Schmooze Thoughts: Towards Understanding the Merits of Juristocracy in Comparison with Other Political Institutions

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With rare exceptions, political scientists have been consistently skeptical about the notion that U.S. courts in the United States can in any meaningful way act independently from the other government branches.[1] Instead, courts are seen as responding to both explicit and subtle efforts by elected officials to influence their behavior. Judges, mindful both of those who have nominated them and those who have veto power over them, make decisions strategically instead of following their own normative ideals.[2] When courts are active in policy making, and particularly when they intervene in legislative matters through the use of judicial review, political scientists have increasingly argued that they act with at least implicit support from elected

[1] Recent exceptions include Malcolm M. Feeley and Edward L. Ruben, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*, (New York: Cambridge University Press, 1998); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, (Chicago: University of Chicago Press, 1994).

[2] Lee Epstein and Jack Knight, *The Choices Justices Make*, (Washington D.C.: CQ Press, 1997); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (New York: Cambridge University Press, 2002); William N. Eskridge, Jr. and John Ferejohn, "Politics, Interpretation, and the Rule of Law," in Ian Shapiro, ed., Nomos: The Rule of Law 26: 265 (1994).

representatives who wish to deflect or entrench issues that are particularly controversial and divisive.[3] More common than judicial review is the tendency of legislators to pass statutes loaded with provisions for court interpretation, enforcement and policy-making.[4] When courts venture beyond the opportunities given them by legislators, the general consensus is that they are failures, "hollow hopes," with no way to enforce their edicts, and eventually return in line with the dominant coalition.[5] In recent years, a number of law professors—perhaps motivated by a conservative Supreme Court—have joined the chorus of skepticism, and at times down right opposition, to judicial activism.[6]

This view of American juristocracy is well-warranted and the scholarship has resulted in a far more nuanced understanding of court behavior. In fact, the systematic and comprehensive nature of this research has rendered rather shallow any argument that courts act as independent determinants of legal truths. Equally ample research has shown the ineffectiveness of court efforts at policy-making when they act entirely alone. So any

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[3] Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *American Political Science Review* 96 (2002), 511-24; Mark A. Graber, "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993), 35-73; Martin Shapiro, "Fathers and Sons: The Court, The Commentators, and the Search for Values," in Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* (New Haven: Yale University Press, 1983).

[4] Robert A. Kagan, *Adversarial Legalism: The American Way of Law*, (Cambridge: Harvard University Press, 2003); George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*, (New York: Cambridge University Press, 2003); R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights*, (Washington D.C.: Brookings Institute, 1994).

[5] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker," *Journal of Public Law* 6:279 (1957); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

[6] Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999). Also see, Mark Tushnet, *Taking the Constitution Away from the Courts*, (Princeton: Princeton University Press, 2000); Larry Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100: 215 (2000); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (New York: Oxford University Press, 2004). Of course, there have always been law professors with these views: see Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54:543 (1954).

criticisms that I have of this literature is measured. However, in this short essay, I will offer two qualifications to what has become the defining political scientist understanding—and increasingly a popular understanding among law professors—of judicial politics. First, there is a tendency among those who criticize court activism to provide a positive yet entirely undeveloped notion of American democracy radiating in an uncomplicated manner from the other institutions of government. This assumption that elected officials are more legitimate representatives of the people's will ignores the many ways in which elected branches are far from representative, both for the well-organized and the demobilized. The form that democracy takes in the elected branches must be carefully examined and defended, not casually assumed or defined only in a crude formalistic manner that votes and elections necessarily lead to democracy and representation. Closer inspection of democratic representation deeply problematizes the role played by legislators, not just in the manner that the Supreme Court first responded to in *Carolene Products*, or the critiques later offered by Owen Fiss, John Hart Ely, and many others. Its not that Congress has become captive of southern segregationists or iron triangles, it is that the everyday form of activity by legislators promotes some forms of opportunities and denies others. Even when acting "democratically", legislators do not "represent" all sides equally, particularly those groups most in need of government aid.

