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ASSESSING JURISTOCRACY: ARE JUDGES RULERS OR AGENTS?

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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? On conventional accounts of judicial power in the United States, this question seems uninteresting because the answer is obviously yes. We contend, however, that the question is more important and more deeply puzzling than it seems on conventional accounts. Recent scholarship has made it clear that interaction between judges and other officials cannot be understood as a zero-sum competition in which each branch uses fixed institutional powers.

This Essay builds on a growing body of innovative scholarship on separation of powers that has documented instances in which judges exercise power only because elected officials made choices that expanded judicial discretion or expanded the institutional capacities of the courts.¹ Such findings mean scholars cannot accurately measure shifts toward juristocracy by simply counting the number of times a pronouncement by a judge is the proximate cause of some policy change. Scholars need first to distinguish instances where judges act as rivals of other officials from cases where judges act as imperfect agents for those officials.

While recent scholarship has documented numerous instances where elected officials deliberately empower judges, scholars have not worked out an adequate theoretical framework for addressing the

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1. *E.g.*, RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003); *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* (Mark C. Miller & Jeb Barnes eds., 2004); KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO Brown* (2004); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 *AM. POL. SCI. REV.* 511 (2002); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

puzzles that such empowerment creates.² The result is that the old paradigm is crumbling without an available replacement, and some basic and once-settled questions about judicial power now seem to have no readily available answers. Of course, scholars could make the puzzles about power go away by definitional fiat, i.e., by deciding to call *any* instance where Justices exercise real discretion and make choices that change the direction of policy a case where judges exercise "power." This solution has some appeal but is ultimately unsatisfying. The concern that has led to scholarly fascination with judicial review and juristocracy is not simply that judges exercise discretion but also that increases in judicial discretion and influence somehow distort or disrupt democratic politics. To understand that distortion and disruption, scholars need to distinguish cases where judges exercise fixed powers to thwart the will of elected officials from cases where more responsive officials deliberately choose to empower judges.

Our goal in this Essay is to make some observations that identify important puzzles and to introduce some conceptual distinctions. Part I reviews some recent findings on the deliberate empowerment of judges and introduces some of the methodological complications that such findings create. Part II frames three important empirical questions that need to be asked before making final assessments of judicial power. Part III 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.

I. CONVENTIONAL FRAMEWORKS AND NEW EMPIRICAL WORK ON SEPARATION OF POWERS

Much recent and innovative scholarship on interactions between branches of government has shown that the capacity of judges to exercise power is often dependent on contingent, politically motivated decisions by elected officials in other branches of government. In the United States, 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.³ Other studies have fo-

2. See LOVELL, *supra* note 1, at 13-33 (outlining the reluctance of court scholars to develop theories of interpretation and decisionmaking that take legislative deference to the judiciary into account).

3. See, e.g., *id.* at 252-54 (describing the effect legislative choices have on judicial decisionmaking); McMAHON, *supra* note 1, at 221-22 (concluding that the Roosevelt administration advanced its civil rights agenda through the Supreme Court); Gillman, *supra* note

cused 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.⁴ In some instances, legislators invited the courts to resolve pressing policy problems that legislators were unable collectively to resolve;⁵ in other instances, legislators responded to divisive policy issues by passing highly symbolic statutes loaded with deliberately ambiguous language that empowered the courts.⁶

These studies also reveal that instances where legislators try to shift responsibility to judges can quite easily be mistaken for cases where judges thwart the will of elected officials, in part because legislators who defer to the courts often have strong incentives to mask their true intention.⁷ For example, George Lovell's study 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.⁸ When judges, quite predictably, made rulings that narrowed the reach of these statutes, they created a powerful appearance of juristocracy. However, careful attention to legislators' strategic choices revealed that the choices judges made were possible only because legislators enacted statutory language that expanded judicial discretion while rejecting alternative proposals that would have better cabined judicial power.⁹ Lovell's study also suggested that the real impact of the courts is not always the difference between judges choosing policy option *A* over policy option *B* but the fact that judges help elected officials to divert political forces that might otherwise result in more dramatic changes in policy or more consequential political reactions.¹⁰

1, at 511-13 (arguing that national political trends influenced and empowered the judiciary).

4. See, e.g., LOVELL, *supra* note 1, at 255 (concluding that a factor leading to deference was a deeply divided legislature); Graber, *supra* note 1, at 45-61 (detailing three instances where legislators directly or indirectly invited the Supreme Court to settle three divisive political issues: slavery, antitrust, and abortion).

