Courts in a Democracy

Peter H. Schuck*

At one level, the relationship between courts and democracy seems obvious. Courts are a constitutive element of all forms of government that respect the rule of law, including democratic ones. As an empirical matter, every democracy in the world has established courts with extensive jurisdiction over important disputes. Indeed, even non-democratic regimes like Nazi Germany, Communist China, and the former Soviet Union have used courts to implement their arbitrarily-imposed public policies and to enforce such private law as they have permitted to exist.

The necessity of courts to a functioning polity, democratic or otherwise, is equally clear in normative political theory. Aristotle, the first systematic theorist of political constitutions, maintained that courts were necessary in any regime to resolve disputes by applying general principles of law, whatever their substantive content, to particular fact situations. More than two millennia later, Max Weber showed that even systems of private conflict resolution that rely less — or not at all — on fixed legal rules and the force of precedent (his example was the Ottoman system of almost wholly discretionary kadi justice) need courts to assist in governance, including the legitimation of political power.¹ We are safe, then, in offering this precept: no courts, no government — and certainly no democracy.

But this is only the beginning — or more accurately, the end — of the story. It is easy enough to note the empirical and theoretical importance of courts to democracy. Our task, however, is to understand the nature of that relationship and how it differs from polity to polity. In order to do this, I offer five socio-legal variables that seem to shape that relationship between courts and democracy in all democratic systems. They are: (1) the degree of judicial independence; (2) the social prestige enjoyed by judges and other parts of the legal profession; (3) the formal legal authority conferred on and exercised by courts; (4) the role of civil society processes and institutions in shaping legal and political decisions; and (5) the performance of non-judicial governmental actors.

Two caveats. First, the judicial role in a democracy is an immense topic, and I can explore only certain selected features of that

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* Simeon E. Baldwin Professor of Law, Yale Law School.

¹ See MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., 1968).
role here. Accordingly, I shall not discuss the quality and selection of judges, their jurisdiction and remedial powers, their constitutional status relative to other legal actors, or the many other elements of judicial power except as they seem relevant to what I do discuss. Second, my discussion is based largely upon the institutions and experiences of the United States and to a lesser extent western Europe. (I do make brief reference to India in Part IV but wish to emphasize that I have not analyzed the Indian system closely). These institutions and experiences are the ones with which I am most familiar and on which the relevant scholarship is most abundant. I do not underestimate the many important differences between common law and civil law systems, and will mention those differences when they seem particularly relevant to my larger points. Even so, I believe that the fundamental conditions shaping the relationship between judicial power and democracy are likely to be applicable to civilian systems and polities as well, and even to other democratically-authorized adjudicative systems such as military tribunals. And although my analysis will focus more on civil litigation, it also applies, mutatis mutandis, to criminal proceedings.

I. JUDICIAL INDEPENDENCE

By judicial independence, I mean the freedom of judges to conduct their proceedings and render their decisions without regard to the wishes or pressures of other governmental actors and other power holders in the society. To be meaningful, this freedom must be both structural and cultural — that is, judges must enjoy both formal protections that can be invoked against threats to independence and informal protections arising out of the society’s values and traditions. Some qualifications of this claim are in order. First, judicial independence is not a binary phenomenon; it is manifestly a matter of degree. In the United States, judicial independence, especially for federal judges, is as well-protected both structurally and culturally as in any system of which I am aware. Nevertheless, judges are influenced by their former partisan affiliations, their desire for professional advancement, their sense of the zeitgeist, and other extra-legal factors. No knowledgeable observer doubts that (in the words of a famous nineteenth century political commentator, George Washington Plunkitt) “the Supreme Court follows the election returns.” Still, the difference between a polity like the United States or the United King-

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2 Indeed, the precise nature of this relationship is the key issue in U.S. President Obama’s proposed redesign of those tribunals to adjudicate the fate of certain terrorism suspects. William Glaberson, U.S. May Revive Guantanamo Military Courts, N.Y. TIMES, May 1, 2009, at A1.
dom, in which judges are substantially independent, and one in which they are more constrained, as judges have sometimes been in some Latin American countries, may be the difference between a robust rule of law and a weak one.

