

Assessing Juristocracy: Are Judges Rulers or Agents?

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Note: Parts of this paper are distilled from a paper in progress on which Scott E. Lemieux is co-author. Scott deserves none of the blame for this.

Do increases in the number or scope of policy decisions that are made by unelected judges automatically indicate that power has shifted from elected officials in other branches to judges? This paper contends that this question is more important and more deeply puzzling than it seems on conventional accounts of judicial power. On more conventional accounts, judges and elected officials use fixed institutional powers to try to influence policy outcomes in a sort of zero-sum competition. In cases where branches take conflicting official positions, the successful assertion by one branch of its own preferences necessarily signals a loss of influence for other branches. Such accounts of interbranch interaction make my question seem uninteresting. The answer is obviously “yes”.

The problem, however, is that a growing body of innovative scholarship on separation of powers has undermined that conventional framework. In particular, many scholars have documented instances in which judges exercise power only because elected officials took deliberate steps to expand judicial discretion or expand the institutional capacities of the courts. Such findings introduce a number of complications that make questions about the relative power of the branches seem more interesting and important. Such findings mean that the observation that a pronouncement by a judge is the proximate cause of some shift in policy cannot always be taken as an indication that judges are really in charge. In some cases, judges who make policy choices may be better understood as agents acting on behalf of elected officials than as rivals whose policy rulings block the will of those officials, and thus thwart electoral controls. Any time the number of important policy changes that are announced by judges increases, it means in some sense that the power of judges has increased. However, if judicial discretion increases only because of choices made by elected officials, the fact that judges are announcing the changes in

policy need not indicate that judges have wrested power from elected officials. Thus, the jury is still out on juristocracy.

At a minimum, the possibility that elected officials deliberately empower judges means that accurate assessments of the relative power of judges and elected officials have to be built upon empirical inquiry into whether judicial discretion is the result of contingent (and perhaps reversible) choices made by elected officials. If it turns out that judges make policy by exercising fixed institutional powers over which elected officials have no control, then increases in the number or range of judicial policy decisions is a reliable sign of “juristocracy”. However, if deeper inquiry reveals that judges are able to influence policy outcomes because of choices made by officials elsewhere in government, the relative power of judges, and the threat that judicial power poses to democratic accountability need to be measured more carefully.

Thus far, the scholars who have uncovered instances of deliberate empowerment of judges have not worked out an adequate theoretical framework for addressing these sorts of puzzles with empirical evidence. Many of the scholars who have uncovered instances of judicial empowerment have noted that their findings raise important questions about more conventional accounts. However, scholars (myself included) have not been as successful in coming up with an alternative framework. The result is that the old paradigm is crumbling without an available replacement, and some basic questions about judicial power and legitimacy seem to have no answers.

Of course, scholars could make the puzzles about power go away by definitional fiat. Scholars could decide to call *any* instance where justices exercise real discretion and make choices that change the direction of policy a case where judges exercise power. They could then measure trends toward juristocracy by simply counting the number of such instances, and ignore questions about the institutional sources of judicial discretion. This solution has some appeal, and certainly does not stretch the meaning of the word “power” beyond all recognition. I think, however, that it is unsatisfying. The real concern that has led to scholarly fascination with judicial review and an alleged rise in juristocracy is not simply that judges are exercising discretion, but the concern that judges use their discretion to make decisions that thwart the will of elected officials. More specifically, scholars are interested in cases where choices made by judges result in public policies that are different from the ones that would result if elected officials had all the power. If such differences in outcome are the real concern, it is important that scholars identify

cases where judicial discretion is the result of choices made by elected officials, and to ask in such cases if the differences between judicial choices and legislators' preferences are as big as they seem.

Of course, it is easy to say that assessments of judicial power have to be based on realistic and nuanced accounts of the complicated and continually reconstructed relationship between judges and elected officials. It is much harder to come up with a coherent framework for doing so. Alas, this short and hurriedly constructed paper does not present a full fledged alternative framework. My more modest goal is to make some observations that identify important puzzles and to introduce some conceptual distinctions that clarify some preliminary questions about legitimacy and impact. Part one reviews some recent findings on the deliberate empowerment of judges, notes how those findings undermine conventional accounts of judicial power, and introduces some of the methodological complications that such findings create. Part two frames three important empirical questions that need to be asked before making final assessments of whether assertions of judicial power take power away from elected officials or thwart electoral accountability. Part three introduces a distinction between two categories of cases where legislators empower judges, a distinction that helps to frame two different sets of concerns about the threat that judicial empowerment poses to democratic accountability.

