The Political Tilt of "Juristocracy"?

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Argument overview:

It seems to me to be of more than passing interest that the generations of legal scholars who enshrined *Marbury* as establishing the important power of judicial review wrote in support of the Progressive Era and New Deal Era project of building state capacity. They tended to support a role of the Court in authorizing the expansion of the power and scope of the national government. But *Marbury* has certainly undergone a rereading of late; critics of the earlier view have rethought Marshall's accomplishments and downgraded *Marbury*'s role as they debunk the notion that the Court has been a powerful agent of change. Critics who decry the power and reach of the contemporary Court, who see the Court constitutionalizing political issues, supplanting majoritarian decision-making, and attempting to arrogate sole authority to pronounce on the meaning of the Constitution come in a variety of political hues. While conservative critics attack activists who would seek to realize their purposes in Court--e.g., rights expansion, liberal and progressive critics wonder why we need judicial review when the Court, even at its best, hasn't been very effective in improving the status or constitutional position of discrete and insular minorities (and is so obviously political and results-driven most of the time). But if the celebrators of judicial review and of *Marbury* wrote during a period of statebuilding, what is the political consequence of "juristocracy" thinking now? While it is obvious that both conservatives and liberals writing in this vein are interested in curbing Court power and enhancing democratic deliberation where it is currently being silenced or supplanted, there is a clear political struggle about what a more vigorous democratic order would look like. Is it not possible that scholars who would take the constitution away from the Court provide the intellectual foundations for an era of contracting state power, or nation-state dismantling? If this question is thinkable, is it because a) we are trying to make the best of a bad bargain in an era when war and tax-cut driven budget deficits undermine state capacity and/or b) globalization is increasingly undercutting the institutions of the nation-state and generating supra-constitutional obligations and power arrangements? (Finally, if the Court doesn't silence deliberation over the meaning of the Constitution or settle constitutional questions anyhow, perhaps we should be rethinking the Court's role in this sometimes vigorous debate over meaning and values.)

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It has become increasingly difficult for those of us in Political Science to pin political labels on the diverse array of legal scholars who call out for a people's constitution, for taking the constitution away from the courts, or for much greater judicial restraint so that constitutional values can be deliberated—and indeed more fully owned—outside the Court.[2] One strain of the argument has been staked out by conservatives who decry the arrogance of the Court in supplanting the will of majorities as they articulate a Constitution more egalitarian and democratic than the framers gave us.[3] In this view, decency, morality, piety, and federalism are all casualties of an overreaching, power-intoxicated, and rights-creating judiciary. (And, as Scalia told us this week, "[t]hough the views of our own citizens are essentially irrelevant to the Court's decision [in *Roper v. Simmons*] the views of other countries and the so-called international community take center stage.")[4] However, these critics of contemporary legal thinking and of political activism aimed at the Court are now joined by more liberal and progressive legal scholars

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[1] I borrow part of the title from Jules Lobel, "The Political Tilt of Separation of Powers," in David Kairys, ed., *The Politics of Law: A Progressive Critique, 3rd ed.* (New York: Basic Books, 1998), 591-616.

[2] For one very helpful discussion, see Mark A. Graber, "Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change," 90 *Georgetown Law Journal* 233 (November, 2001), a contribution to the Symposium: Justice, Democracy, and Humanity: A Celebration of the Work of Mark Tushnet.

[3] Classics include Robert Bork, *The Tempting of America* (New York: Simon & Schuster, 1990); Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997).

[4] Scalia, J. dissenting in *Roper v. Simmons* 543 U.S. ____ (2005). http://a257.g.akamailtech.net/7/257/2422/01mar20051300/www.supremecourtus.gov/opinions/04pdf/03-633.pdf

who, never expecting the Court to be much of a progressive force, are dismayed at the constitutional order the Rehnquist Court is dismantling (including some of the power of Congress through the commerce clause, state sovereign immunity, and the Tenth Amendment). Jack Balkin has pointed out that, "[b]y the end of the 1990s, the major beneficiaries of the emerging conservative judicial activism appeared to be whites, state governments, advertisers, opponents of environmental and land use regulation, and wealthy contributors to political campaigns."[5] Tom Keck calls this the most activist Court in history, with Sunstein's most "minimalist" justices embracing judicial review and demonstrating no significant deference to the elected branches.[6] Moderate and left legal scholars began to urge respect for democratic, majoritarian decision-making, concerned for what the Court was pre-empting in the name of being faithful to the Constitution. Those legal scholars who placed far more faith in elected branches and in social movements than in the Court to bring about real, lasting social change worked overtime to demonstrate that the heroic efforts of the Court in decisions such as *Brown* or *Roe* had little impact by themselves, in any case.[7] Or, the argument that the Constitution includes values compatible with a wide array of political programs undercut the claim for

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[5] Jack M. Balkin, "*Brown* as Icon," in Balkin, ed., *What Brown v. Board of Education Should Have Said*. (New York: New York University Press, 2002), 18.