So, to twist Ran Hirschl's demand for comparative study of courts, we also need to do more comparative studies of courts in comparison with the effectiveness of other political branches.[7] By looking at American democracy more critically, it becomes clear that all of our political institutions are implicated in their failure to promote the rights of

[7] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, (Cambridge: Harvard University Press, 2004).

the disadvantaged, the worker, the individual, and those most in need. The record of courts is no more checkered than any other branch, and court activism is credited for reforming prisons, taking on the tobacco industry, creating employee rights (if not labor rights), and protecting certain civil rights and liberties often from far more reactionary elected officials.[8]

Once we see courts as just one vehicle among many in the struggle to promote rights and representation, it is also worth taking a second look at what services courts can uniquely provide. Without in any way claiming that courts provide less hollow hopes than the legislative branches of government, the institution does provide certain opportunities that often do not exist within the elected branches. I say this with an immediate qualification: all government institutions and the actors within them are dynamic and malleable forces that participate in political combat in the effort to achieve goals. As such, to speak of institutional capacities and the opportunities provided by them to political activists is to recognize the historical contingency of such discussion and to recognize that no institution has absolute qualities or powers that exist independent of political combat.[9] Given this caveat, courts provide certain political opportunities that have been fairly durable; as institutions, they provide rules and structures that can be meaningfully autonomous, and provide an opportunity for certain types of political behavior.

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[8] See Feeley and Rubin, *ibid*; McCann, *ibid*; Martha A. Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics*; and Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85," *American Political Science Review* 97:483 (2003).

[9] Keith E. Whittington, *Constitutional Constructions: Divided Power and Constitutional Meaning*, (Cambridge: Harvard University Press, 1999).

Complicating Democracy: Scrutiny of Elected Official Behavior

Most scholars who critique the expansion of juristocracy in the United States rely on an assumption usually implicit and never fully developed: that the elected branches will provide these opportunities if democratically desired. The argument, however, rarely goes beyond formalistic notions of democracy—people can vote for legislators, they cannot vote for judges, hence legislators are more democratic. In the last few decades, however, election and legislative scholars who scrutinize the role of institutions, rules, and incentives, have provided a far more complicated view of representation. While some end up concluding that American democracy works, while others are more critical, all of these scholars would agree that the right to vote is only the beginning of the discussion of understanding representation. We need to spend more time, therefore, examining exactly what it means for democracy to be representative and compare the opportunities and capacities of different branches of government.

We know, for instance, that courts have been ineffective protectors of the rights of laborers. But what success has elected politics offered in its stead? While some notable scholars blame courts for the downfall of unions, at least an equal number blame the legislative efforts—either from the legislation passed during the Truman and Eisenhower years, or the efforts of the Reagan Administration to make the National Labor Relations Board more conservative.[10] My own work on this issue argues that it is a bit of both. Courts, in many ways, made a mess of labor union rights when they entered into NLRA

[10] For the argument that labor law's decline was a product of court decisions, see Karl Klare, "Judicial Deradicalization," *Minnesota Law Review* 62: 265 (1978). For the argument that it was due more to the actions of elected officials, see James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994*, (Philadelphia: Temple University Press, 1995).

matters to promote civil rights during the 1960s and 70s, particularly by failing to recognize that destroying unions financially would lead to a decline of job opportunities for all workers of all races and sexes.[11] At the same time, courts entered into the fray because elected officials had created laws that allowed unions to discriminate on the basis of race. When elected officials attempted to remedy this in 1964 with the passage of Title VII, they purposely denied the EEOC enforcement powers and purposely gave unions loopholes such as seniority protections and making it difficult for individuals to prove discrimination without direct intent. So, civil rights activists were left with a choice of bad alternatives—and by every indication, most civil rights leaders recognized the problems of both solutions and participated ambivalently in court actions only after repeated failures with the elected branches.[12]

We also know that courts have historically tried to stay out of legislative and electoral activities based on the principle that elected officials are more legitimate sources for adjudicating democratic representation. But knowing that parties need to get elected to win office does not, contrary to the recent arguments of Nathaniel Persily and Larry Kramer and even certain members of the Supreme Court, mean that they are by definition better representatives or even more democratic than courts.[13] For, as skeptical as court scholars tend to be of their institution's promotion of rights, legislative scholars tend to be even more skeptical of theirs. Even a quick look at party scholarship (e.g., just read

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[11] Paul Frymer, "Race, Labor, and the Twentieth-Century American State," *Politics and Society* 32: 475 (2004).