Part One: Conventional Frameworks and New Empirical Work on Separation of Powers

Conventional accounts of judicial power focus on the relative weakness of electoral controls on judges as the defining feature of courts, conceptualize judicial power as growing out of relatively fixed sources of institutional power, and portray actors in different branches of government as acting independently of one another in a competition for influence over policy. Such conceptualizations make it fairly easy for scholars to measure judicial power. Scholars need only to compare the policy positions that result from judicial decisions to the official positions taken earlier by elected officials in other branches. If judges make rulings that announce policies different from the ones announced by elected officials (e.g., by ruling a statute unconstitutional), and if implemented policies match the judicial rather than legislative position, judges are exercising power. Such conceptualizations also lead to tidy characterizations of the threat that judicial power poses to democratic accountability. Instances where the official position taken by the “democratic” branches are implemented without judicial interference are treated as presumptively legitimate; instances where unelected judges successfully interfere with those democratic

outcomes are problematic and in need of special constitutional justification. Tracking trends toward “juristocracy” is also a fairly straightforward process. One need only tally the number of times the proximate cause of some shift in policy is a decision announced by a judge rather than a decision announced by a body of elected officials.

Much recent and innovative scholarship on interactions between branches of government has challenged this conventional framework for understanding the links between judicial policy making, the formal institutional powers of judges, and democratic accountability. In particular, a growing body of scholarship has shown that the capacity of judges to exercise power is often dependent on contingent, politically motivated decisions by elected official in other branches of government. In the U.S., scholars have traced broad shifts in the institutional role and/or institutional capacities of the courts to deliberate choices made by elected officials in other branches. Such accounts show that elected officials sometimes choose to empower judges as a means of securing long-term policy or political goals (Gillman APSR, McMahon 2004- and not just in U.S., e.g., Hirschl 2004)

Other studies have focused more narrowly on judicial decisions in particular policy areas rather than broader institutional trends, and have traced the power of judges to resolve particular policy controversies to efforts by elected officials to escape responsibility for certain kinds of divisive choices. In several highly salient policy areas, judges have been able to make rulings with important substantive policy consequences only because legislators made earlier choices that expanded judicial discretion. In some instances, legislators invited the courts to resolve pressing policy problems that legislators were unable collectively to resolve (e.g., Graber 1993 on slavery and abortion); in other instances legislators deliberately expanded judicial discretion through the deliberate use of ambiguity in statutory language (e.g., Graber 1993 on antitrust, Lovell 2003 on labor injunctions).

It is particularly important to uncover instances where legislators try to shift responsibility to judges because the rulings judges make as a result of such efforts are easily mistaken for cases where judges thwart the will of elected officials. For example, in my book, I uncovered instances where legislators used deliberate ambiguity to empower judges in statutes that were advertised as pro-labor “reforms” that would take power away from judges. When judges, quite predictably, made rulings that narrowed the reach of these statutes, they created a powerful appearance of “juristocracy”. The rulings, many observers noted, contradicted the advertised goals

of the congressional leaders who sponsored the legislation. However, careful attention to the strategic choices made by legislators revealed that the court rulings were not judicial usurpations of legislative power. The judges did make discretionary choices that shaped labor policies, but only because legislators used statutory language that expanded judicial discretion while rejecting alternative legislative proposals that better cabined judicial discretion. The judges did just what legislators wanted when they assumed responsibility (and blame) for making difficult choices that resolved statutory ambiguities.

Instances where judges assume power as a result of blame shifting strategies also reveal that assessments of the impact of judicial rulings have to look beyond the immediate effects that judicial choices have on policy outcomes. Efforts to shift blame to the courts are motivated in part by the belief that a policy choice announced by a judge will have different political effects than the same choice would have if announced directly by elected officials. Thus, the real impact of the courts may not be the difference between judges choosing policy option A over policy option B. The more important impact may be that by taking over responsibility for resolving certain controversies, judges help to divert or silence political forces that could otherwise result in more dramatic changes in policy or more consequential political reactions.