[6] Thomas M. Keck, *The Most Activist Supreme Court in History* (Chicago: University of Chicago Press, 2004), 293.

[7] Gerald Rosenberg, *The Hollow Hope*: Can the Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991). See the work of Michael J. Klarman, including "Rethinking the Civil Rights and Civil Liberties Revolutions," 82 *Virginia Law Review* 1 (February, 1996). See, however, the fine critique of Rosenberg that includes an examination of Rosenberg's methodology by David Schultz and Stephen E. Gottlieb, "Legal Functionalism and Social Change: A Reassessment of Rosenberg's *The Hollow Hope*," 12 *J. L. & Pol*. 63 (1996); a version appears in David A. Schultz, ed., *Leveraging the Law: Using the Courts to Achieve Social Change* (New York: Peter Lang, 1998; Teaching Texts in Law and Politics, Vol. 3).

a non-political exercise of judicial review.[8] As Mark Graber has pointed out, "virtually every political movement that has enjoyed substantial political success in the United States has eventually concluded that the Constitution of the United States privileges its particular political program."[9]

I suspect that some part of the more centrist-liberal interest in popular constitutionalism can be located in the desire of Third Branch scholars to get in on the 'decline of civic engagement' debates. That is, with the proclamation that discussion of public affairs, trust in government, and social capital are all suffering decline, a less activist and ambitious Court might leave ambiguities and unfinished business for legislatures to flesh out—and democratic citizens could even be stimulated to deliberate the meaning of constitutional values (instead of watching Survivor XV). The Court, having probably contributed to the problem in the first place by usurping popular prerogatives, could help Americans with their deficit of democratic deliberation.[10] Sunstein's formulation, in particular, suggests that narrower and less fully-reasoned decisions are generally more democracy-promoting (or permitting) than other kinds of decisions. If the object extends beyond getting Congress to say what it means and flesh out values and goals better—if it is in part to take the Constitution to the streets and town meetings—I remain skeptical. Leaving *Dred Scott* aside as an extreme case, I would

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[8] Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," 96 *Harvard Law Review* (1983) 781.

[9] Mark Graber, ""Thick and Thin," 250.

[10] Cass R. Sunstein, *One Case at a Time* (Cambridge and London: Harvard University Press, 1999) and Sunstein, "The Smallest Court in the Land," *New York Times* (July 4, 2004), Section 4, Editorial Desk, p. 9. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford, 2004). A brief statement of a prominent decline of civic engagement argument is found in Robert D. Putnam, "The Strange Disappearance of Civic America," *The American Prospect* (Winter, 1996), 34-48.

suggest rather that the kinds of decisions that capture popular imagination and discussion about constitutional values are more like *Brown, Roe, and Miranda*—decisions that people recognize because of their relative clarity and breadth.

Given several decades' decline in so many survey indicators of trust in political institutions—Congress, the Executive, the press—why is it that trust in the Court is higher (at least percentages indicating some or a great deal of trust) and remains more stable than trust in other branches of the federal government? Is it simply because the Court is more insulated from the public eye and guards its secrets of the temple better, while Bill Clinton answered press questions about what his underwear looked like? Judge Walter L. Nixon aside, we see fewer scandals and indicators of corruption featuring the courts in the press, despite internet cartoons such as the Elmer Fudd-inspired one last year that featured duck hunting and Scalia's refusal to recuse himself in *Cheney*.[11] If the public believes the Court protects rights they wish to see protected, then Scalia is the one who wants a minimalist constitution. Alternately, one might make an argument that the public has grown accustomed to a Court that speaks authoritatively about its prerogative to say exclusively what the Constitution means, and that we are happy with aspects of that authoritarianism. After all, perhaps the public craves certainty and settled, known law, not constant legal deliberation and flux that the adversarial process generates. (Rousseau certainly thought there was something to this, and so did

[11] If anyone regrets having missed Duck Season by Mark Fiore (1/28/04), it is available at http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/01/28/fioreduck.DTL I refer to *Nixon v. United States* 506 U.S. 224 (1993).