Second, judicial independence is not the same as legal formalism, nor does it assure sound judgment. Judicial independence does rule out certain political influences on judges’ decisions, but it leaves open the question of which other materials and influences may properly affect those decisions. Thus, it is perfectly consistent with the legal realists’ empirical claim that judges’ policy views, personal experiences, and other informal factors do inevitably shape their decisions (especially in hard cases), as well as the normative defense of this practice by many realists.³

Third, although most court judgments are routinely enforced, certain controversial judgments cannot be fully enforced without heavy reliance by courts on cooperation or resources from the executive and legislative branches. This reliance may delay or frustrate judicial effectiveness but except in extreme cases,⁴ it does not inherently threaten judicial independence.

Structural safeguards, by definition, do not depend on the particulars of a given situation but are more or less systematic protections, and can usually be enforced as such. In the United States, federal judges are appointed to life terms and cannot be removed except by impeachment for “high crimes and misdemeanors,” an uncertain but demanding standard.⁵ Their compensation may not be reduced during their terms in office. No religious test for judicial (or any other) office may be applied. A very early decision by the Supreme Court held that judges may not be called upon to render advisory opinions, and there is a tradition, sometimes selectively applied or ignored, of judges recusing themselves from cases in which their objectivity could reasonably be questioned. (A test of this tradition involved Justice Antonin Scalia, who declined to recuse himself from a case which Vice-President Dick Cheney, with whom Scalia went on a hunting

³ The heated controversy in the United States over the effect of Judge Sonia Sotomayor’s policy views, ethnic identity, and personal experiences on her fitness for appointment to the Supreme Court often conflates these empirical and normative claims, while also mixing formalist and realist assertions in ways that are confusing, sometimes intentionally so. E.g., David D. Kirkpatrick, Sotomayor’s Focus on Race Issues May Be Hurdle, N.Y. TIMES, May 29, 2009, at A1. For the classic statement of legal realism, see Jerome A. Frank, LAW AND THE MODERN MIND (1930).

⁴ For an example of one such extreme case, see Mark Curriden, A Supreme Case of Contempt, A.B.A. J., June 2009, at 34 (chronicling United States v. Shipp, 215 U.S. 580 (1909)).

⁵ In the history of the United States, only thirteen federal judges have been impeached and only seven of those were removed.
trip in a corporate jet, was a defendant.\textsuperscript{6} Not all of these protections apply to state judges who, depending on the state, may be elected and dependent for campaign contributions on interests that appear before them. In June 2009, a sharply-divided U.S. Supreme Court held for the first time that an elected state court judge's failure to recuse herself or himself from a case despite having received a substantial campaign contribution from a party in the case may violate the Due Process Clause.\textsuperscript{7} This decision seems certain both to intensify the debate over the wisdom of electing judges, and to create strong tactical incentives for lawyers in state court litigation to seek to force the recusal of elected judges whom they deem unsympathetic to their clients' claims. Moreover, the grounds for removing elected or appointed state judges from their positions, not just from individual cases, are often easier to satisfy than the grounds for removing federal judges through impeachment.

Cultural attitudes toward judicial independence are probably even more important than structural ones. They are causally prior — formal structures are unlikely to be established unless the underlying values that those structures are meant to vindicate already exist. In addition, a principle's antiquity tends to reinforce its social legitimacy and impart to it a kind of naturalism that makes it seem less contestable. Hoary tradition, frequently invoked and always celebrated, dulls our critical faculties. To a Burkean conservative, this entrenchment of the familiar is essential to social stability and wellbeing, while an iconoclastic reformer finds it a frustrating obstacle to progress. Moreover, cultural affirmation of judicial independence infuses moral conviction and political support into otherwise empty legal forms. A dramatic example of this occurred in 1937 when President Franklin D. Roosevelt attempted to pack the Supreme Court with his nominees in order to neutralize a body that had been hostile to parts of his New Deal agenda.\textsuperscript{8} Roosevelt's unusual effort was decisively rejected by Congress and the public, but even more routine efforts by politicians to compromise judicial independence have been fiercely resisted in the United States, and the politicization of the process for selecting federal court judges, a politicization that is no longer confined to Supreme Court nominations, has become a major subject of intense public debate because of its possible diminution of judicial independence.

\textsuperscript{7} Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009); see also U.S. CONST. amend. XIV, § 1.
Judicial independence, however, must be earned if it is to be sustained. Enduring support for the principle ultimately depends upon a widespread belief in the public that it can rely upon judges to use their freedom from constraint, well, judiciously. In the Anglo-American setting, this public confidence has accumulated only after a centuries-long struggle whose outcome was by no means preordained. Former British Prime Minister Tony Blair’s campaign to impose political control over the House of Lords, the United Kingdom’s highest court, demonstrates that this struggle is by no means over. In Argentina, former President Nestor Kirchner’s successful campaign for mass resignations by Supreme Court judges was seen by some as a triumph for human rights, and by others as a long-term threat to the Court’s independence.