The deliberate empowerment of judges also raises some important puzzles regarding the links between elections and judicial power. Judicial power looks undemocratic or “counter-majoritarian” on conventional accounts that presume that elected officials watch helplessly from the sidelines as insulated judges exercise fixed institutional powers. Constitutional guarantees of appointment, life tenure, and salary separate judges from the electoral pressures that shape outcomes in other branches, and can make it difficult for elected officials to reverse judges. However, if the capacity of judges to rule on particular issues is the result of choices made by elected officials rather than constitutional guarantees, then judicial power seems better tethered to electoral processes. Legislators who choose to empower courts are just as “elected” as legislators who make clear choices that narrow judicial discretion. Their decision to empower courts is just as much a response to electoral pressures as any other type of decisions. Moreover, when judges exercise power as a result of choices made by elected officials, elected officials will probably have an easier time reversing the effects of judicial rulings. Expansions of jurisdiction or other grants of discretion can be reversed through ordinary legislation if legislators decide that the expansion of judicial discretion no longer serves their interests. Thus, the discovery that judges

exercise power because of choices made by elected officials seems at first to assuage concerns about the lack of electoral constraints on judges.

On the other hand, the studies that have uncovered deliberate efforts to empower judges have discovered many elements of the practice that do not lead to a rosy picture of democratic accountability. Instead of putting concerns about democratic accountability to rest, work on the strategic empowerment of judges has instead uncovered new pathologies in existing mechanisms for democratic accountability. For example, Howard Gillman's study of the expansion of judicial capacities in the late 19th Century reveals that empowerment of judges was a strategy that one political party used to entrench its power and shield itself from subsequent electoral shifts. While the officials who made those decisions were subject to election, one result of their decision to expand judicial power may have been to make subsequent elections less effective as a check on government power. My study of labor legislation similarly linked expansions of judicial discretion to electoral incentives, but also raised real concerns about legislators' duplicity, and thus about the transparency and responsiveness of legislative processes. Legislators responded to electoral pressures not by making clear choices among competing policies, but by covertly attempting to shift responsibility for making those choices to actors in other parts of the government who were less responsive to electoral pressures. That strategy can only be an effective response to electoral pressures if legislators deceive some key constituents by providing deceptive accounts of their expectations about the effect of legislation.

Section Two: Finding Judicial Power

In order to provide a more accurate picture of the real power exercised by judges, more attention must be paid to the broader interbranch context in which judges make decisions. While "power" might still be conceptualized as the ability to win interbranch conflicts, scholars have to be much more careful about identifying when such conflicts occur, and more careful in assessing the magnitude of shifts brought about by judicial rulings. The process of making such assessments is complicated by the fact that many of the strategies that empower judges are attractive to elected officials only if they can be carried off covertly or with deception. Given that possibility, legislators' official statements of their preferences can no longer automatically be taken as signs of their true preferences. To make accurate assessments of what elected officials really want, and whether what they want is really different from what judges produce, scholars need to pay

attention to a range of contextual factors. The three questions considered in this section are meant to call attention to some of those factors.

1) Are judges exercising powers only because of choices by elected officials that expand judicial discretion?

Before deciding that judges are taking power away from elected officials, scholars need to determine whether the power of judges to exercise discretion is the result of choices made by elected officials. Recent accounts of the deliberate empowerment of judges have identified at least three important ways that elected officials add to judicial capacities or judicial discretion.

a) Deliberate statutory ambiguity: Legislators understand that judges are institutionally positioned to make authoritative rulings on the meaning of statutes. Nevertheless, legislators sometimes create laws that leave important issues unresolved in statutory text, and thus give judges authority to make choices as they make interpretive rulings in response to litigation. Legislators can create statutory ambiguity by leaving key terms undefined (e.g., “restraint on trade” or “commerce” in an antitrust law), by failing to address obvious interpretive questions that will almost immediately arise (e.g., whether H.I.V. is a disability under the ADA), by articulating conflicting policy priorities in parts of statutes that could otherwise provide guidance to judges faced with interpretive questions, or by passing laws that create conflicts with existing laws without explaining how those conflicts should be resolved.

