"Informal Thoughts: SCOTUS, Active Judicial Policy-Making, Uncertainty, and Pragmatism"

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## INTRODUCTION

The goal of this especially "informal thought-piece" is to present a self-proclaimed pragmatist's (partial) account of why a deep uncertainty about the normative implications of SCOTUS's contemporary active policy-making is justified. The sources for the frame of this account are five-fold: the political model for understanding Supreme Court decisions (i.e., analysis of SCOTUS and its decisions by focusing primarily on its role as a political institution within both its ambient and more distant political environment); the constitutive approach of the New Institutionalism concerned with how legal institutions and the law shape and are shaped by a multiplicity of inherently ambiguous and indeterminate factors (McCann 1999); social scientific findings about SCOTUS's capacity to influence public opinion; (liberal) extrapolations from recent comparative studies of the political implications of judicial active policy-making "juristocracy" (Hirschl 2004), "judicialization" or "juridification" (Koopmans 2003), and "legalization" of politics (Ginsburg 2003); and a "Weberian" sensibility that anticipates that one should only expect "shafts of light" when it comes to drawing connections between empirical and normative claims about politics because those connections are inevitably multifaceted and mischievously complicated, if not downright indeterminate.

In ready self-defense, I admit that this brief "thought-piece" about active judicial policy-making is going to be so full of qualifications, and logical twists and turns over tentative claims, that the sum of it all will not be a "forest" but lots of trees; or worse yet, branches and twigs. But I have to think that eventually all of what follows will come together because I am committed to fulfilling the stated intentions of the following proposal for "Leaving the Legal Model Behind: The Consequences of a Pragmatic Analysis of Judicial Power and Review in the U.S.?"

This paper is an initial attempt to address the somewhat shopworn but still compelling question whether the exercise of judicial power and review under-

mines aspirations for representative democracy. It attempts to get some measure beyond the shopworn by promoting the strengths, yet acknowledging the weaknesses, of a pragmatic approach to judicial power and review.

The version of pragmatism at work in this paper is a meld of insights from the New Institutionalism and Constitutionalism; the pragmatism and skepticism of Stanley Fish and Richard Posner; the empirical work of political scientists Tom Ginsburg, Ron Hirschl, and Valerie Hoekstra; and my own work on neglected policies and agnostic skepticism. The version of pragmatism at work in this paper buttresses the premise that theory and principle are relevant only to the extent that they are framed by contingent social fact and consequentialist considerations. It also challenges the premise that legal model materials in general, and the U.S. Constitution in particular, ought, necessarily, to be the central consideration for understanding how judicial power and judicial review relate to democratic aspirations. Put slightly differently, the version of pragmatism at work in this paper gives greater weight to political and empirical considerations (rather than legal model considerations) in addressing judicial power, review, and aspirations for a representative democracy

However, in order to acknowledge a weakness of this version of pragmatism---its trouble treating ideals as aspirations on their own, rather than in consequentialist ones—I offer the conclusion to give greater weight to political and empirical, rather than legal model considerations, in hypothetical and qualified terms. These terms are associated with a social scientific skepticism about the relationship between empirical considerations and ideals as aspirations.

# BACKGROUND CONSIDERATIONS AND EXTRAPOLATIONS

A fortuitous accident led me to recent political science studies in the sub-field of comparative legal studies. These studies in "juristocracy," "judicialization," and the "legalization" of politics renewed interests in what heretofore I had considered to be relatively shopworn issues about the origins, nature, and significance of active judicial policy making. One of the things that impresses me about these various treatments of the global trend toward active judicial policy-making (and the relocation of significant measures of political power, prestige, deference, and policy-formation away from representative institutions) is the intellectual rich range of competing explanatory hypotheses, empirical observations, and data across a range of socio-economic, cultural, political, psychological, and institutional variables.