5. See, e.g., Graber, *supra* note 1, at 46-50, 53-61 (describing the judiciary's role in slavery and abortion).

6. See, e.g., LOVELL, *supra* note 1, at 99-160 (explaining the Court's role in interpreting the meaning of an overly broad Clayton Act); Graber, *supra* note 1, at 50-53 (describing the judiciary's role in antitrust law).

7. See Graber, *supra* note 1, at 37-45 (detailing the process by which legislators keep socially divisive issues off the political agenda by deferring to the judiciary).

8. LOVELL, *supra* note 1, at 154-56, 249-51.

9. *Id.* at 104-60, 234-49.

10. *Id.* at 156-60, 258-61.

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. However, if the capacity of judges to rule on particular issues is the result of choices made by elected officials, judicial power seems better tethered to electoral processes. Moreover, elected officials should have an easier time limiting the effects of judicial rulings that grow out of deliberate empowerment than they will when judges use fixed institutional powers over which legislators have no control. Expansions of jurisdiction or other grants of discretion can be reversed through ordinary legislation if enough legislators decide that the expansion of judicial discretion no longer serves their interests.

On the other hand, the studies that have uncovered deliberate efforts to empower judges have by no means put concerns about democratic accountability to rest. Instead of providing a rosy picture of moldable and responsive courts, the recent studies uncovered a range of previously overlooked pathologies in the mechanisms for democratic accountability that operate in other branches of government.¹¹ For example, Howard Gillman’s study of the expansion of judicial capacities in the late nineteenth century reveals that one political party empowered judges to entrench its power and shield itself from subsequent electoral shifts.¹² Lovell’s study of labor legislation showed that legislators used deception to covertly shift responsibility for divisive choices to less accountable actors and thus raised substantial concerns about the transparency and responsiveness of legislative processes.¹³

II. FINDING JUDICIAL POWER

To provide an accurate picture of how judges exercise power and whether judges interfere with democratic process, scholars have to identify cases where real conflicts between judges and other officials occur and assess carefully the magnitude of any policy shifts brought about by judicial rulings. The process of making such assessments is difficult because the strategies that empower judges are sometimes attractive to elected officials only if those officials can create the illusion that judges are usurping their power. Thus, key actors in these processes can have strong incentives to create deception. As a result,

11. *E.g., id.* at 252-55; Graber, *supra* note 1, at 70-73.

12. See Gillman, *supra* note 1, at 521-22 (concluding that postbellum Republicans succeeded in entrenching their interests within the judiciary).

13. LOVELL, *supra* note 1, at 254-61.

legislators' official statements of their preferences, and their votes on legislation, cannot automatically be taken as straightforward indicators of their true preferences. To make more accurate assessments of whether judges thwart the goals of elected officials, scholars have to pay attention to the three questions outlined below.

A. *Are Judges Exercising Powers Only Because Elected Officials
Chose to Expand Judicial Discretion?*

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.

1. *Deliberate Statutory Ambiguity.*—Because judges are institutionally positioned to make authoritative rulings on the meaning of statutes, statutory ambiguity allows judges to make discretionary choices that influence policy outcomes. Of course, much ambiguity is the result of accidents or unforeseen circumstances and not deliberate efforts to empower judges. However, there are also instances where legislators deliberately create statutory ambiguity by leaving key terms undefined (e.g., failing to define what counts as a “restraint on trade” or “commerce” when passing an antitrust law),¹⁴ by failing to address obvious interpretive questions that will inevitably arise (e.g., passing a major law on disabilities without stating whether HIV counts as a disability),¹⁵ by articulating conflicting policy priorities in parts of statutes that are supposed to 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.¹⁶

2. *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 or expand the jurisdiction of courts to cover more areas.¹⁷ Congress also routinely incorporates provisions of the Administrative Procedures Act into regulatory statutes, including pro-

14. See Graber, *supra* note 1, at 50-53 (documenting how legislators left key policy choices to the courts when passing the Sherman Antitrust Act).

15. See *Bragdon v. Abbott*, 524 U.S. 624, 630-31 (1998) (interpreting the Americans with Disabilities Act to determine whether HIV constitutes a “disability” for purposes of the Act).

16. See Lovell, *supra* note 1, at 225-34 (describing how Congress did not clearly prioritize the policy goals enumerated in the Wagner Act, which forced the courts to decide between conflicting goals when resolving interpretative controversies).