b) Provisions that expand opportunities for judicial review: Legislators often include provisions in statutes that make it more likely that judges will be in position to make policy choices. Legislators can create new courts and thus increase the capacity of judges to make influential rulings or expand the jurisdiction of courts to cover more areas (Gillman APSR). In the U.S., Congress routinely incorporates provisions of the Administrative Procedures Act (APA) into regulatory statutes, provisions that empower judges to make important policy choices (framed as “review” of agency interpretation of statutes). The APA sets up rules for jurisdiction and standing that allow (or, perhaps more accurately, invite) parties to challenge in court certain administrative decisions regarding interpretation or enforcement of laws. Such provisions make it almost certain that judges will find themselves in a position to exercise broad discretion, particularly when statutes provide little specific guidance about whether to accept or reject agency interpretations

of statutes.¹ Legislators also include provisions in statutes that expand standing or otherwise make it easier to get cases before judges (e.g., class action rules). Congress also makes decisions that move in the opposite direction, e.g., narrowing standing, limiting judicial review of particular parts of regulatory statutes, narrowing or removing jurisdiction.

c) Efforts to shift the ideological direction and role conception of judges: I have in mind here Kevin McMahon's (2004) book on FDR's efforts to make the court more deferential to executive power and more willing to follow executive directions on rights related issues. While the mechanisms McMahon describes are subtle and less predictable than the first two strategies above, they do reveal important links between broader electoral trends, political entrepreneurship by elected officials, and changes in the institutional mission and role conceptions of judges. Those links seem to have some impact on decisions made by judges.

2) Are judges really producing dramatic changes in policy outcomes, or merely reconciling gaps between official law and legal practices?

Instances where judges strike down statutes appear to provide the starkest examples of judges exercising power at the expense of elected officials. However, simply counting the number of laws struck down by judges will not provide accurate measures of the extent to which outcomes would be different if the courts ceased to exist. Not all instances of judges striking down law are equally impressive as demonstrations that judges exercise power at the expense of more accountable officials in other branches of government. Instances where judges strike down very old statutes that have fallen into disuse should not count as much as instances where judges strike statutes that are being actively enforced.

Judges sometimes attract a great deal of attention by making highly symbolic rulings that reinforce popular images of judges as protectors of minority rights, but that do not do much to affect the way elected officials actually carry out policies. For example, the U.S. Courts rulings striking down flag burning statutes generated much gnashing-of-teeth and political opportunism, but have very little actual impact on the lives of real people, or on the incidence of flag burning. In the case of the Bush administration's war policies, the Supreme Court has so far asserted the power to review cases as a matter of principle, but has done little to cramp the administration's style by actually ordering the release of unjustly imprisoned persons. Such assertions of judicial

¹ Judges sometimes announce doctrines that suggest they will not second guess agencies without good substantive support in the text of statutes, as in the *Chevron* case, but there are considerable doubts about whether judges consistently follow such rules.

power may annoy elected officials, but they don't take away significant powers from those officials.

The question of how to assign relative weight to different instances where judges strike down statutes is a vexing one, and there is no scholarly consensus on how to do it. In his classic article on judicial review, Robert Dahl drew some clear lines. He discounted instances where judges struck down statutes that were more than four years old, ignored cases involving state laws, and introduced a primitive (and rather unexplained) distinction between important and unimportant statutes. The precise lines drawn by Dahl have been widely criticized, but no one has come up with an agreed upon way of measuring the relative import of judicial decisions, but no one has refuted Dahl's conviction that assessments of judicial power should somehow take into account the importance of the laws or policies that judges alter.

A semi-hypothetical example may help to understand my concern. Consider two states, Texas and Schmexas, with identical statutes that establish criminal penalties for persons who engage in "homosexual sodomy". While the laws on the books are identical, actual enforcement practices on the ground are quite different. In Texas, authorities take no steps toward systematic enforcement the statute, and take no actions that indicate any serious interest in ending the practice of "homosexual sodomy". State authorities regularly license bars and nightclubs that openly market themselves to gay clientele, despite the fact that state authorities are well aware that such businesses profit in part because they provide a setting in which gay persons can meet one another, occasionally as a prelude to engaging in forbidden sexual acts. More generally, state authorities decline to pursue persons who engage regularly in criminal sexual acts, even though they have or can get information that would make it possible to identify many such persons. The sodomy laws are not complete dead letters. Persons are sometimes charged with violating the law. Cases that have reached the Supreme Court have involved rogue cops who abused their discretion in ways that are rather transparently ugly. The statutes may also be used in cases where the sodomy charge is added to other charges in an indictment of a person who the state has targeted only because of violations of other criminal laws that the state is more interested in enforcing. While the actual risk of prosecution is small, it is not trivial. Many Texas citizens recognize that the threat of such charges interference with basic human rights, and sympathetic state legislators sometimes propose repeal of the statute. However, repeal efforts have difficulty gaining momentum precisely because lack of enforcement leads many legislators to view the repeal

campaign as mostly symbolic, and thus less important than fights over laws that have bigger impacts on people's lives.