From the perspective of public choice theory, the vitality of judicial independence depends on how judges and politicians (and the voters that elect them) define their self-interest and how constrained they are in pursuing it. Rhetorically, at least, judges are the strongest proponents of judicial independence, and it seems obvious that it serves their professional interests by maximizing their decisional autonomy, freeing them to apply whatever legal rules they deem appropriate, subject only to the relatively mild sanctions of reversal on appeal and criticism by academics and other court-watchers. Public choice analysis is less clear about whether and to what extent politicians think that judicial independence serves their electoral goals. Some have argued that judicial independence enables politicians to assure enforcement of the deals that they make in the form of statutes and regulations, which in turn increases their own bargaining power and predictability. Others believe that this same judicial independence undermines predictability by giving courts the latitude to deviate from the arrangements on which the politicians think they have agreed. Academics, for their part, strongly support judicial independence for reasons of both principle and professional self-interest.

The proposition that judicial independence serves the public interest in economic growth has some empirical as well as theoretical and ideological support. American scholars Daniel Klerman and Paul Mahoney have presented data showing that early eighteenth century England, by adopting more secure tenure and other protections for judges, increased the value of publicly-held companies.9 Other scholars have also argued that the safeguards of judicial independence established by the Glorious Revolution of 1688 enabled the English government to make credible commitments to repay sovereign debt

and protect other contractual and property rights, thereby encouraging investment and wealth-increasing transactions.\textsuperscript{10} Related to economic growth but perhaps even more fundamental to social well-being, independence has enabled courts to protect dissent and diversity despite political pressures for conformity, which protection has significantly promoted social stability and individual freedom.

What is the effect of judicial independence on judicial behavior? This crucial question is difficult to answer for obvious methodological reasons. But part of the answer, surely, lies in the interpretive theories that judges deploy in their decisions. An important and controversial feature of contemporary jurisprudence in the United States (and perhaps elsewhere) is that judges use a number of different modes of interpretation of legal texts and principles. This is not to say that they are always or even commonly self-conscious about the particular theories they use — legal scholars are far more likely to think about hermeneutics in this theoretical way — but rather that careful observers of a theoretical bent can often discern these different hermeneutics, alone or sometimes in hybrid forms, at work in judicial decisions. For present purposes, the important point is that independence permits judges, among other things, to choose from among a number of possible options how they will go about interpreting legal texts and principles. This substantial hermeneutical freedom, permissible only in a regime that protects judges’ independence, is perhaps the most consequential choice they make.

\section*{II. Judicial Prestige}

Judges cannot enjoy high social status — nor can the rule of law — unless they are substantially independent. If they are merely functionaries who do the bidding of politicians and bureaucrats, they will be held in low social esteem relative to those who are empowered to pull the strings.

The social status of judges, however, depends on more than their independence. It also depends on the extent of their formal authority (discussed in the next section), the level of actual power they are thought to exercise, public respect for their competence and performance, their association with venerable tradition and august ceremony, the exclusivity, size, and public prominence of the judiciary, and the honored place that they occupy in the eyes of other prestigious people and institutions.

In the United States, judges score very well on all of these status markers — although this tends to be truer of federal judges than of state judges.\textsuperscript{11} As we shall see, American judges usually have broad jurisdiction over matters of great public and private importance. Their actual power, moreover, often extends beyond their formal jurisdiction, at least in the sense that they tend to interpret their own jurisdiction expansively and fashion remedies that enlarge the reach of their writ. Public approval rankings invariably place the courts above politicians and almost all other social institutions. Their physical elevation in the courtroom, total and conspicuous control of their environment, imperious manners, black robes, ostentatious displays of erudition, and antique rituals may be derided by sophisticates as elaborate efforts at self-dramatization and public mystification. Nevertheless, these efforts succeed in linking them in the public mind with that most precious public value, the rule of law. The federal judiciary in the United States, despite growth over time, remains a relatively small and elite corps to which it is very difficult to gain entry; indeed, it is impossible without political sponsorship. The withdrawal of judicial nominees when they are shown to lack strong judicial credentials, most prominently in the case of the nomination of Harriet Miers to the U.S. Supreme Court, reflects not only political realities but also the high public esteem in which the federal judiciary is held. Finally, judges enjoy the studied deference of other prestigious actors in the political, legal, and social systems. Today, unlike during the civil rights struggles of the 1950s and 1960s, it is almost unheard of for a public official to proclaim his intent to defy judicial rulings.