Colored by pragmatist inclinations (and an inclination to "problematize" everything), the conflicting and cross-cutting methodological and substantive claims in these comparative legal studies have drawn me back into thinking about conceptualizing empirical observations and data about active judicial-policymaking by SCOTUS on the one hand, and normative questions about aspirations for representative democracy, on the other hand. (The use the term "aspirations for representative democracy" to signal my the empirical and normative complications that arise when configuring relationships between what law making authorities actually do and an understanding of the actual distribution of power in the polity, the nature of political conflict, and the interests represented, excluded, or cut off in and by political processes.)

Extrapolating from these conflicting and cross-cutting methodological and substantive claims about the origins, nature, and significance of active judicial policy has led me to rethink what should count as adequate conceptualizations of active judicial policy-making in regard to SCOTUS (its nature and significance in particular). To illustrate, in characterizing active judicial policy-making, how much relative weight should be given to the following (not exhaustive and altogether conventional) list of factors: whether decisions are at odds with dominant national or state political coalitions (granted longitudinal considerations of electoral alignments and disalignments); the number and/or frequency of federal and state statutes struck as unconstitutional (a macro-level consideration); whether decisions are based on "unenumerated" rather enumerated rights (a micro-level consideration); whether decisions are at odds with precedent (a micro-level consideration, and obviously a hard one to pin down because of jurisprudential disagreements); whether decisions are principled (another micro-level consideration that is a matter of deep jurisprudential controversy); and whether judicial remedies are broad or narrow (ditto). This list is not meant to suggest that no headway has been made in constructing "adequate" measures of active judicial policy-making. Neither is it intended to suggest that adequate measure must necessarily include all the macro and micro-level factors (judicial power, review, modes of constitutionalism, and the role of courts) indicated above. Rather it signals, for the sake of heuristic exercise, the groundwork for my asserting that what should count as active judicial policy-making is more complicated and even ambiguous than I expected.

Having, for the sake of argument, put down the groundwork for my "problematizing" active judicial policy-making, I find good reason to do the same thing for democratic aspirations. When I follow the legal model for understanding SCOTUS's decisions and opinions (e.g., lawyerly materials indicating what makes a court the COURT and its decisions "consistent," "coherent." legitimate," "persuasive," "wise," etc.), it appears to me that "democratic aspirations" become a kind of residual category. That is to say, the "counter-majoritarian" (tensions and conflicts with democratic aspirations of the majority) is especially acute when decisions and opinions are found to be "unjustified" because they transgress some normative facet of legal reasoning---be it some characterization of judicial duty, constitutionalism, the rule of law, doctrinal analysis, and the like. It goes without saying more that each of these normative facets is interpretable in multiple ways. Each facet can be weighed variously in constituting what should count as "unjustified" adjudication, and that, in turn, makes what counts as the "counter-majoritarian difficulty" indeterminate. This indeterminacy is intensified when political science concerns about what should count as democratic aspirations are brought into play. (In January, 2004 the "LawCourts listserv, lawcourts-l@usc.edu, had an exchange between lawyers and political scientists which could be used to make this point).

In a more social scientific frame of mind I am reminded that there are two dominant indicators for democratic aspirations which are independent of any facets of normative legal reasoning for what should count as democratic aspirations: 1) the persistence of dominant national and state electoral coalitions and their policies and 2) public opinion about Supreme Court (as an institution) and its (specific) decisions. In regard to (1), decisions and opinions that run counter to (1) are "counter-majoritarian regardless of normative considerations. With respect to the first indicator, it is a commonplace social scientific finding that SCOTUS is to be understood primarily, if not fundamentally, as a legitimating institution in US politics in that it usually sustains the constitutionality of policies of elected branches of governments (Adamany and Meinhol 2003: 372). So sometimes, in my more social scientific frame of mind, I am tempted to ignore all the legal model concerns about legitimate adjudication. This allows me to flirt with the idea that active judicial policy-making in conflict with democratic aspirations is, to a considerable extent, much ado about not very much.