In Schmexas, the same statute is much more vigorously enforced. A popular governor, elected in part on a promise to "end homosexual sex as we know it", coordinates with the legislature's appropriations committees and law enforcement officials to vigorously enforce the law. Large numbers of undercover police officers take part in sting operations to entrap persons into engaging in forbidden acts; large rewards are offered for neighbors who "drop a dime" on suspicious sexual activity in their apartment buildings; children in public schools are given extensive DARE-like training and taught to report parents or friends who engage in the unlawful sexual conduct. The final stages of the governor's plan to ensure literal fulfillment of her campaign pledge are delayed only because of an opinion of the state attorney general regarding the Constitution's prohibitions on the quartering of soldiers in people's homes. Nevertheless, the popularity of her highly visible enforcement program propels the governor to reelection (in a contest in which a large number of newly disenfranchised felons were unable to participate).

Now imagine for each state that a Supreme Court announces that the sodomy statute is unconstitutional, and that as a result of that announcement the statutes are no longer enforced. It seems clear that the judicial ruling in the Schmexas case involves a more significant judicial interference with the power of legislators than the ruling in the Texas case. This seems true despite the fact that the statutes and the technical legal effect of the judicial ruling are identical for each case. The differences in enforcement patterns seem relevant in part because they mean that the magnitude of the changes brought about by the judicial rulings are different in the two cases. The deeper issue, however, is that the different patterns of enforcement also seem to indicate that the gap between the outcome produced by judges and the underlying preferences of elected officials is much larger in Schmexas than it is in Texas. The lack of enforcement in Texas is not just some accident resulting from the difficulty of implementing regulatory statutes. The gap instead reflects conscious choices by elected officials to not carry out policies as expressed in statutes. Legislators' decisions to pass and retain the law are also influenced by those choices about enforcement.

The point of this perhaps too facetious example is that the magnitude of changes wrought by judges cannot be measured by looking only at the magnitude of modifications to the statute books. Assessments of judicial power should at least consider enforcement practices, both to get

a sense of just how big a change is wrought by the judicial opinion, and because enforcement patterns can provide insight into the actual preferences of elected officials, and thus insight into whether judges thwart the will of those officials. Enforcement practices are also important because they can effect legislators' decisions about what changes to make in the statute books. Lack of enforcement may in some cases be the only reason a particular statutory provisions remains in effect long enough for the Court to strike it down. While judicial rulings striking down such statutes can have very important symbolic value and potential value as precedents for rulings on other topics, their importance does not necessarily rest on the fact that judges wrested power from legislators.

More attention to these issues might also correct that tendency to talk about cases that are like my Texas as though they were cases like my Schmexas. Rulings like *Lawrence v Texas* are sometimes attacked for interfering with the right of the "majority" to create and enforce moral standards. Justice Scalia once compared the majority's interest in defining murder as a crime to its interest in defining sodomy as a crime. Actual enforcement practices indicate that "majorities" want very different things from the two types of laws, however. Enforcement patterns suggest that majorities of Texans take their laws against murder much more seriously than their laws against sodomy. Enforcement patterns fail to provide any indication that a majority of Texans had any interest in effectuating a moral standard that made criminals out of persons who engage in gay sex, or any desire to drain the public treasury by prosecuting and punishing such persons..