These markers of prestige, it must be said, come more easily to judges than to politicians and bureaucrats. This is not simply because judges control their environment in a way that politicians and bureaucrats can only envy,\textsuperscript{12} and because politicians seek a constant exposure and familiarity that often breed contempt and that judges eschew. It is also because, as I explain below, adjudication is a much easier task than the crafting of complex social policies. Even so, the lay public probably understands what judges do less than it understands what politicians and bureaucrats do. Politics can be and often is viewed by the public as a kind of familiar, indeed ubiquitous, spectator sport. In contrast, the language of law is more arcane, as are its forms and processes — even today when legal sitcoms and television in courtrooms are common. For this reason, an educated, legally so-


\textsuperscript{12} This difference, among others, raises an interesting question about the rationale for affording judges absolute immunity from liability for their harmful errors while extending only a qualified immunity to "street-level" officials. I have explored this question in Peter H. Schuck, \\textit{Suing Government: Citizen Remedies for Official Wrongs} 89-92 (1983).
phisticated public is a mixed blessing insofar as judicial prestige is concerned. As people learn more about how law works, and as law is imported into popular culture, they may find it less awe-inspiring and more political than the civic books suggest. This demystification of the courts is probably occurring in the United States today, and is desirable in some respects so long as it does not go too far. Familiarity with courts, one hopes, will breed not contempt but a better informed, more sophisticated understanding of their strengths and limitations.

Prestige is by its nature a scarce good. Distributing it too widely tends to debase it. Accordingly, the competition for prestige may approach that of a zero-sum game in which one group can only gain it at the expense of another group. Whether or not this is true of conflicts among other political actors, it does appear that when the courts have challenged politicians in their judgments, they have usually enhanced their reputation as principled guardians of the law at the expense of the opposed politicians and bureaucrats. This prestige advantage, which may seem surprising given the far greater array of weaponry available to the politicians, tends to magnify the already intense institutional competition, the struggle for power, between the judiciary and the other branches of government.

I have already noted that the prestige of courts in the United State is both reflected and reinforced by the deference paid to them by other prestigious social actors. Of special importance is the strong support of various elements of the legal culture — the organized bar, the professoriate, and the media — for judicial independence and legitimacy. In addition, this support is at least tacitly provided by politicians, who are understandably reluctant to do battle with the courts in public. Politicians, interest groups, and commentators, of course, often attack particular judicial decisions in controversial areas like abortion rights and presidential war powers. Congress sometimes overrules judicial decisions interpreting statutes, but when it does so it is careful not to challenge the principle of judicial independence itself.

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13 This may also occur as the public comes to realize that judges are, after all, lawyers and thus share some of the characteristics that have made lawyers the object of much public ridicule and humor. See, e.g., Marc S. Galanter, Lowering the Bar: Lawyer Jokes and Legal Culture (2006).


III. LEGAL AUTHORITY

Judicial power also depends on the formal legal authority — the breadth of jurisdiction and the remedial apparatus for enforcing judgments — that courts possess. This authority ultimately must be grounded in the constitution, of course, but the U.S. Congress and state legislatures have steadily expanded the courts’ jurisdiction far beyond the constitutional minimum, and this expansion seems to continue almost regardless of which party controls the legislature. Legislative efforts to restrict judicial authority are not uncommon. Recent examples of jurisdiction-stripping efforts by Congress and some state legislative have targeted lawsuits against gun manufacturers, medical providers, fast food retailers, and those seeking punitive damages, as well as attempts to restrict courts’ power to adjudicate certain kinds of national security disputes. Such efforts, however, tend to be narrowly focused. Courts and juries are popular icons in the United States, and politicians know that sustained attacks on them may backfire.