Robert Nagel.[12]) If we want claims adjudicated, and want to believe that the Constitution has a clear meaning, why politicize it more than it already is?

In his new volume, *Constructing Civil Liberties*, Ken Kersch argues that Ackerman and other liberal legal scholars are busy defending Whiggish narratives and their liberatory- and society-centered, rather than state-centered analyses of constitutional development. To defend the constitutional legitimacy of the New Deal order, such scholars must defend (and simplify the development of) the particular civil rights-civil liberties arrangements and understandings as the will of the people, while denying that popular will is expressed in different understandings in the Burger and Rehnquist Court years.[13] While Kersch argues that the Whig narrative is disintegrating before our eyes because of its own historical implausibility, I would suggest that it is also important to think about how contemporary scholars are creating new narratives to befit a new state project and new constitutional order.

Several generations of legal scholars who enshrined *Marbury* as establishing the important power of judicial review wrote in support of the Progressive Era and New Deal Era projects of building state capacity. They tended to endorse a role for the Court in authorizing the expansion of the power and scope of the national government. And what of the current revisionist projects that downgrade *Marbury* and the accomplishments of

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[12] Jean Jacques Rousseau, "Discourse on the Moral Effects of the Arts and Sciences," in *The Social Contract and Discourses*. Edited by G.D.H. Cole. (New York: E.P. Dutton and Company, 1950). Robert F. Nagel, *Constitutional Culture: The Mentality and Consequences of Judicial Review* (Berkeley: University of California Press, 1989). Akhil Reed Amar's suggestion that James Madison and John Bingham's recognition that "a Bill [of Rights] that did not live in the hearts and minds of ordinary Americans would probably, in the long run, fail" might be read in somewhat the same vein because it stresses meanings enduring outside of courts and law offices. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven and London: Yale University Press, 1998), 297.

[13] Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York and Cambridge: Cambridge University Press, 2004), Ch. 1. In addition to Ackerman, Kersch argues that Amar, Dworkin, and Rawls in some measure all share in this project.

the Marshall Court? What is the political consequence of domestic "juristocracy" thinking now? Is it not possible that scholars who would take the constitution away from the Court provide the intellectual foundations for an era of contracting state power, or nation-state dismantling? If I am at all correct, are we, then, Gramsci's organic intellectuals generating the intellectual framework for this new constitutional order as we engage in handwringing about juristocracy in America?[14] I wonder, too, what we may be saying to those who had such a difficult time having their rights recognized absent judicial intervention in the political process, however anemic those judicial interventions may have sometimes been?[15] Was the Court not then offering hope, and occasionally powerful rhetoric, in political struggles? Shall we simply signal our willingness to abandon minorities and historically disfavored groups to the democratic will just because judges, too, make value choices?

While it is obvious that there are conservatives and progressives who are interested in curbing Court power and enhancing democratic deliberation where it is currently being silenced or supplanted, there is a clear political struggle going on about what a more vigorous democratic order would look like. If democratic formalism

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[14] I shall have to leave aside fascinating questions that are raised about the role of globalization, international human rights norms and international law in reconstructing the American constitutional order and constitutionalizing politics even further. Rather than blame justices for looking abroad for norms to import (as conservatives so loudly do), I would suggest that treaties, international organizations with enforcement powers such as the World Trade Organization, and statutes such as the new copyright act that attempt to harmonize American law with laws elsewhere have done far more to "change" the constitution than a few justices running around to international conferences on the death penalty.

[15] Patricia Williams, *Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991). John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980). Hirschl argues that Ely's attempt to rescue judicial review for a supportive and confined role via policing the process of representation fails to survive a democratic critique. Moreover, "simple and sweeping claims about the unequivocally positive effects of constitutionalization on historically marginized interests ought to be viewed skeptically." See Ran Hirschl, *Towards Juristocracy* (Cambridge and London: Harvard University Press, 2004), 188-89, 162-63, quote 168.