[12] *Ibid*.

[13] Nathaniel Persily, "Toward a Functional Defense of Political Party Autonomy," *N.Y.U. Law Review* 76: 750 (2001); Larry Kramer, Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100:215 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

Anthony Downs, hardly a radical democrat) will show that not all votes count, that not all voters are represented, and that elected officials will often act in ways that deny democracy, particularly to those who are most in need of it. Any course on election law, moreover, will take students through a list of problems from redistricting to voting rights denials to campaign finance to the ways in which the two party system denies opportunities to third voices. And of course the Supreme Court first entered into the political thicket in response to the failure of elected officials, both nationally and in the South, to take civil and voting rights seriously and promote equal representation.[14]

Beyond the explicit ways in which legislators often deny rights and representation to specific groups, they also act in a day-to-day manner that makes democracy problematic and complicated. Congress scholars, for instance, have shown repeatedly that the elected incentives of legislators drive members to pass legislation that is full of grandeur and symbolism, and equally devoid of details.[15] Congressmembers are not oriented towards technical issues of legislation because they are not elected on such technicalities; nor are they interested much in the enforcement of policy. They respond to emergencies that are alerted to them by organized interests who find flaws in the enforcement of the policy—they do not "patrol" and make sure enforcement power is working.[16] The passage of symbolic legislation allows legislators to make broad appeals to an only half-interested national public while providing loopholes to electorally important interests who pay close attention to legislation and who often resist the public

[14] Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process, *Stanford Law Review* 50: 643 (1998).

[15] See David R. Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974).

[16] Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* (1984).

policy. Recognizing the costs of not responding to "concentrated" interests—groups that have a direct financial stake in the legislation—members have created a variety of ways in which they appease public matters with symbolic efforts, all while protecting those who pay attention and (often) are most powerful. Congress may very well have the power to make policy change; more typical, however, their legislative behavior creates mandates filled with loopholes and hollow enforcement policies so that those who do pay attention (i.e., lobbyists) will be happy.

This does not mean that corporate interests never lose, but that there are long-term structural reasons why they win with great frequency. "Public interests"—i.e., those that benefit large numbers of people such as clean air or civil rights—are consistently hampered by collective action problems. Because gains in civil rights will benefit all members of the relevant group regardless of whether they participate, people have an incentive to "free ride" and not donate money or time to the organization if they can benefit without paying any costs.[17] Moreover, many of the problems that people of a group face with a concern such as clean air and civil rights are relatively diffuse. People can get by day to day without it. In contrast, "concentrated" business interests have much more direct financial incentives to spend money on legislative battles as often millions, if not billions, of dollars are on the line with decisions made over tax and trade laws.[18] When one's livelihood is on the line, people will prioritize and fight with all their resources if their economic survival is threatened by potential legislation. It is for this

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[17] See Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1971); and Jane Mansbridge, *Why We Lost the ERA?* (Chicago: University of Chicago Press, 1986).

[18] James Q. Wilson, *Political Organizations* (Princeton: Princeton University Press, 1995).

reason that one way in which public interests try to gain power in legislative battles is to align their issues with a concentrated interest. Hence, President Clinton's attempts to make public health care reform economically advantageous to H.M.O.'s, or civil rights groups emphasizing the financial benefits provided to trial lawyers.[19] These strategies bring powerful interests into the legislative battle on the side of public interests to equalize the power dynamic.

Moreover, congressmembers act strategically within the context of institutional rules and procedures, enabling them to both create and maneuver within often multiple political agendas and in a manner that leads to the representation of interests independent of those who elected them. Committee and floor rules of both houses offer members opportunities to hide from their constituents in order to pursue other goals, many of them well-meaning—important but unpopular policy, helping their party on an issue that their voters oppose, etc. But again, these types of dynamics must be examined as opposed to being understood formalistically. Take, for example, the critique that Larry Kramer makes of judicial review—updating Herbert Wechsler's argument that courts need not protect state interests because Congress does so automatically through its over-representation of small states in the Senate, through the committee system, and so forth. Kramer argues that courts should stay out of congressional decision-making because Congress is more democratic and more representative of state interests. Formalistically, this is self-evident. Substantively, this is problematic for a number of reasons that at least need to be explored in detail. Campaign spending, for example, is widely considered to be essential for winning elections. It is also widely assumed, though admittedly