In principle, common law and civil law systems take rather different views of courts’ legal authority. The primacy of codified law in civilian systems certainly does not eliminate the scope for judicial lawmaking and creativity, but it does consign judges to a secondary, gap-filling role. In contrast, common law judges are lawmakers in almost every meaningful sense of the word. Virtually all sophisticated legal actors fully understand this reality, whatever their rhetorical obeisances to the values of judicial restraint and legal formalism. This understanding renders the notional boundary between law and politics even more difficult to define and defend. Even in civilian systems, where this distinction tends to track that between code and interpretation, it has been increasingly blurred in practice as civilian judges, recognizing that code language is not always self-defining, infuse it with more interpretive flexibility.

The distinction between law and politics becomes even more elusive where courts, as in the United States, are widely understood to have a special institutional responsibility for constitutional adjudication and interpretation. This is particularly true when (again, as in the United States) the constitutional text is brief and delphic, containing many important undefined, question-begging phrases like “equal protection of the laws” and “due process of law” that only courts can, as a practical matter, flesh out in the course of applying

16 Again, the Sotomayor appointment battle — particularly the debate over what to make of her casual boast in a videotaped law school conference, that judges make public policy — reveals a mix of views among commentators: ignorance concerning the realities of law and judicial process, and tactical disingenuousness in invoking formalistic ideals.
them in individual cases presenting specific facts. Unlike the constitutions of many other countries, the American version confers no positive social welfare entitlements, thus providing fewer (though still ample) occasions (if not pretexts) for the courts to make society-wide redistributive decisions. Nevertheless, the widespread view of courts, particularly federal courts, act as the ultimate guardians of the universally venerated United States Constitution, the sacred text of America's civil religion, endows them with an immense reservoir of legitimacy, prestige, power, and independence.

It is interesting to note that the constitutional courts of the European Union — the European Court of Justice and the European Court of Human Rights — have followed the American example in expanding the scope of judicial review in the name of this special responsibility for expounding constitutional texts and protecting constitutional values. Remarkably, the national governments of the European Union seem to have acceded to this assertion of supra-national judicial power at the expense of the authority of the members' own national courts. The fact that, as noted earlier, European state constitutions and E.U. charters tend to include more positive rights to government-provided social and economic benefits than the federal and state constitutions in the United States do is bound to involve the European courts in essentially political and distributive controversies. U.S. courts rhetorically maintain that they should avoid such cases, noting a variety of judicial doctrines that counsel deference to the political branches. Yet despite this rhetoric of self-restraint, they have often succumbed to the temptation to take jurisdiction over such questions, even eagerly reaching out for them in some cases. Important examples include the Supreme Court's decision in Bush v. Gore and in a series of post-9/11 decisions limiting the scope of presidential powers over detainees accused of terrorism.

IV. CIVIL SOCIETY AND THE COURTS

Judicial power is also shaped by the institutions and processes of civil society. The greater the differentiation among interests, values, and groups in a society, the more likely it is that courts will be called

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17 This metaphor of the Constitution as sacred text is a familiar trope in American public discourse. For an exploration of this connection, see Jaroslav Pelikan, Interpreting the Bible and the Constitution (2004).
upon to adjudicate conflicts and disputes among them. This does not necessarily mean, of course, that all or even most of these conflicts must go to court — or even that the conflicts are socially problematic. Quite the contrary. Markets thrive on heterogeneous interests, enabling welfare-enhancing trades between them. If law permits, the vast majority of social conflicts are resolved through markets, social norms, and other informal mechanisms. But even so, some proportion of those conflicts cannot, will not, and in some cases should not be resolved in these ways. For those conflicts, courts must fill the gap.

More than any other civil society institution, markets bear an important and complex relationship to government in general and judicial power in particular. Markets, of course, cannot function without government to define and protect property rights and enforce contracts. At the same time, robust markets are necessary to make government, including courts, both manageable and effective. In fact, a direct relationship exists between the scope of markets and the capacities of democratic government. To the extent that markets do more of the difficult work of social integration and dispute resolution, the government (including courts) needs to do less of it. This division of responsibility between decentralized markets and centralized public authority, including courts, enables government to conserve its limited supply of legitimate coercive power. Only in this way can the government mobilize its limited power in order to alleviate suffering, protect individual liberties, defend the nation, and administer justice. This kind of division of responsibility between markets and government, then, is an essential ingredient of liberal democracy — and perhaps for any democracy — although the precise mix of politics and markets varies considerably among democracies, with the United States being at the market end of the spectrum and the Scandinavian states being at the other, statist end.

