by moments of decision, the path of the present constitutional tradition. The first is familiar but unarticulated. The second is conventionally accepted as history. The object of the experiment taken here is to suggest the character of the constitutional reality produced by the first past, as opposed to the second.

B. Exploring local motion

Several aspects of the past that is consumed, in contrast to the fictionalized one that replaces it, challenge the conventional models of constitutional history and decision-making. First, this past has a different and distinctly ephemeral character compared to

the present. Rather than another scene, several frames ago, it is an action, one that ends. It produces, in that manner, the sensation of a stop—or the current moment. Second, this past generates a sense of constitutional order out of the constant effort to piece it together rather than to recreate a record of it. The strength of that sense lies again in motion: it arises from the continual reiteration of the many assumptions that underlie any decision. Finally, the character of the past that is lost as opposed to the one that is reconstructed depends wholly on the fact that it produces a personal resolution, one that may be echoed but is not reproduced in any other individual's experience. Considering each aspect—the ephemeral nature of the past, its reiterative character, and its personalized yet coincidental occurrence—could open up the way we think about the present, the order we find there so apparently entrenched, and our approach to human initiative, so commonly cast in terms like choice and interest.

Perhaps the most obvious aspect of the experienced past is its transience. Within the memory of men and women, constitutional reality is a conviction, but even that may be indistinct. Formed from a variety of exchanges that were idiosyncratic, in which much was assumed rather than articulated, it is elusive to any outsider. And as a matter of memory, the character of a constitutional order disappears when memory does. History is buried daily without a murmur.

The act of forgetting, in this account, is precisely what produces certainty. The critical theories of the century, in a curious confluence with their scientific counterparts, have long suggested that loss in fact produces the real. According to both approaches, the attempt to create coherence or order is intensely experimental. Participants work to piece together a world that they can understand, predict, perhaps even manage. In that process, most basic is the effort to locate oneself and to dispel the ambiguity of a world in play. Following their claims and the cues they receive from those around them, people define alternatives and the differences between them. Categories come into being. Certain interests and ideas take shape and invite use. Through them, it seems suddenly possible to articulate a path, take a position, have a perspective, and put a world in focus. In this view, the disappearance of the past creates the experience of the present, the stream of change itself produces the sense of stasis.

The approach suggests that it is only in retrospect, in the reconstructed history, that those differences or categories appear distinct or obvious. It is only after the formative period that they can operate like poles of decision. Interest, preference, and desire are products in this process, not fundamentals capturing the range of possibility or reflecting the attributes of the human will. More basic than interest or ideals, it turns out, is the action that defines them.

Jettisoning the elements conventionally assumed to be constitutive does not suggest that we retreat to an unconscious or submerge the individual in the social. It suggests, instead, that the components commonly used to guide our theories and prescriptions—components like preference, interest, and desire—may give us less access than we assume to the dynamics that inform the current equilibrium. If we returned to the dynamics that produced the sensation of the stop and the appearance of the categories, we

would ask different questions. That orientation towards the fluidity of the system would direct attention to how claims to power operated in certain situations, how justifications rose and fell, and how participants in a constitutional regime moved before very different audiences. It would thus highlight the production of the elements in any given regime, including the definitions of interest and desire. Perhaps most importantly, considering the underlying dynamics of those phenomena would locate them as reflecting the complexly relational movement of participants.

Second, constitutional reality is an applied or reiterative affair. Imagining a past as motion suggests that individuals manage day-to-day by projecting constitutional designs constantly, in fluid situations that require much to be assumed and much to be accepted quickly. That is true whether the questions at issue are large or small; in fact, there is no great distance between the two. The large questions are pervasively informed by the small, and the small are pervasively prosaic. Surrounding the most dramatic or the most apparently deliberative moments, are webs of exchange, everyday contacts that stretch back into the past and produce the present. These are the moments in which people, dealing with the ordinary tasks of life, negotiate authority in their communities. In regimes of such fast and constant construction, changes are everywhere but are almost nowhere conspicuous, influences are indirect, and conclusions are only occasionally announced with fanfare.

The applied character of constitutional decision contributes another aspect to the character of the constitutional effort. It means that even when participants change the orders in which they live, readjust or reconceive the coherence they imagine—an endlessly repeated enterprise—they carry much continuity forward. At any juncture in the day, any point of decision, any determination to accept (or not) authority, a whole load of assumptions is necessary to keeping an actor oriented, conversant, able to speak the language of the decision. Of course, all in theory are contingent and could be overturned. In fact, the very operation of innovation solidifies old assumptions, buttresses them, buries them in the foundation of the new decision. Even a revolution, it seems, is quite partial. Its supporters, as radicals have long recognized, can only shed so many assumptions and still maintain the coherence they project onto the new order.