[19] See Theda Skocpol, *Boomerang* (New York: WW Norton, 1997).

contested in the political science literature, that winning candidates are influenced by those who donate money. Yet in the House of Representatives, based on 2000 election campaign data, more than 25 percent of members and 25 percent of committee chairs received a majority of their campaign contributions from outside of their state. In the Senate, more than a third of the members received money from out of state.[20]

Moreover, congressional rules allowed members to avoid representing their constituents. The Brady Bill is emblematic, a bill that is a centerpiece of Kramer's argument because it was later overturned by the Supreme Court in *Printz v. U.S.*[21] on Tenth Amendment grounds that Congress had exceeded its Article I powers by forcing, or "commandeering," the state legislative process. The bill's passage makes clear that formalistic representation is not sufficient and is worth discussing in some detail.[22] This bill, dealing with a waiting period on hand guns, became so complex and with so many provisions that congressmembers formed multiple and intersecting factions. Democrats opposed the restrictions of federal prisoners' habeas corpus petitions, while Republicans objected to the waiting period provisions. Meanwhile, Bill Clinton had made the passage of the Brady Bill a key piece of his 1992 campaign and an essential aspect of effort to move the Democratic Party to the center on crime and violence issues. In attempting to pass this legislation, Clinton and Democratic leaders in Congress faced a number of problems. Most notably, southern Democrats, many who represented pro-gun constituencies and received substantial funds from the National Rifle Association, were

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[20] Paul Frymer and Albert Yoon, "Political Parties, Representation, and Federal Safeguards," *Northwestern University Law Review* (2002).

[21] 521 U.S. 898 (1997).

[22] This material is a very short version of that found in Frymer and Yoon, *ibid*.

understandably wary. These members were also among the most vulnerable to electoral defeat as they represented constituents who for at least two decades had been voting Republican in presidential elections. They represented conservative voters and their only hope of maintaining office was to continue to convince their constituents that were similarly conservative, despite their Democratic identification. On the other hand, Clinton represented perhaps a last chance for southern Democrats to have influence over the national party. For decades, Democrats were seen in the South as too liberal, particularly on race and crime. Clinton was trying to change this while balancing liberal constituencies he needed to win northern support. Southern Democrats recognized this and that Clinton needed a victory to jump-start his presidency.

To pass the legislation, then, Democrats in the House used the Rule Committee to allow and protect those members to vote for the bill even though their constituents opposed it. The rules limited the general debate both in time and scope and prohibited—with a few specific exceptions outlined and authorized by the Rules Committee members themselves—amendments. This allowed members to flip flop on different votes, allowing them to support their constituents symbolically by voting for what amounted to meaningless votes, while blaming their final vote on the arcane rules of the House. Constituents are generally unaware of their representative's record on specific votes, and certainly unaware of votes on seemingly procedural matters such as voting on rules; accordingly, the House members who switched votes knew that they would have to explain only their floor votes to their constituents (one needs only watch presidential debates to see how George Bush attacked John Kerry for strategic voting, and how Bill Clinton did the same to Bob Dole—any and every congressmember votes for higher taxes

at some point for strategic reasons). Nearly 50 Democrats voted for the rule and against the bill, quite likely because they were acting strategically to support their party while protecting themselves from angry constituents. Most of these members were from southern states that have tended Republican in recent decades; nine alone came from Texas.

My point here is that elected officials, in attempting to get re-elected, act in manners that lead them not to be representative of different populations. While groups suffering from class and racial inequality suffer the most from this as members often fail to represent these groups because they find their support fairly inconsequential, even mobilized, middle class constituents can be denied representation by strategic voting, rule making, and electoral incentives. Future work on juristocracy ought to be more aware of this complexity and attempt comparative analysis in areas where it scrutinizes courts for their failure to more aggressively promote rights and policy.