17. See Gillman, *supra* note 1, at 515 (noting that the Judiciary Act of 1862 expanded and modified the jurisdiction of federal courts).

visions establishing rules of jurisdiction or standing that empower judges to make important policy choices (framed as “review” of agency interpretation of statutes).¹⁸ Legislators also include provisions in statutes that expand standing or otherwise make it easier to get cases before judges, e.g., class action rules.¹⁹ Congress can make decisions that move in the opposite direction, e.g., by narrowing standing or limiting judicial review of particular provisions.²⁰

3. *Broader Attempts to Shift the Ideological Direction or Role Conception of Judges.*—Kevin McMahon’s recent book documents President Franklin D. Roosevelt’s efforts to make the Court more deferential to executive power and more willing to follow executive directions on rights related issues.²¹ McMahon’s detailed analysis of FDR’s often covert judicial policy reveals links between later rulings by the Warren Court and the administration’s efforts to manage divisions within its coalition by shifting the Court’s focus to civil liberties issues.²²

B. Are Judges 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 does not provide an accurate measure of the extent to which outcomes would have been different if the courts somehow ceased to exist. Judges sometimes make highly symbolic rulings that reinforce popular images of judges as powerful protectors of minority rights but

18. See generally MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 55-56 (1988) (stating that Congress often places administrative procedure provisions in specific statutes); PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 298-99 (2d ed. 2002) (describing how statutory language often sets forth the type of procedure available to beneficiaries). Judges sometimes announce doctrines that suggest they will not second guess agency decisions that are at least consistent with the text of statutes. See, e.g., *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (deferring to agency interpretations of ambiguous statutes unless they are unreasonable in light of the text or history of the statute). However, there are substantial doubts about whether judges consistently follow such rules. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1023-29 (questioning the impact of *Chevron* on lower federal courts).

19. See SHAPIRO, *supra* note 18, at 45-46 (noting that congressional legislation gave more groups standing to challenge agency action).

20. See LOVELL, *supra* note 1, at 245 (stating that the legislation creating the National Labor Relations Board included provisions that limited judicial review of some specific types of board decisions).

21. McMAHON, *supra* note 1, at 97-98.

22. *Id.* at 142-43.

that do not do much to affect the way elected officials actually carry out policies. For example, the U.S. Supreme Court's rulings striking down flag burning statutes²³ continue to generate much gnashing-of-teeth and political opportunism²⁴ but have very little conceivable impact on real people or even 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.²⁵ Such assertions of judicial power may annoy or empower elected officials, but they do not remove any significant powers from those officials.

The question of how to assign relative weight to different instances where judges strike down statutes is, of course, a vexing one, and there is no scholarly consensus on how to do it. In his classic article assessing judicial review, Robert Dahl discounted instances where judges struck down statutes more than four years old, ignored cases involving state laws, and introduced a primitive (and rather unexplained) distinction between important and unimportant statutes.²⁶ The clear lines drawn by Dahl have been criticized,²⁷ but no one else has come up with an agreed upon way of measuring the relative import of judicial decisions. More importantly, no one has refuted Dahl's conviction that assessments of judicial power need to take significance into account.

A hypothetical example may help to clarify our concerns. Consider two hypothetical American states, Teksas and Schmexas, with identical statutes establishing criminal penalties for persons who engage in "homosexual sodomy." While the laws are identical in the statute books, actual enforcement practices on the ground are quite different. In Teksas, authorities make no systematic effort at enforcement of the law. State authorities regularly license bars and nightclubs that openly market themselves to gay or lesbian clientele, despite the fact that state authorities are well aware that such busi-

23. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

24. *House Backs Ban on Flag Burning*, N.Y. TIMES, June 23, 2005, at A16.

25. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a citizen held in the United States as an enemy combatant has a due process right, albeit limited, to contest the underlying factual allegations of the government).

26. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

27. See, e.g., Jonathan D. Casper, *The Supreme Court and National Policymaking*, 70 AM. POL. SCI. REV. 50, 50 (1976) (arguing that Dahl's narrow approach fails to adequately represent the Supreme Court's role in policymaking).

nesses profit in part because they provide a setting in which persons who engage in felonious sex socialize, occasionally as a prelude to engaging in forbidden conduct. More generally, state authorities decline to pursue persons who make it known that they engage in criminal sexual acts. The sodomy laws are not complete dead letters. Persons are sometimes targeted for violating the law, perhaps by rogue cops abusing their discretion in ways that are transparently ugly, as has been the case in real Supreme Court rulings on sodomy laws.²⁸ Sodomy charges may also occasionally be added to indictments of persons the state pursues for violations of other enforced criminal laws. While the risk of prosecution is thus small, it is not trivial, and many Teksans complain that even a small risk of such charges is a violation of basic human rights. Such concerns lead some state legislators to propose repeal of the statutes. However, the repeal campaigns never develop much momentum because lack of enforcement makes the campaign seem mostly symbolic and thus less important than fights over more consequential laws.

In stark contrast, Schmexas officials try much more vigorously to enforce an identical statute. A popular governor, elected on a promise to “end homosexual sex as we know it” coordinates with the legislature’s appropriations committees and law enforcement officials; undercover police officers take part in sting operations; large rewards are established for neighbors who “drop a dime” on suspicious sexual activity; and children in public schools are given extensive DARE-like training and taught to report parents or friends who might be engaging in unlawful sexual conduct. The popularity of the governor’s highly visible enforcement program propels her to reelection (in a contest in which a large number of newly disenfranchised felons are unable to participate).

Now imagine for both Teksas and Schmexas that a Supreme Court announces that criminal sodomy statutes are unconstitutional and that the Court’s ruling is not defied in either state. Such a ruling would, it seems, indicate much more significant judicial interference with elected officials in the Schmexas case than in the Teksas case. This seems true even though the two rulings created identical changes in the legal status of two identically worded statutes.

The Teksas/Schmexas example illustrates the importance of taking prior enforcement patterns into account when assessing the im-

28. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 379-403 (1988) (describing the events which led to the Supreme Court’s decision in *Bowers v. Hardwick*, 478 U.S. 1039 (1986)).

pact of judicial rulings. It also shows that the continued existence of statutes does not reliably reveal the underlying preferences of elected officials. The lack of enforcement in Teksas was not simply some accident resulting from the practical difficulty of enforcing the law. The failure of Teksas officials to take many available steps to enforce the law indicates that elected officials were not really committed to the policy goals expressed in the text of the statute.

The point of this overly facetious example is that the magnitude of changes wrought by judges cannot be measured by looking only at the magnitude of the modifications to the statute books that result from court rulings. Observers cannot assume that the content of the statute books accurately reflects legislators' preferences and thus cannot assume that any judicial alterations to that content thwart legislative preferences. Assessments of judicial power have to at least consider the way law is working on the ground. Scholars also need to consider whether lack of enforcement is the only reason a particular statutory provision remains in effect long enough for a court to strike it down. Of course, judicial rulings striking down under-enforced statutes can have value as symbols and as precedents. Nevertheless, their significance is not that judges wrested power from legislators.

More attention to these issues might also correct that tendency to talk about cases involving real states like Texas as though they are more like our Schmexas example than our Teksas example. Rulings like *Lawrence v. Texas*²⁹ are sometimes attacked for interfering with the right of the "majority" to create and enforce moral standards.³⁰ Justice Scalia once compared the majority's interest in defining murder as a crime to its interest in defining sodomy as a crime.³¹ Comparing the enforcement practices of laws against sodomy and murder would presumably indicate for most jurisdictions that "majorities" want very different things from the two types of laws, however. The enforcement patterns in the real Texas provide no indication that a majority of Texans wanted to effectuate a moral standard that made all persons who engage in gay sex into felons or that Texans had much interest in

29. 539 U.S. 558 (2003).

30. *Id.* at 603-04 (Scalia, J., dissenting).

31. In *Romer v. Evans*, Justice Scalia argued that

I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.

517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

draining the public treasury by prosecuting and punishing such persons.³²

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 courts directly challenge existing *practices*. The U.S. Supreme Court's ruling in *Brown v. Board of Education*³³ upset laws that were being enforced and thus better qualifies as an instance where democratically elected officials lost power to judges³⁴ (assuming, perhaps too charitably, that one wants to call the processes for selecting legislators in South Carolina in 1954 democratic "elections"). Ironically, however, 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.³⁵ There are, however, some rulings that have led legislators to devote considerable resources to meeting judicial standards, e.g., *Gideon v. Wainwright*.³⁶ It may be that scholars could develop more accurate measures of the impact of judicial rulings by measuring the direct effects of judicial rulings on the distribution of resources rather than looking to see how big a hole a ruling creates in the statute books.