Recognition that some seemingly dramatic judicial rulings have less dramatic impact on the implementation of actual policies helps to throw into sharper relief those cases where Court's do exercise real power by issuing rulings that directly challenge existing *practices*. The U.S. Supreme Court's ruling in *Brown v Board of Education* upset laws that were actually being enforced and thus better qualifies as an instance where elected officials lost power to judges. (Assuming, perhaps too charitably, that one wants to call the processes for selecting officials in South Carolina in 1954 "elections".) Of course, the failure of *Brown* to have much effect on governing practices before Congress devoted financial resources to ending segregation a decade later suggests that the capacity of Courts to upset prevailing governing practices is quite limited (Rosenberg 1991). However, there are some rulings that lead legislators to devote considerable resources to meeting judicial standards, e.g., *Gideon*. It may be that scholars could develop more accurate measures of the impact of judicial rulings by measuring the direct effects of judicial rul-

ings on the distribution of resources rather than looking to see how big a hole a ruling creates in the statute books.

3) Do elected officials decline to use available counter-measures for limiting the reach of judicial rulings?

In his seminal book on judicial review, Alexander Bickel repeatedly emphasized that the *finality* of Supreme Court constitutional decisions rendered them particularly problematic in a majoritarian system of government. Scholars often note that court-imposed constitutional obstacles can be overcome through passage of a constitutional amendment, but generally regard the supermajority procedures for amending the Constitution as so cumbersome that the option is usually impractical. However, accounts of judicial *finality* often miss the fact that elected officials almost always have available other, more easily pursued options for responding to judicial decisions. Even if the pursuit of some of these options is not very common in constitutional cases, the *availability* of powers for controlling the courts is still relevant to assessments of whether exercise of judicial power should be interpreted as genuine interference with the powers of elected officials. It is more difficult to conclude that judicial decisions thwart the will of elected officials when elected officials decline to take easy steps to reverse or limit the reach of the judicial decisions.

In some cases, legislators have options available for accomplishing their policy goals through other means. The reach of the Supreme Court's decision striking down certain kinds of hate crimes laws in *R.A.V. v St Paul* could be limited by passing sentence enhancement statutes instead. A Congress prevented from passing an outright ban on child labor could still pressure many reluctant states to ban the practice by withholding federal subsidies for improvements in transportation facilities or other projects important to the states. States can act aggressively to limit the post-*Roe* availability of abortions by continually passing statutes that push up against and test the weaker and vaguely defined constitutional standards that the Court announced in subsequent cases. If the power of the Court to issue a ruling is the result of a statutory expansion in a court's jurisdiction, legislators can repeal the law granting the court the power to decide.

More dramatically, legislators might take institutional steps that directly attack the powers of the courts. In the U.S., the Constitution allows Congress to pack courts with new members, and invites Congress to make "exceptions" to the jurisdiction of the courts. Congress can also impeach and remove an uncooperative Supreme Court justice with fewer votes than it takes

to override a presidential veto. Elected officials have been reluctant to use these powers, even in instances where judges made very unpopular rulings. That reluctance is undoubtedly the result of the fact that elected officials have learned to appreciate the value of maintaining an independent judiciary in a constitutional system. The availability of such measures nevertheless remains part of the constitutional system, and judges who cause too much difficulty are presumably aware that their actions might have some effect on whether elected officials continue to value judicial independence.

The availability of numerous means for challenging or reversing the effects of judicial rulings means that the *finality* of judicial rulings is sometimes the result of choices made by elected officials rather than the result of judges having the institutional power to thwart the will of elected officials. That fact surely seems important when thinking about whether increases in the number of policy making decisions by judges is a genuine sign that judges have taken power away from elected officials in other branches.

PART THREE: Empowerment of judges and the democratic legitimacy of judicial policymaking.

As a means of sorting out the implications that different mechanisms of judicial empowerment have for democratic accountability, I introduce in this section a distinction between two types of decisions by elected officials that might add to judicial power: Decisions that increase judicial power by *delegating* to the Courts, and decisions that add to judicial power by *defaulting* and allowing judges to make choices. The two categories both involve *deliberate* efforts to expand judicial discretion or to give judges power to resolve particular policy questions.

The distinctions between the two types of cases are somewhat stylized. Many cases will likely fall between categories, and individual statutes might contain elements or provisions that fit into different categories. While both types of cases raise important concerns about electoral accountability, the distinctions between the two types of cases is helpful in trying to understand important connections between democratic accountability and legislative deference.

Legislative Delegation to Judges.