"identifies democracy with whatever happens to emerge from majoritarian politics,"[16] then how do progressives want to talk about democracy? Since I believe that democracy probably means something else—something more substantive—to many of those who might take the Constitution away from the courts, I think it is time for a discussion about whether progressives who are willing to reduce the Court's judicial review understand by democracy something other than "whatever happens to emerge from majoritarian politics." What would the struggle over a more democratic constitution look like, and how might it take place in a less "juristocratic" political order?

A question worth posing is whether a domestic reading of "juristocracy" may be overly alarmist. The Hirschl study stressed the importance of comparative constitutional investigation and focused on Canada, Israel, New Zealand, and South Africa to make the case for mechanisms of judicial empowerment. While *Towards Juristoracy* considers important issues for the American context, such as constitutionalization, the judicial interpretation of rights, and the judicialization of mega-politics, doesn't the Court in the U.S. faces major obstacles to the judicialization of politics even if it tries? Wouldn't the arguments that the Court is a great deal weaker than it apparently wants to be tend to support this idea? I do not claim that these obstacles are unique to the United States; I simply refrain from speculating whether similar obstacles exist in states where the institutions and traditions of civil society differ.

Perhaps if we think about how to locate the Court in an interpretive community in the United States, the "juristocracy" problem might diminish. The Supreme Court is surely not the final arbiter in struggles over the meaning of constitutional principles and

[16] Cass R. Sunstein, *One Case at a Time*, 212.

rights. Recent scholarship has had a great deal to say about why and how courts fail to monopolize the Constitution's meaning. Mobilized activists, interests groups, lawyers, legal scholars, social scientists, legislators, administrative officials, other political figures, journalists and editors, and maybe now even bloggers play important roles and framing—and reframing—constitutional issues. A jurisprudential model that focuses so exclusively on the Court's interpretation of constitutional meaning incorrectly neglects the ways in which constitutional meanings are actually and actively constructed by other actors in the political process. There is a great deal of "elaboration of constitutional meaning outside the courts."[17] According to Keith Whittington, "[t]he jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text."[18] Judicial activism and judicial attempts to foreclose constitutional questions tend to leave unresolved many issues at stake in political disputes; both historically and in modern contexts, "public debate over constitutional meaning has been a significant component of developing the constructions."[19] If the Court cannot monopolize the Constitution's meaning or foreclose avenues of deliberation elsewhere, I would suggest there is still room for considerable creativity in the construction of constitutional meanings.

In some periods of Constitutional contestation, the relationship between the Court and other members of the interpretive community could be characterized as an iterative process. Interest groups fund particular cases to get questions before the federal courts;

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[17] Keith E. Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1997), 207.

[18] Whittington, *Constitutional Construction*, 5.

[19] Whittington, *Constitutional Construction*, 226.

they even search for appropriate parties to gain standing.[20] As Charles Epp has argued, the availability of resources for litigation determines the sustained attention particular issue areas receive in Court.[21] Groups, unhappy with a particular Court decision, press statutory reforms upon Congress or upon state legislatures. Legislative responses help determine the kind of cases that come to the Court. The Court then engages in statutory and constitutional construction that leads to criticism by activist reformers and policy makers, including members of the legal community, followed by a new round of proposals and responses by institutional actors including the Court. Activists press particular understandings and expectations about constitutional language and values upon the Court, and doctrinal developments within the Court both reshape the efforts and affect the mobilization language and strategies of activists.[22]

Moreover, if the Court sometimes appears to settle constitutional matters for a time (e.g., the New Deal Court's reading of substantial effects and aggregate effects on interstate commerce), the Court also frequently unsettles constitutional matters. Some moments are riper than are others for those outside the Court to contest particular constitutional meanings. Opportunities may come and go like "policy windows" that policy entrepreneurs attempt to exploit when a problem is recognized, a solution is

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[20] Tom Keck, in his contribution to Kersch and Kahn, ed., *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, forthcoming), explores the process of bringing *Grutter* and *Gratz* to the Supreme Court, including the recruitment of litigants by the Center for Individual Freedom.

[21] Charles R. Epp, "External Pressure and the Supreme Court's Agenda," in *Supreme Court Decision Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 255-79. Of course there are, then, "message skews" in what kinds of groups and claims have access to the Court.