The result is to reiterate the experience of constitutional reality: each determination, like adding lines to a sketch, both changes and reimagines the entire design. Located in the perpetual motion of the enterprise, its pervasiveness, its very tediousness, its near but never quite redundancy is the power and the compulsion of the experience. There is constant improvisation, and there is, just as constantly, the refrain and restraint of the old restated order. In the end, all these events leave a sense, an understanding, an expectation, a conception of the way things work.

Conceiving coherence as a product built by reiteration underscores how tenacious are assumptions about constitutional authority and order. It locates that effect in the consolidation of knowledge at an experiential level. It is not just the correspondence between social and mental structures, nor only the limits on our conceptual vocabularies that cir-

cumscribe what we come to conceive and act upon.⁹ It is also the repeated experience of holding to certain reference points that consolidates them in our orientation towards the world.

The reiterative character of our own activity directs attention to new questions. It asks, for example, how sociologies of knowledge incorporate theories of practice. It opens up institutions as human dynamics constantly re-enacted by participants. And it invites new approaches to the issue of change, suggesting that we scrutinize the less apparently momentous flows in everyday activity for new currents. Thus we might read the assumptions of a society by mapping its redundancies. We could search for convergences across fields (philosophical, political, technical, etc.) that fixed certain points of reference—the conviction common in the late twentieth century, for instance, that material incentives best organized human behavior. Change can also be understood in a complementary way, as a chronic matter that gains momentum when these redundancies break down. The fracturing of spiritual incentives that operated in the political as well as religious institutional realm thus famously accompanied the turn towards the world of material incentives. But other corollaries paint the transformation as even more penetrating, or transform our understanding of it. For example, the secular transformation above corresponded to changing practices that produced both new “facts” in the world of experimental science and accounting and different kinds of “value” in the realm of money and finance.¹⁰ Both the real and its change are grounded, in this view, in a thick medium of activity. They occur, gather force, and break in ways we could further reconceive.

Finally, constitutional reality is a coincidental affair, a performance of authority produced by the contemporaneous improvisation of political authorities by participants at any given moment. The enterprise differs according to the place and power of the individual, without commonality, universality, or equality. As the enterprise differs, so also the results. The initiatives made by any person—their attempts to assert a power of the community and to rationalize it—are only the start of the particularity. They may be launched from platforms of authority or from weak and beleaguered positions, along well-established paths or in uncommon ways, in a manner deliberate or unselfconscious and routinized—the claims of the judge, the taxpayer, the applicant for public support, the secretary in the government office. The relevant audience for each of these claims is just as varied as the person making it. Different circles validate or reject with their own counterclaims, confirming or questioning the coherence of the authority asserted to them.

⁹ See, e.g., Pierre Bourdieu, The State Nobility: Elite Schools in the Field of Power, coll. Monique de St. Martin, trans., Laretta C. Clough (Stanford: Stanford Univ. Press, 1989); Duncan Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” 36 J. of Legal Education 518 (1986).

¹⁰ See, e.g., Mary Poovey, A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society (Chicago: University of Chicago Press); Christine Desan, “The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History,” 5 Law and Social Inquiry __ (Winter 2005).

The mediums they use are just as diverse. So some audiences make a claim by deciding a case or passing a law; others by contributing money to a cause; others only by sympathy for the despair of work without change, the decline of a neighborhood without power, the fragility of a politics without success, the loss of a child in war. All of those circumstances shape the constitutional perception in which an individual lives.

Nothing about the idiosyncrasy of these circumstances and the experiences that result means that the constitutional order existing in a society is uncoordinated or unrelated, only that it is neither shared nor unified. The process of exchange connects people, as well as placing them in separate worlds. The odd sense of a communal order individually imagined is the result. In short, the present constitution is a coincidence, in many senses only an accident, of the political form, the division of public and private authority, perceived by individuals in exchange with one another.

Conceiving constitutional reality as coincidental may rearrange the way we think about agency and, in turn, consent. If constitutional worlds are projections contemporaneously launched by participants, their synchronicity is a phenomenon remarkable in and of itself. Imagine that individuals projected worlds that comported with each other to some degree, at least in the sense of allowing participants to equate, if only partially, their own proposals of coherence. To that extent, the event of synchronicity would produce a sense of knowledge, orientation, an ability to navigate, according to the only touchstones available—the apparent success at the moment of a hypothesis about the way that world might be.

The experience of agency flows, in this account, from the event of synchronicity. It arises from the perception that worlds overlapped and, from that perception, the sensation of a system or order. Given that perception and the sensation it generates, agency takes shape as a sense of competence at negotiating the existing order. In that sense, agency—so iconized as initiative—is actually an after-effect.