C. *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 emphasized that it was the *finality* of Supreme Court constitutional decisions that rendered them particularly problematic in a majoritarian system of government.³⁷ 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 impractical. However, reports of the finality of judicial decisions are

32. See *Lawrence*, 539 U.S. at 573 (stating that Texas had not prosecuted anyone for violation of their sodomy statute as of 1994).

33. 347 U.S. 483 (1954).

34. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42 (1993) (noting that seventeen states and the District of Columbia required segregation by law at the time *Brown* was decided).

35. See *id.* at 70-71 (concluding that courts had no direct effect on ending discrimination or implementing other social reforms before Congress and the executive branch acted).

36. 372 U.S. 335 (1963).

37. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 20 (1962).

greatly exaggerated. Elected officials almost always have available other, more easily pursued options for limiting the impact of judicial decisions. Even though many of these options are not used very often, the *availability* of such controls is still relevant to assessments of judicial power. It is more difficult to conclude that judicial decisions thwart the will of elected officials when elected officials decline to take easy steps to 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. City of St. Paul*³⁸ could be limited by passing sentence enhancement statutes instead.³⁹ States could also do much more to limit the availability of abortions by passing statutes that push up against the weaker constitutional standards that the Court announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁰ More dramatically, legislators might take institutional steps that directly attack the powers of the courts. In the United States, the Constitution allows Congress to pack courts with new members⁴¹ and invites Congress to make "exceptions" to the jurisdiction of the Court.⁴² Congress can also impeach and remove an uncooperative Supreme Court Justice with fewer votes than it takes to override a presidential veto.⁴³

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 any fixed power to have the final word. The reasons elected officials decline to use their powers to limit the effect of court rulings have to be considered before scholars can conclude that judges have thwarted the will of elected officials.

38. 505 U.S. 377 (1992).

39. Compare *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993) (upholding a Wisconsin penalty enhancement statute imposing a higher criminal penalty when the victim was selected on account of race), with *R.A.V.*, 505 U.S. at 391 (striking down a Minnesota statute criminalizing certain racist conduct).

40. 505 U.S. 833 (1992). Note that *Casey*, oddly remembered for its pronouncement that it is not overturning *Roe v. Wade*, 410 U.S. 113 (1973), upheld almost every provision of the challenged Pennsylvania statute, including provisions that made it impossible for many women to get abortions in Pennsylvania. Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 93-95 (1999) (concluding that minors seeking a judicial bypass from the Pennsylvania parental notification requirement are unable to receive accurate and consistent information from the courts, which effectively denies minors their right to an abortion without parental consent).

41. U.S. CONST. art. III, § 1.

42. *Id.* at art. III, § 2, cl. 2.

43. *Id.* at art. I, § 7, cl. 2; *id.* at art. I, § 3, cl. 6.

III. DELIBERATE EMPOWERMENT OF JUDGES AND DEMOCRATIC LEGITIMACY

As a means of sorting out the implications that different mechanisms of judicial empowerment have for democratic accountability, we introduce in this Part a distinction between two types of decisions by elected officials that deliberately add to judicial power: *delegation* to the courts and *legislative defaults*. The two categories both involve *deliberate* efforts to expand judicial discretion or to give judges power to resolve particular policy questions.⁴⁴

A. *Legislative Delegation to Judges*

Delegation describes cases where elected officials empower the courts to make instrumental use of judicial power as a means of attaining settled policy goals. Legislators delegate if they perceive some advantage that judges have when it comes to finding an appropriate resolution to certain kinds of policy questions.

Delegation occurs most clearly in statutes that leave judges discretion to make choices from within a specified range as they participate in the implementation of policies, e.g., criminal statutes that specify a range of penalties for persons convicted of a particular offense. Legislators may also delegate certain decisions to judges to take advantage of the relative political independence of the judiciary. For example, the election-related legal battles in Florida in 2000 provided reminders that legislators sometimes invite judges to exercise broad equity powers to craft solutions to electoral disputes, presumably with the hope that judges are more likely to find credible solutions than more transparently partisan officials in other branches.⁴⁵ Legislators can also delegate more obliquely by placing judges in a position to evaluate and modify decisions made by other actors, e.g., administrators in regulatory agencies.⁴⁶ Legislators might also try to take advantage of the fact that judges typically make interpretive rulings years after statutes are enacted and thus with a great deal more information about how a statute actually works than the legislators who enacted it. Building flexibility into statutes allows judges to use that information to make needed adjustments as unexpected problems arise during implementation.