Delegation captures the more palatable and justifiable of the two forms of deliberate empowerment. Delegation describes cases where elected officials empower the courts in order to make instrumental use of judicial power as a means of attaining settled policy goals. The motive for empowering judges is the expectation that such discretion will allow judges to help elected

officials to achieve their policy goals. That recognition is based on some advantage that judges have over legislators when it comes to finding an appropriate resolution to certain kinds of policy questions. That advantage may be because of some special abilities that judges have, or because of their position at the end point of implementation processes.

The clearest examples of delegation are statutes that specify a range of choices and leave judges free to make choices from within that range, e.g., criminal statutes that specify a range of penalties for persons convicted of a particular offense. Such statutes may include criteria that judges are supposed to use when making decisions, but still allow judges to exercise some range of choice about how to apply those criteria to the unique circumstances of a particular case. Legislators may also delegate certain decisions to judges precisely because the relative independence of the judiciary makes judges the best available candidates for making appropriate choices. For example, election related fights in Florida in 2000 and Washington in 2004 made more people aware that legislators invite judges to exercise broad equity powers to craft solutions to electoral disputes, presumably with the hope that however imperfect judges may be, they are more likely to find fair solutions than more transparently partisan officials in other branches. In other cases, statutes may delegate to judges more obliquely by including provisions in statutes that place judges in a position to evaluate and modify decisions made by other actors. Whatever the precise reason for delegating to judges, it seems reasonable to assume that legislators decide to build such flexibility into such statutes because they believe that giving discretion to judges is a better way of attaining their agreed upon policy goals (effective criminal sentences, fair elections) than a statute that attempts to remove all judicial discretion and specify all the details in advance.

There are other reasons legislators might decide that their policy goals will best be served by expanding judicial discretion. Judges typically make interpretive rulings a long time after statutes have been passed. As a result, judges typically have a great deal more information about how a statute actually works than legislators had at the time of enactment. Legislators may sometimes try to take advantage of that judicial advantage by deliberately building some flexibility into a statute, flexibility that allows judges to make needed adjustments during implementation. Of course, there is always some risk that judges will use any flexibility as an excuse for pursuing their own policy preferences rather than the preferences of legislators. However, that risk may quite often be worth taking. After modeling a process through which legislators might try to take advantage of the information advantages possessed by judges, James Rogers (AJPS 2001) found

that judicial discretion at the endpoints of implementation can help legislators to attain policy goals even when judges are not reliable ideological allies of the legislature.

Legislators may also empower judges in order to create a check on the power that legislators delegate to executive branch agencies. Judges may lack expertise on specific policy questions, (Horwitz 1977) but they are experts of sorts at maintaining the integrity of prescribed institutional processes, and can thus help to promote the deliberativeness and openness of executive branch decision making processes. It should be noted again that judges can also overreach by reversing agency interpretations that are consistent with general statutory language, or by making policy choices outside the range of what legislators consider acceptable. Ultimately, however, the fact that legislators routinely delegate oversight powers to the courts suggests that they quite often consider the risk of judicial shirking tolerable when balanced against the potential advantages of delegating.

Legislative Defaults.

These cases differ from *delegation* cases because the reason legislators choose to empower judges has nothing to do with the legislators expectations that judges will help them to attain particular policy outcomes. In cases of *legislative default*, legislators invite, or at least tolerate, judicial policy making because they cannot (or don't want to) reach a coherent collective agreement on policy goals. In some cases, legislators will be less concerned about which policy the judges choose than they are concerned about avoiding responsibility for making a clear choice. In some cases, a default may be quite passive. Legislators may choose to do nothing when some pressing issue arises even though they know that inaction will inevitably mean that the courts will become involved. Legislators may also actively default, e.g., by enacting a statute that appears to address some pressing problem but that actually opens up space for judges to exercise discretion in one of the ways described above in part two.

Possible incentives for defaulting include an interest in engaging in symbolic politics, a desire to avoid responsibility for making contentious decisions, or the desire to preserve the resources needed to make a more careful decisions. Defaults might be a strategy for breaking a stalemate between two strong factions that fall just short of a majority. In such a situation, legislators on both sides of the issue may decide that their best chance of "winning" is to pass a law that gives the courts discretion to decide. Even a small chance of winning in the courts might be attractive if there is no chance of winning a clean victory in the legislature. Note also that the

legislative indifference that produces a default is collective. It is not necessary that very large numbers of individual legislators be indifferent about the policy outcome. There can be a collective decision to default even when large numbers of legislators care a great deal about the eventual policy outcome. So long as there is no effective majority for any clear resolution of a policy controversy, and at least some legislators willing to support a compromise that empowers judges to decide, it may be possible to craft a legislative proposal attracts majority support by empowering judges. A statute that defaults may pass with support from legislators with an array of conflicting motives. Some legislators may vote for a deliberately ambiguous law because they are confident that judges will support their preferred position, some because even a small chance of winning in the courts is a more promising strategy than holding out for an unattainable legislative victory, some because they are not paying attention and think they are voting for a clear law, and some because they do not care what happens so long as judges get the blame from whichever side is made unhappy.