We could try out this notion of agency at a fairly elemental level. We might imagine a narrow assertion of public authority—a salesclerk adds tax to a purchase with the comment that it's "an extra quarter for the governor." From his customers, he receives smiles, nods and small talk about the current candidate. Or he gets snorts about the corruption at the top. He may field constant resentment as the figurehead of a white power structure. Or face questions about why he would cooperate with a power-hungry bureaucracy to take the people's property. He may be lauded as the agent of a burgeoning economic power or condemned as the representative of a capitalist state. The character of the state he perceives, and how appropriate he believes it is to participate in its authority, likely will come to depend to some extent on how widespread is each reaction, who expresses it—those he respects, despises, or relies on--and how it comports with the image of the state he finds in other interactions. At the same time, we can imagine each customer, veteran of a thousand such interactions. Offering any comment—let's imagine the comment about corruption—she may get agreement, anger, embarrassment, or non-engagement, again affecting her image of the state and its agent behind the counter.

If we imagine all these experiences, overlaid again and again, we could ask in what

state, exactly, did the parties choose to participate? What state, exactly, did they act to extend? Surely they could give an account, produced by the sequence in which they participated and perceived as shared by the simultaneity of the experience. That account would then be carried (as each his or her own account) to the next exchange. But that would be the nature of the parties' agency—a recognition after the fact, produced as idiosyncratic projections were tendered together and interpreted in turn to make a map for the next moment.

Recast as an after-effect, the experience of agency may be triumphal, perhaps even indispensable. It is also, however, retrospective as opposed to visionary, necessary as opposed to voluntarist, and chronic as opposed to occasional. It postdates the most active moments of individualized engagement with uncertainty, itself a process that is more experimental, reactive, interpersonal, and improvisational than liberal notions of agency imply.¹¹ Agency as reconceived in this account may consolidate an improvisation, or convince its bearer of a proposed order, but it would not obviously equate with initiative, choice, or the manipulation of the future.

If it is plausible to rethink agency in this way, then the current consensus that agency involves exactly initiative, choice, and the manipulation of the future seems peculiar. That peculiarity is highlighted by the enormous emphasis given agency by right and left alike, by progressives in favor of self-determination and conservatives in favor of private choice. Conceived as the exercise of self-determination or choice, agency in turn founds the enormously important concept at the heart of Western political economic structures—consent. The issue is whether this way of approaching agency, and consequently, consent, may in fact be the singular suggestion of a Western way of thinking about time.

It may be that the way we conventionally frame the process of change carries with it a particular orientation towards the present as consummately about control, authorship, and inauguration. Freezing a series of moments to isolate the decisions made there is widely accepted, because the strategy is understood and sanctioned to create an assumption of equality. We can approve as epistemologically and morally appealing a blank slate, a level playing field, an original position, a fair adjudication. That image in turn invites the notion that the moves made there are choices or determinations against a neutral baseline that can or perhaps should be identified as discrete in some coherent way.

From that point, we easily imagine decision-making as a shared enterprise, a practice that can be generalized and therefore, in some mental legerdemain, accomplished in common. The exercise makes it easier to anthropomorphize the body politic, and to project a kind of unity to its conclusions or, more subtly, to the path of its debate. The moment of decision can even be admitted as an ideal, a projection or hypothetical rendered more realistic by admitting divergent practices and pasts, social influences and barriers. But the paradigm of an arrested moment of choice or determination undergirds the

¹¹ For examples of liberal agency, consider the models assumed by the authors cited in note 6, *supra*.

narration of change.

In the recent West, the emphasis on choice dictates the salience attached to consent. Consent, in turn, plays a vital role in narrating—as well as shaping—both the economic and the political order. More than that, insofar as consent serves as a touchstone for material progress and democratic achievement, it generates the questions we ask. Both functions legitimate current arrangements.

The narrative work is especially obvious. Choice and consent, according to conventional theorizing, occur in many forms. The economic marketplace caters to material desire; a wide variety of goods supplies a choice; consumption affirms that choice and satisfies the underlying desire. In that sense, consumption appears as popular consent to the economic project. Similarly, the democratic marketplace caters to diversity of political preference; a range of candidates for office supplies a choice; by voting, citizens exercise that choice and satisfy their desire for representation. The vote here functions as popular consent to the political project.

The effect of this sequence is quite dramatic. We assume a world of demanding individuals and consider, in turn, the structures of their desire. We measure agency by degrees of satisfaction within those structures. (Or their close analogues: the vote may be replaced, for example, by other forms of political initiative.) And we equate the exercise of choice with a demonstration of consent to those structures. Put another way, the presence of choice within current economic and political regimes creates the possibility of consent, which in turn justifies democracy and the market in roughly their current forms.