Broader Understandings of Court Power

In contrast to the previously under-developed section of this essay, this section is entirely speculative and represents just the beginnings of some thoughts on the matter. My goal is to examine courts institutionally in the same manner that legislative scholars study Congress—as a place of rules and incentives that can be used to help explain both behavior and outcomes. Mark Galanter's classic article on repeat players and one-shotters provides a model of this in legal scholarship that can be further developed in relation to broader questions about opportunities for plaintiffs and political activists in the

court room.[23] Just as the rules and structures of Congress lead to specific types of behavior by legislators and specific types of opportunities for political action, so it is true for courts. While court rooms are clearly dominated by repeat players, they also provide certain opportunities that the legislative process does not. As Lon Fuller has famously argued, adjudication is a process that allows those affected by disputes have an opportunity to give proofs and reasons that will be decided by an independent arbitrator.[24] While clearly overstated and celebratory, there are important institutional truths that are only amplified when compared with congressional activity. Courts must respond in some way when addressed by potential litigants. In contrast to the legislative and executive branches that have a number of techniques that they can use to avoid responding entirely, courts are much more limited. Compare the power of committee chairs in Congress to schedule hearings for a potential bill with that of a court room judge. Committee chairs have complete authority and if an issue is not of their liking, they can simply refuse to any discussion. Today with Republican control of the House and Senate, groups unwelcome by the majority party are simply denied access to a hearing. Despite a similar conservative majority on the Supreme Court, there are far more opportunities for activists to be heard in a court room. First, the legal process provides far more entry points to getting issues raised on the table. Strategic use of forum shopping, and multiple jurisdictions can provide entry points for activists through a single judge in a single state. As Martha Derthick describes, tobacco litigation exploded by lawyers filing class action lawsuits in front of sympathetic judges in Mississippi and Texas. Procedural rules also

[23] Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9: 95 (1974). See too Samuel Issacharoff and John Fabian Witt, "The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law," Working Paper 2004.

[24] Lon Fuller, "The Form and Limits of Adjudication," *Harvard Law Review* 92: 353 (1978)

allow a potential litigant, assuming they follow the relatively simple pleading requirements, a hearing in the courtroom, and then have opportunities for appeal if they are inadequately served.

Moreover, court rooms in the latter part of the twentieth century have expanded opportunities for disadvantaged plaintiffs by benefiting from rule changes that were authorized by Congress. The class action and the increase in attorney fee provisions on civil rights and other political matters are two notable example of this, and both provide increased opportunity for political activism in the court room. To dismiss these opportunities provided by courts as simply products of congressional authorization misses important institutional dynamics at work. Congressmembers, as mentioned above, are far better at passing "particularized benefits" for small, concentrated interests, than they are at passing substantive legislation. This is independent of whether a majority of members have preferences for a certain policy goal or whether they are fearful of disrupting a coalition; instead it is a product of members being actively willing to hand out what they perceive to be goods that are enthusiastically supported by a small group and ignored by everyone else. It is part and parcel of the legislative process, and groups that are disadvantaged in the legislative process can find opportunities in court rooms through this type of backdoor legislative behavior. At the time of the passage of the class action and attorney fee awards, this was exactly what happened. They were each passed with almost no controversy because lawyers asked for them and no one protested. Once passed, as we know from American political development scholars and from Max Weber, rules and interests become entrenched, making reform difficult. Corporate America has since realized that class action reform is a top priority, and last

week they finally achieved a first step in weakening the power of these class action suits. But whereas those who most benefit from class actions, racial and gender minorities, workers, consumers, will not rise up to fight business on tort and class action reform, lawyers will and have done so with repeated success by being among the leading donators to legislator campaigns. The American Bar Association is far more powerful, and more representative in Congress, than most public interest organizations. While groups have difficulty gaining legislative victories, they have far more success, when backed by powerful lawyer groups, of gaining the particularized benefit of greater court room opportunities.

With more time, I hope to provide a more systematic account of institutional opportunities in the court room. As Galanter and others have well shown, these opportunities will not be unproblematic. But until someone finds a better way in which the poor, the under mobilized, and the underrepresented will find political opportunities, the court room will remain not just a vehicle, but a prominent vehicle for promoting political equality.