One final note on differences between *delegations* and *defaults*. By definition, delegations are cases where there is broader consensus on particular policy outcomes than in cases of default. That means that legislators are more likely to care about the choices made by judges, and more likely to agree in their assessments of the choices that judges make, than in *default* cases. This in turn makes it more likely that legislators will be able to make a coordinated corrective response to any judicial abuse of discretion, and perhaps also that judges will be more likely to exercise restraint. In contrast, legislators often choose to default because there is no majority consensus on policy goals. This makes it less likely than any effective majority will emerge to try to reverse any judicial choice. These differences mean that, on average, judges will be more free to exercise discretion and more likely to see their choices stick in *default* cases, and thus also that the grant of power to judges in such cases is greater and, practically speaking, more difficult to revoke.

Delegation, Defaults, and Assessments of Democratic Legitimacy

The question of whether the deliberate empowerment of unelected judges threatens democratic legitimacy cannot be answered definitively because answers hinge in part on deeper and largely unresolvable controversies regarding constitutionalism and separation of powers. Some observers will object to all delegation of legislative power, whether to the courts or the executive branch, as a violation of formal separation of powers principles that are essential to pro-

viding constitutional accountability (Schoenbrod 1993). Other observers might tolerate delegation because they are more tolerant of flexibility in institutional structures when they are convinced that such flexibility improves governance. Since it is not possible to make decisive pronouncements about the legitimacy of deliberate judicial empowerment without taking sides on these broader issues, and since there is not room here to defend a particular position on those issues, my aim here is to lay out the distinct set of problems raised by delegation and defaults.

Delegations are easier to defend as being democratically legitimate. In a quite plausible range of cases, deliberate expansion of judicial discretion can actually enhance electoral accountability by making government more responsive to popular demands. Legislators who create conditions that allow courts to exercise discretion in response to unforeseeable circumstances can make it more likely that the policy goals of elected official are attained. Such choices can also presumably improve welfare, e.g. by fixing irrationalities or smoothing out unanticipated barriers to effective implementation. If the processes that produce delegation are sufficiently transparent, and if actors in other branches pay attention and take corrective action when the courts produce incorrect or unpopular outcomes, the court rulings themselves need not create any substantial barrier to electoral accountability.

Nevertheless, there is room for concern. Since judges are being given real discretion, there is always some risk that they will not behave as expected. While the threat of reversal provides some check on the power of judges, that check is much less direct than the controls provided by regular elections to office in other branches. There is also room for concern that delegation violates separation of powers principles by assigning to the courts legislative functions that could and or should be carried out by legislatures.

Cases involving defaults to the courts raise all the concerns raised in delegation cases, as well as a set of additional, more serious concerns about accountability. In default cases, the motive for deferring to the courts is not to achieve policy goals. Rather, the goal is often to thwart important institutional structures that are supposed to assure accountability, e.g., by shielding legislators from direct responsibility for making contentious choices. Such actions are often done covertly, and thus raise real concerns about the transparency of the processes that produce defaults. When legislators shift divisive social issues to the judicial branch because they want to avoid electoral accountability for making divisive choices, their actions raise significant concerns about democratic accountability.

Concluding Note: This paper tries to get at some substantive concerns by framing them as methodological cautions. The underlying concern is that understanding judicial power requires attention to the dynamic processes through which elected officials can shape, constrain, and expand judicial capacities, often to serve admirable goals but sometimes in pursuit of more sinister agendas. Often, pursuit of the more sinister agendas is covert. As a result, apparent exercises of judicial power may mask more complicated interactions that can only be understood through deeper inquiry into the motivations that lead officials to empower judges, and into the real limits that judicial rulings place on the options of elected officials.