Three things hold me back from taking this flirtation with the idea that SCOTUS juristocracy is not too serious problem. Firstly, when drawing implications from social science indicators, the devils are always in the complications, controversies, and ambiguities. If one takes into account conceptual and empirical questions about whether lawmaking authorities' policies are a good indicator of democratic aspirations (questions such as linkages, or the lack of them, between electoral coalitions, and "majority will," or the extent to which electoral victories are more a product of personalities and images than the "interests" of the "majority"), then how confident can one be in saying that SCOTUS's juristocracy is a serious problem?

If one is looking to run uncertainties into the ground then there are few better places to look than empirical studies of that second indicator, SCOTUS's impact on public opinion. Yet, to complicate matters, let's add to the mix the idea, drawn from comparative studies of juristocracy (especially Hirsch 2003) and the constitutive version of the New Institutionalism (McCann 1999), that active judicial policy-making is, in actuality, a form of "hegemony" (to be specified below). As for the first element in

the mix, there is some "relatively new but still tentative evidence that the Court might *influence* public acceptance of policy" (Adamany and Meinhol 2003: 372, italics added; also (Hoekstra 2003). If SCOTUS can influence public acceptance of public policy then, to that extent, it is logically and conceptually possible to say that there is no conflict between active judicial policy-making because SCOTUS is actually shaping democratic aspirations; moreover, it would be shaping democratic aspirations regardless of whether it is legitimating or challenging law making authorities (however conceived, at either at the macro or micro-level)!

This is, of course, something that has mischievous possibilities, but making an argument for it and then finding social science evidence to back it up is not easy. Nevertheless, the possibility of SCOTUS's shaping democratic aspirations and being hegemonic raises the specter that active judicial policy-making is [not much ado about not very much.] Comparative studies in juristocracy have made some remarkable contributions to interpretive and social scientific progress in regard to thinking about hegemony. Here I am extrapolating, but the "hegemonic preservation thesis" about the origins, nature, and significance of "juristocracy" (Hirschl 2004: 11-16, 42-48) leads me to think about the extent to which *both* the legitimization of and challenges to lawmaking authorities (macro and micro) are a product of strategic efforts by political and economic elites, their government cohorts, and judicial elites to shape public opinion according to their own agendas (Hirschl 2004: 43). This coincides nicely with the idea drawn from the New Institutionalism that SCOTUS's decisions generate some measure of "consent and induce(s) acquiescence in status quo power relations" (McCann 1999: 88, embedded citation omitted).

Another thought, this one extrapolating from the "insurance model" thesis about the origin of judicial review (Ginsburg 2003: 25-28, 248), is that, in the context of persistent uncertainty about electoral and party competition (or disalignment?), SCOTUS's legitimization of and challenge to

lawmaking authorities (at macro and micro levels) shape public opinion so as to maximize public perceptions that all policies are subject to challenge, when in fact [they] maintain the broader boundaries of the status quo. Thus, active judicial policy-making could provide competing hegemonic elites with some measure of indemnity from becoming a "permanent minority."

Thinking like this leads to trying to answer difficult social scientific questions about the extent to which SCOTUS actually persuades citizens to endorse opinions that become part of "democratic aspirations," or leads them to doubt, obscure, and even rule out other aspirations (McCann 1999: 89). These questions are difficult to answer at a social scientific level because, to date, it has been hard to say precisely what the impact of active judicial policy-making (either supporting or opposing law-making authorities) on the public is. While studies do confirm "general congruence between Supreme Court policies of all kinds and public opinion," they cannot confirm that SCOTUS acts democratically or undemocratically (Adamany and Meinhol 2003: 374) when it supports or challenges law-making authorities. Corroborative evidence is hard to pin down because the inter-relationships among the multidimensional factors that go into characterizing the Court's influence on attitudes and attitude change, are complicated and therefore have been marked by operational and measurement difficulties. Granted that, whatever evidence there is for SCOTUS's shaping public opinion -- whether having "created support or opposition for its policies…" (Hoekstra 2003: 89) -- is "slight" and "inconsistent" (Hoekstra 2003: 151, 154).