44. Our distinction between the two types of cases is somewhat stylized. Many cases will fall between categories, and individual statutes might contain elements or provisions that fit into different categories. The distinction is nevertheless helpful for trying to understand important connections between democratic accountability and legislative deference.

45. LOVELL, *supra* note 1, at xv-xvi.

46. See, e.g., SHAPIRO, *supra* note 18, at 55-56.

Of course, there is always some risk that judges will use any grant of discretion to pursue their personal preferences rather than the goals of legislators. However, that risk may quite often be worth taking. After modeling a process through which legislators might take advantage of the information available to judges, James Rogers found that judicial discretion at the endpoints of implementation helps legislators to attain policy goals even when judges are not reliable ideological allies of the legislature.⁴⁷

B. *Legislative Defaults*

Defaults differ from *delegation* 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. Legislators instead invite, or at least tolerate, judicial policymaking because they cannot (or do not want to) reach a coherent collective agreement to establish a particular policy outcome. Legislators may default passively by choosing to do nothing when some pressing issue arises, even though they know that inaction will leave judges with discretion to choose among available policy outcomes. Legislators may also actively default, e.g., by enacting a statute that appears to address some pressing problem but that actually gives judges discretion in one of the ways described above.

Defaults are likely to occur when legislators are primarily interested in shifting responsibility for making clear choices and only secondarily concerned about which policy alternatives judges eventually select. Note, however, that the relative indifference about policy outcomes is a *collective* indifference. A default can occur even when most legislators care very much about policy outcomes. So long as there is no effective majority in favor of any particular outcome and at least some legislators are willing to support a compromise that empowers judges, there may be court-empowering compromises that can attract majority support. Note also that a default statute may pass with support from legislators with different motives. Some legislators may vote for a deliberately ambiguous law because they do not care what policies judges choose so long as judges get the blame; others because they are not paying attention and think they are voting for a clear law. Many other legislators may care about policy but vote for a default because they decide that even a small chance of winning in the courts

47. James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84, 93-95 (2001).

is a more promising strategy than holding out for an unattainable legislative victory.

Note finally that judges are less likely to be corrected by elected officials in default cases than in cases involving delegation. Since delegations are cases where there is consensus on policy goals, legislators are more likely to care about the choices made by judges, more likely to share in their assessments of those choices, and thus more likely to take steps needed to reverse bad judges. In contrast, defaults are likely in cases where there is no majority consensus on policy goals, making it much less likely that any majority will emerge to reverse judicial choices.

C. Delegation, Defaults, and Assessments of Democratic Legitimacy

While both delegation and defaults are problematic, delegations are easier to defend. In a quite plausible range of cases, deliberately expanding judicial discretion can actually enhance electoral accountability by making it more likely that the policy goals of elected officials are attained. Delegation can also presumably improve welfare in some cases, e.g., by fixing irrationalities or smoothing out barriers to effective implementation. There is still room for concern. Since judges are being given real discretion, there is always some risk that they will not behave as expected. The threat of legislative reversal also provides a much less direct form of control than the threat of regular elections. Nevertheless, 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 irrational or unpopular outcomes, delegation to the courts need not create any substantial barrier to electoral accountability.⁴⁸

Cases involving defaults to the courts raise all of the concerns raised in delegation cases, as well as a set of additional, more serious concerns. The motive for defaulting is often to thwart important institutional structures that are supposed to assure accountability, e.g., by shielding legislators from responsibility for making contentious choices. Default only works as a strategy when it is done covertly and

48. We are ignoring, for reasons of space, the *constitutional* problems that delegation across branches can create. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (arguing that legislative delegation to the executive branch is unconstitutional). But see George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 *CONST. COMMENT.* 79, 80 (2000) (challenging the idea that judicial enforcement of a constitutional ban on delegation would solve the policy and political problems that Schoenbrod identifies).

thus raises 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 hard choices, their actions raise significant concerns about democratic accountability.

CONCLUSION

This Essay has tried to get at some substantive concerns by framing them as methodological cautions. The underlying substantive 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. Apparent exercises of judicial power sometimes mask more complicated interactions that can only be understood through deeper inquiry into the motivations that lead officials to empower judges.