[22] I attempt to explore some of these processes and feedback loops with regard to deliberation about the meaning of Native American citizenship in "Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s-1930s," in Kahn and Kersch, eds., *The Supreme Court and American Political Development*, forthcoming.

developed in the policy community, and the opportunity for policy change is present. These "windows" may stay open only for short periods.[23] If periods of negotiation of constitutional meanings can be described in terms of dialogue or iteration, the allocation of attention to issues and problems on the Court may nevertheless tend to be more episodic than incremental. Frameworks through which issues are analyzed in the Court may, somewhat like Congress, alternate between periods of relative stability and rapid change, as Baumgartner and Jones recognize that "the American political system lurches from one point of apparent equilibrium to another."[24] This approach would seem to comport with Whittington's analysis of the "punctuated character of much of constitutional development," when political pressures and preexisting institutions, norms and settlements that hitherto contained them reach an untenable point.[25]

Although I have borrowed from literature describing the patterning of other American political institutions, it is of course the case that the Court is not an institution that simply resembles or mirrors others. Historical institutionalists Karen Orren and Stephen Skowronek posit the relative independence of different institutional formations, born of different historical origins and tending to different patterns of development. Engagements throughout the polity bring together different norms embedded in different institutions; "at any moment in time several different sets of rules and norms are likely to

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[23] John W. Kingdon, *Agendas, Alternatives, and Public Policies* (Boston: Little, Brown, 1984), especially 173-218.

[24] Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago and London: University of Chicago Press, 1993), 12.

[25] Whittington, *Constitutional Constructions*, 216.

be operating simultaneously."[26] If, as a result, relations among political institutions are likely to be in tension, political actors may exploit tensions and contradictions that exist because of these institutional mismatches, and one can see the potential for creativity by actors of all sorts.[27] Intercurrence specifies "a political universe that is inherently open, dynamic, and contested, where existing norms and collective projects, of varying degrees of permanence are buffeted against one another as a normal condition."[28]

The Court as an institution has its own norms, dynamics, and institutional history; it has doctrine, rules, precedents, metaphors, and language peculiar to it. But if precedents and stories about case law trajectories establish the terrain on which contestants will frame their complaints, these precedents and stories are constantly reworked. Litigants bring their own understandings about law when they come to court, and this 'contact' plays a vital role in keeping law in touch with the social order in which it is embedded. As Ron Kahn has insisted, the Court brings the outside world into its decision-making in more ways than taking cognizance of events and facts.[29]

Now if the Court is located in the political system and in the history of American political development in some of these ways, it is harder to be quite so juricentric. And if we see the involvement of other institutions and actors in the shaping of the Constitution's meaning, a domestic version of "juristocracy" doesn't carry quite as much

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[26] Karen Orren and Stephen Skowronek, "Institutions and Intercurrence: Theory Building in the Fullness of Time," 111-12. In Ian Shapiro and Russell Hardin, eds., *Political Order. Nomos* 38 (New York and London: New York University Press, 1996).

[27] Orren and Skowronek, "In Search of Political Development," 39. In David F. Ericson and Louisa Bertch Green, eds., *The Liberal Tradition in American Politics* (New York and London: Routledge, 1999).

[28] Orren and Skowronek, "Institutions and Intercurrence," 139.

[29] Ronald Kahn, "Institutional Norms and the Historical Development of Supreme Court Politics: Changing 'Social Facts' and Doctrinal Development," 43-59 in Howard Gillman and Cornell W. Clayton, eds., *The Supreme Court in American Politics: New Institutionalist Interpretations.* (Lawrence: University Press of Kansas, 1999).

weight. Does juristocracy claim too much? Is it we who are being a bit too court-centered in our analysis of constitutional dynamics?

There is certainly reason to be concerned that some political issues are being over-constitutionalized. This may sometimes tend to "freeze" the language with which we think about questions of values and impoverish our political debate.[30] There is reason to be concerned if other actors in the political system are becoming too deferential to the judiciary. There is reason to pay close attention to the ways in which international opinion, treaties, and human rights discourses are reshaping constitutional reasoning and bringing the world closer together. I do not wish to be Pangloss or Polyanna, but I am not prepared to conclude that we live in a juristocracy. So I return to an earlier question about some of the additional reasons this question of juristocracy—along with the demotion of *Marbury*—has such resonance for progressives. To what extent is this a conversation about the ways in which the nation-state is being dismantled from one side and superseded from another? If we cannot hope to count on the constitutional order from the era of statebuilding, why count on the Court?

[30] This is a claim made by Mary Ann Glendon. *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).