The adjectives "slight" and 'inconsistent' are not unjustifiably understated. According to the source I am depending upon here, there are data that suggest the Court's efficaciousness for shaping public opinion might vary in relation to citizens' education and political engagement: "the frequency with which people pay attention to politics and media, thereby increasing their exposure to information about the Court's decisions, increased the Court's ability to persuade" (Hoekstra 2003: 152). On the

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other hand, "there was also some evidence that [people] with lower levels of education were swayed more by ... new information than those with higher levels of education" (Hoekstra 2003: 152). Interdependent with that, there is some evidence that the Court's capacity to shape attitudes may vary relative to whether a case is "highly charged" or not (Hoekstra 2003: 152) because "when people learn about Court cases---and some mechanism triggers an identification with the individuals or issues in the case...they are more likely to seek out information and to feel strongly about the issues (Hoekstra 2003: 85).

Data of this kind suggest prudence in assigning the Supreme Court a hegemonic role shaping democratic aspirations. In fact, there is some evidence that SCOTUS might have some difficulties in fulfilling a hegemonic role, especially among the educated and politically engaged! Some studies appear to indicate the possibility that

those who are able and motivated to spend time thinking about an issue are actually less likely to be persuaded than those who hear about [decisions] but spend less time thinking about an issue. Thinking through the issue, or having extensive prior information, enables individuals to generate counterarguments. Those who are less able and less motivated, but who still manage to hear about the information, are more likely to be persuaded. As important in the persuasion process is how the individual feels about the source of the message. Simply put, those with greater confidence in the source of the message (here, the Court) are more likely to be persuaded than those with less confidence in the constitution (Hokestra 2003: 93).

None of this, by the way, is incompatible with the (weaker) idea of hegemony, which does not presume that control over ideas and the communication of ideas is all encompassing and that it is impossible for some citizens and groups (for a variety of reasons) to escape it (Litowitz 2000). Moreover, it is usually safer to say that the jury is still out (Hokestra 2003: 153) on the verdict over the extent to which SCOTUS can shape public aspirations and therefore has the capacity to be hegemonic as a "persuasive social actor" (Hoekstra 2003: 153).

## **BACK TO PRAGMATISM: THE BIND**

How to proceed from here? As a self-proclaimed pragmatist, to proceed requires focusing on the "results" of SCOTUS 's active policy-making. Since the "results" of active judicial policy-making appear to be uncertain, one question that arises is: "What is required to make SCOTUS an efficacious agent for shaping democratic aspirations?" To answer that question I am tempted (in part to be provocative) to say, "leave the legal model behind." That is because it is arguable that the legal model presumes what needs to be demonstrated, which is that SCOTUS is an efficacious agent for its ideas. I suppose it is open to question, but my understanding of the legal model is that it is deeply committed to the idea that SCOTUS is, and ought to be, a putative civic educator (Rostow 1952); or a "forum of principle" (Dworkin 1986); or a trustee for fundamental legal and political principles (Bork 1990); and/or that should engage the polity in an on-going conversation about "the nation we are becoming" (Tribe and Dorf 1991: 31, 110) (Strauber 2002: 16-17).

From a pragmatic and results-oriented perspective, legal model commitments appear to be at odds with empirical uncertainties about SCOTUS as an efficaciousness persuasive actor front in center. Legal model analysis is concerned about different "results": whether decisions and opinions fulfill those normative jurisprudential standards for principled decision-making, legitimate judicial capacity and functions, appropriate means of constitutional interpretation and the rest of it. As for the business about hegemony, it is arguable to say that from the legal model SCOTUS *is* a hegemonic institution when it fails to fulfill those standards, regardless of whether it is an efficacious persuasive agent or not. That argument has its place, but not in a pragmatist's account of SCOTUS, because it puts, in effect, the normative horse before the cart of results (Hirschl 2004: 3). (As an aside, the same thing might be said for some political model approaches, such as the constitutive branch of the New Institutionalism

(McCann 1999: 88-91 which tends to frame SCOTUS as, to some significant degree, a hegemonic institution).