V. The Performance of Non-Judicial Governmental Actors

It might seem odd to suggest that judicial power in a democracy turns to a significant degree on how the public thinks the other branches of government are performing their own activities. After all, the rule of law implies that judicial power should be a function of formal legal authority, defined by whatever jurisdiction the constitution and laws confer on the courts. Nevertheless, the experience of

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the U.S. and some other countries strongly suggests a more complex
dynamic and one worth exploring.

Citizens in a democratic polity demand, among other things, that
their government produce and distribute public goods. Such goods
are of many different kinds; their common feature is that only gov-
ernment, not the market, can supply them efficiently.\(^{22}\) For present
purposes, the relevant public goods that citizens demand are various
forms of social justice. These forms include certain conceptions of
equality, limits on arbitrary governmental and private power, protec-
tion of people's property and civil rights, and relief from the most se-
vere consequences of destitution. In a vigorous democracy, of course,
the precise nature and level of each of these public goods are matters
of fierce debate and political struggle. Moreover, they change over
time. Sharp disagreement also exists about how these public goods
should be provided and through which processes and institutions.

In the United States, this last question often lacks a clear an-
swer. As the late political scientist Richard E. Neustadt pointed out,
the constitutional arrangement known as "separation of powers" is
really a messy system of "separate institutions sharing power."\(^{23}\) The
boundary lines between what each of the branches may and may not
do are ill-defined; except in the clearest cases, these lines are politi-
cally and legally contestable, intensifying the competition over juris-
diction and power. This institutional struggle, of course, is also
characteristic of many parliamentary systems, although the competi-
tion in such systems may take different forms than in the United
States.

In such competitive systems, the courts are often the joker in the
constitutional deck. For several reasons, they tend to be relatively
well-positioned to expand their jurisdiction and power. They often
(but not always)\(^{24}\) have the last word in dispute resolution. As al-
ready noted, the public usually regards them as the principal guardi-
ans and expositors of the constitution and of its division of juris-
dictional domains among the branches. To the extent that courts
are at some remove from competitive politics, they are less likely to
be tarnished by accusations of self-interest, power-seeking, unprinci-
pled behavior, and expedient compromise. Courts, unlike politicians,
characteristically speak in the exalted language of general principle
and wrap themselves in the mantle of an oracular rule of law. Every-
thing about the judicial process conspires to make courts' exercise of

\(^{22}\) See generally Paul A. Samuelson, The Pure Theory of Public Expenditure, 36 REV. ECON.
& STAT. 387 (1954).


\(^{24}\) See, e.g., Michael J. Klarman, Brown v. Board of Education and the Civil Rights
Movement (2007) (analyzing the political backlash against some unpopular decisions).
power seem more limited and temporary, less visible, and harder to attack.

Accordingly, when politicians seem to fail in producing the public goods that are demanded, the courts have an opening that litigants, invoking some source of legal authority and often goaded by judicio-centric academics, will urge them to fill by decreeing principles and remedies that can supply those public goods. In the popular mind, this form of argument — “a grave injustice exists, and the politicians are not doing what needs to be done to rectify it” — is perhaps the most common and compelling justification for expanding judicial authority beyond its previously recognized limits. In itself, this argument from political failure to judicially-mandated reform is not enough to carry the day. A plausible claim must also be made that the court’s order is simply a logical implication from previously-decided cases and principles, which it sometimes is not. But the argument will carry plaintiffs and receptive courts a long way toward the desired reform. Most of what is called “judicial activism” — whether it be of the liberal variety associated with the Warren (and to some extent, the Burger) Court or the conservative variety associated with the Rehnquist Court (and arguably the Roberts Court) — reflects this melioristic, vacuum-filling political and legal dynamic.

This same phenomenon, mutatis mutandis, is clearly visible (at least to this non-specialist) in India today. Indian politicians, whose comings and goings seem to excite inexhaustible public fascination, are routinely denounced for corruption, indifference, complacency, and ineffectuality. In sharp contrast, the Supreme Court of India (if not all of the lower courts), is widely revered for being precisely the opposite: honest, principled, morally engaged, and effective. In a series of cases decided under the Indian Constitution’s “public interest litigation” authority, which gives such cases priority on the Court’s docket and allows any concerned party to satisfy the minimal standing requirement, the Court has relied upon open-ended constitutional provisions to mandate a significant number of far-reaching reforms to the consternation of the government officials who had eschewed or ignored them. The Court, in short, has provided public goods where the politicians have not, and its perceived legitimacy seems to rise in direct proportion to its willingness to do so. It is hard for an outsider to see what will reverse this court-revering, self-justifying, jurisdiction-expanding trend, which I believe has its counterpart in the