The relevant questions follow: Assuming the importance of demand and the structures of desire takes us immediately to the consumer market and the electoral system. We ask what those institutions reveal about buyers and voters; an enormous amount of literature focuses on new directions in the market or the changing platforms and ideologies of political parties.¹² Given the importance of those structures, another significant body of work considers how well distributed is the agency of choice. It probes the issue of who has access to the market and the political system, identifying trends in participation, advances in development and the barriers (political, social, cultural, educational, and other) that remain.¹³ More exacting still, others inquire after the conditions of choice and consent, exploring and critiquing the structure of the market and the political process.¹⁴ By

¹² See, e.g., Thomas K. McCraw, ed., Creating Modern Capitalism (Cambridge: Harvard University Press, 1997); Arthur M. Schlesinger, Jr., The Age of Jackson (Boston: Little, Brown & Co., 1953).

¹³ See, e.g., Robert H. Bates, Prosperity and Violence (New York: W.W. Norton, 2001); Alex Keyssar, The Right to Vote: The Contested History of Democracy in the United States (New York: Basic Books, 2000).

¹⁴ See, e.g., Richard Arnott, ed., Economics for an Imperfect World: Essays in Honor of Joseph E. Stiglitz; Lani Guinier, "Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes," 71 *Texas Law Rev.* 1589 (June, 1993).

contrast, authors much more seldom ask why the consumer market is so widely assumed to define personal economic involvement (as opposed to, for example, workplace organization or the creation of a community's form of public finance), or why the vote is so widely assumed to define political participation (as opposed to, for example, popular attendance at court or decision-making, norm definition, and law enforcement by lay committee).¹⁵

A different approach to time would generate quite different assumptions and questions. That approach suggests that by freezing a series of moments to isolate the decisions made there, we still the very motion at issue, excluding exactly the possibility that flows of acts, articulations, and recognitions make sense out of uncertainty. If so, we would have to set those streams again in motion, and explore the implications.

In this model, for example, a constitutional order, including its politics or its market, is a phenomenon projected by the experience of individuals. That phenomenon rests—in fact depends—on the incommensurability of positions from which individuals participate in an order. The social reality of a tradition, the tenacity of that tradition, follows from the lack of unity or commonality between participants, each of whom have a different capacity or power to affect it. So, a range of people placed in vastly dissimilar situations not only conceives the order differently, but also its legitimacy and the possibility of challenging it. Least controversially, for example, consider the inability of the young, those most controlled by an existing order, to affect it. More controversially, of course, consider the need for those critiquing a selection criterion to succeed by its measure in order to gain the authority to change it.

In those circumstances, we might measure the presence of democracy quite differently. Instead of asking whether consent was present (or not), whether choice had been exercised (or not), or even under what conditions, we might ask how exposed participants were to the experiences of the state held by one another. We might ask how their experiences of the state related one to another. (In the more conventional approach to democratic decision-making, the only limits to interpersonal identification are those of the imagination. The less conventional approach assumes our imaginations are, in fact, too limited.) Or, we could inquire how the channels of claim and justification that they employed compared, or how the audiences that validated or rejected their actions contrasted.

¹⁵ For the implications to individuals of different forms of worker organization and public finance, see, e.g., Michael Piore, *Beyond Individualism* (Cambridge: Harvard University Press, 1995); E. James Ferguson, "Currency Finance: An Interpretation of Colonial Monetary Practices," 10 *Wm and Mary Q.*, 3rd ser., 153-180 (1953). For the implications to individuals of different political practices beyond the vote, see, e.g., Barbara Clark Smith, "What the Public Life of American Colonists Can Teach Us About Politics," <http://bostonreview.net/BR29.1/smith.html>; Hendrik Hartog, "The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts," 20 *Amer. J. Legal Hist.* 282 (1976); William Bradford, Chair, "The Address of the Committee of the City and Liberties of Philadelphia, to their Fellow Citizens throughout the United States," *Pennsylvania Gazette* (July 7, 1779).

A different set of questions would inform histories of the current images as well. As for the present state, instead of asking whether consent was present (or not), whether choice had been exercised (or not), or even under what conditions, we would ask what dynamics (acts, justifications, responses) appeared to render consumption or voting coherent when cast as a satisfaction of desire, an exercise of choice, a demonstration of consent? For example, does the repetition of organizational modes in terms of interest and consent across economic and political terrains essentially undergird the power of those strategies? For whom and why did or do those resolutions have power? How else are they cast? Assuming change as a constant attribute of this and other regimes, what determines its momentum and direction over the many participants in any order?

These questions are clearly only starting points, but they attempt to face a new direction. In a world of movement, capturing the sense of an underlying order seems not only impossible but irrelevant. Rather, an account should consider the way time creates, in the exchanges it makes possible, a coincidence of orders acted out by participants on unequal platforms; the way it reiterates, in the movement from moment to moment, the experience of authority; and the way it erases, in the disappearance of the past, its formative influence.