If the idea is to put results first, then normative issues about active judicial policy-making are only a consequence of empirical assessments of SCOTUS'S institutional and persuasive capacities. Then it would seem to follow that it is instrumentalism and consequentialism all the way down (Posner 2003; Fish 1999). Some of what that looks like turns those legal model normative considerations into rhetorical and strategic ones (Fish 1999: 222). What matters then is whether SCOTUS is a "winner" (at being persuasive). If it is not a winner, then it cannot be either a democratic enhancing or oligarchic institution (or some admixture of both). It should go without saying that this does not mean that "anything goes" for what constitutes "winning" because of factors like lawyers' socialization to legal reasoning; systemic expectations in and outside of courts about the range of 'legitimate" legal rhetorics; and cultural factors such as the "myth of the court." All of these constrain what can make SCOTUS a "winner."

Also, whether SCOTUS can be a winner or not in relation to public opinion is partly determined by empirical factors related to macro-level considerations beyond the control of SCOTUS. For example, the political dominance and efficaciousness of other institutions; micro-level considerations such as the salience of specific issues and the intensity of political conflict associated with them; and unanticipated consequences of its decisions among elites and mass publics. The point is that pragmatism can lead to considerations that move away from a SCOTUS-centered approach to legitimization and hegemony. To really stretch out, instrumentalism and consequentialism can displace a SCOTUS-centered approach by raising the question whether it is a "good" or "bad" thing for SCOTUS to shape public opinion, either in conformity or at odds with democratic aspirations, when those aspirations are an expression of mass publics that political science characteristically finds to be generally apathetic about political

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participation; or not very well informed about politics; or distrustful of political institutions and the political processes; or more engaged in private than public life! This last statement is a classic illustration of what instrumentalism and consequentialism all the way down does to ideals: it recasts them from their conventional dichotomous frame--democracy enhancing ("good" aspirations) versus hegemony ("bad" aspirations)--- by raising social fact and consequentialist questions that breed a skepticism about whether what appears to be "good" in a normative sense is not so good in actual, practical terms, and vice-versa.

Critics of pragmatism will hasten to jump in at this juncture to point up that this line of thinking exemplifies what is wrong with instrumentalism and consequentialism: it leads to saying strange, or even obnoxious things, to ideals as aspirations. And critics of pragmatism are on to something important. Pragmatism all the way down is antagonistic to ideals as aspirations; it turns them into rhetorical or strategic considerations; and we conventionally think about ideals as aspirations as independent of rhetorical or strategic considerations (Strauber 2003; Smiley 1999). Unless one has the courage of one's pragmatist convictions of instrumentalism and consequentialism all the way down, it looks like an awfully big step to abandon legal model considerations to rhetorical or strategic considerations.

So, unwilling to abandon pragmatism, but inclined to be pragmatic about the uncertainties associated with SCOTUS as a persuasive actor and issues of legitimization and hegemony, I am left with a deep uncertainty about the normative implications arising from SCOTUS's capacity as an active policy-maker. (I would like to think that the difficulties that pragmatism confronts carry over to some extent to legal and political model considerations; but that is another story.) In another place, I take some qualified solace in the response that there are no "right" answers in situations like these, just 'better' qualified ones, and even those suffer from deeply troubling consequences that undermine their

credibility. These troubling consequences would have to be framed in reference to otherwise neglected

considerations of multi-faceted, hard -to-pin-down, and perhaps incommensurable fact and value

considerations correlated with competing answers to policy questions" (Strauber 2003: 511). What is

next is showing what that means in regard to the normative implications arising from uncertainties

regarding SCOTUS's capacity as an active policy-maker

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