25 See my discussion of one such judicio-centric analyst, Owen Fiss, in SCHUCK, supra note 1212, at 174-78.

26 Id.

United States and, as Professor Martin Shapiro and others have shown, in Europe and Canada as well.\textsuperscript{28}

Is this trend good or bad for democracy? The answer, of course, is that it depends — on one’s conceptions of democracy and legal legitimacy, one’s theory of constitutional separation of powers, and one’s appraisal of the characteristic institutional strengths and weaknesses of legislatures, administrative agencies, and courts. Much ink has been spilled on the first two of these issues, and somewhat less on the third. Here, then, I shall confine myself to the issue of institutional comparison.

The respective defects of legislators and administrative agencies have been demonstrated and compared with one another in great detail in many different contexts.\textsuperscript{29} But even a brief comparison of the courts’ policy-making capacities with those of legislatures and agencies indicates the severe limitations on courts’ competence to perform the kind of policymaking that is often required to supply the kinds of public goods discussed earlier.\textsuperscript{30} The most important comparison can be grouped under three headings: organizational expertise and rationality, success in implementation, and political responsiveness.

Judges are trained as generalist lawyers, usually as litigators, not as policy specialists. They are unlikely to acquire, or know how to exploit, the kinds of information that a competent policy analysis requires. Few litigants possess the resources needed to adduce this information for the court, and most lack the incentive to do so, such information itself being in the nature of a public good and often marginal or even harmful to their cause. Only a fraction of the many social interests affected by a legal rule are represented by the parties before the court, and the relatively few cases that reach trial are unlikely to be representative of the social reality that a policy must address. Finally, courts lack any reliable way to obtain feedback on the real-world effects of their policies. They must depend for fresh information on the particular litigants and disputes that happen to come to their courtrooms, and case number two is a vehicle for policy change only if it raises the same policy issues as case number one but somehow manages to adduce better policy-relevant data for decision. Even if case number one can be distinguished, disregarded, or overruled, even a court that realizes it has erred may have to wait for a properly framed new case to come along before changing course.

\textsuperscript{28} See, e.g., Martin Shapiro, Courts: A Comparative and Political Analysis (1986).


\textsuperscript{30} For a particular comparative assessment of courts and agencies with respect to regulating drug safety, see Peter H. Schuck, FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot, 13 Roger Williams U. L. Rev. 73 (2008).
Even if courts could readily determine the correct social policy for creating the particular public good, they would be hard put to implement that policy. Ultimately, courts possess relatively few policy instruments — money damages and injunctions — and these tend to be weak, inflexible, or both. Leaving aside certain cases in which government is the defendant, courts cannot impose fines or taxes, subsidize, educate, reorganize, inform, hire, fire, insure, establish bureaucracies, build political coalitions, or coerce non-parties. A damage remedy can be important in shaping some kinds of behavior, but it affects quite a narrow band on the broad spectrum of human motivation. The need to decide cases on principled grounds also limits courts' ability to implement even their sound policy judgments. Legal principles, after all, tend to be binary in structure — one has either been denied equal protection or one has not — whereas optimal social policies tend to have a more-or-less structure entailing a compromise among competing values and interests.

Courts have one significant advantage: as noted earlier, their prestige and association in the public mind with the rule of law ideal means that they can ordinarily count on strong support from the public. As institutions, they enjoy greater respect than markets, legislatures, or most bureaucracies inside or outside government. But judicial activists of left and right should not take too much comfort from this public support. It is probably more a vestige of what courts traditionally did than a tribute to the far more difficult things that many contemporary judges seek to do with their legal authority. In fact, the tasks of legislatures and agencies are generally more intellectually demanding, more politically sensitive, and harder to implement than the traditional adjudication in which courts have engaged. It should come as no surprise, then, that the other governing institutions have seemed to fail in the public's view while courts remain popular, for these institutions are playing very different games by altogether different rules. If courts continue to assume the more comprehensive and problematic policy responsibilities that the provision of many public goods entails, and if the public learns more about how effectively or ineffectively they perform them, one may expect the courts' failure rate — and the general level of public disappointment in them — to rise as well. Should this occur, we can only hope that the result is a more chastened, modest, sophisticated judiciary rather than a tarnishing of the rule of law of which they are essential guardians.