

A Physics of Judicial Politics

Dan Brook

Introduction

The field of judicial politics or public law — even the nomenclature suggests flux — has been, and continues to be, in constant motion, as are the actors within it. This subfield of political science has become more diverse, sophisticated, broad, comparative, and interdisciplinary from its days as the study of constitutional law and the United States Supreme Court. The field, fortunately for it and us, has moved “downward” and “outward” (Shapiro). Partially, as both cause and effect, the study of judicial recruitment for both state and federal courts has contributed to this positive phenomenon. Additionally, as part of the field’s breadth, depth, and sophistication, the study of interest groups and litigation helps to explain the who, what, when, how, and why of the movement and mobilization of interest groups towards the courts. These related phenomena will be examined in turn. Taken together, they represent a physics of judicial politics as they each exhibit movement within their own, albeit overlapping, spheres of action.

The Evolution and Trajectory of Judicial Politics

The field of judicial politics has evolved towards a growth of diversity, indeed multiversity, in its scholarship. It has evidenced a renewed interest in the outputs of the judicial process and the normative questions that necessarily surround them, and has begun to build new bridges across the social science disciplines (Baum). Although never completely homogenous, the field of judicial politics once had a core — constitutional law and the Supreme Court, then later judicial behavior — to which most scholars congregated. The loss of a singular core, however, is not a sign of weakness in the field; on the contrary, it is evidence of growth and maturity. Indeed, one might argue that in this new and improved field, there now exists a set of regional sub-cores in the various areas of judicial politics. This movement of intellectual dispersal is quite important, indeed necessary, for the field’s survival. As Lawrence Baum states, “The field has taken with a vengeance C. Herman Pritchett’s advice to ‘Let a hundred flowers bloom’” (Pritchett cited in Baum).

Two of the important movements “downward” involve scholars who began to study “local courts and judges” and others who rediscovered “the ‘public’ in public law” (Shapiro). Martin Shapiro states that “Public law governs the internal processes of government bodies and their relations to one another and to the citizens. It embodies the public interest and is an instrument of public policies....The political scientist has no interest in private law” (ibid.). As for “local courts and judges”, urbanists in political science realized that they also needed to study the “urban courts” to complement their knowledge bases and to be able to find out “what was really going on in the cities”

(ibid.). For Baum, this was “by far the most important move toward diversity in the field of judicial politics” (Baum).

Although “The lines between process and outputs and between empirical and normative are difficult to draw”, it nevertheless appears, according to Baum, that the renewed emphases on both outputs and normative concerns are not only surviving, but are actually thriving (Baum). Included here, for example, are studies “on decision-making and the effects of decisions” and studies analyzing how “legal language directs and constrains judges in their choices” (ibid.). This, too, demonstrates vitality in the field.

Judicial politics is again forging links with other academic disciplines, yet the jury is still out on the verdict of its success. The interdisciplinary movement of judicial politics has been slow and clumsy. “In some respects the study of judicial politics within political science now appears to be just one loose category in social science research on law and the courts” (Baum). The primary problem that keeps judicial politics disconnected from other fields in the social sciences is that “A large share of political science research in judicial politics continues to fall into areas that are of limited interest to other disciplines”, most notably history, sociology, and anthropology (Baum).¹

Forging interdisciplinary links represents, by and large, “outward” methodological movements; however, there are also strides being taken in conceptual “outward” directions which help to contribute to a more comprehensive and holistic field, as well. One giant step in this direction is the recent return of interest in international law. Some public law political scientists are beginning to expand their horizons by studying such critical international phenomena as transnational corporations, trade policy, human rights, environmental regulation, treaties, etc. Hopefully, these phenomena will be adequately analyzed so that they may be tied, conceptually and theoretically, to sanctions, wars and war crimes, exploitation and neo-imperialism, conservation and sustainability, and other such crucial global political economic issues. Fortunately, judicial politics is also recently employing the comparative method (despite the efforts in this direction of Murphy and Tannenhaus over four decades ago), though unfortunately much of the comparative analysis is focused on constitutional law and constitutional courts.²

An additional move “outward”, though this one mostly within the United States, is the focus on administrative and regulatory law. Shapiro claims that the “political scientists who were concerned not only with the implementation but with the making of policy now discovered that the old policy-making iron triangle of interest group-congressional committee-executive agency had become a rectangle with courts...at the fourth corner” (Shapiro). Still other “outward” movements in judicial politics have been spun off by the power of the rational choice approach and the critical legal studies and feminist legal studies movements, which are inherently interdisciplinary.

All of the above mentioned “downward” and “outward” shifts in judicial politics may have weakened the old core(s), but they also have significantly strengthened and energized

the field in various methodological, conceptual, and theoretical ways. The field is now more dynamic, comprehensive, and holistic with the incorporation of these scholarly movements. In addition, these shifts have resulted in the augmentation of the field's store of data and knowledge which presently exists and which is constantly increasing. These developments have proven quite healthy for a growing field.

The Gravitation of Judicial Recruitment

The study of judicial recruitment for both state and federal courts is a good example of "downward" movement in judicial politics. Although the Supreme Court still figures prominently in this domain, the other federal courts, as well as the state courts, also make strong appearances in this area. In fact, Philip Dubois' award-winning book, *From Ballot to Bench*, exclusively examines state judicial recruitment processes. Charles Sheldon and Nicholas Lovrich, Jr., Henry Glick and Craig Emmert, and John Wold and John Culver also focus on state courts and judges. Sheldon Goldman, Henry Abraham, and Elliot Slotnick assess federal judicial selection.

Regardless of recruitment method and level of court, there are three stages through which a jurist must pass prior to becoming a judge or a justice. They are "initiation, screening, and affirmation" (Sheldon and Lovrich). Goldman delineates five such stages³: (1) recommendation to the president, (2) formal presidential nomination, (3) consideration by the Senate Judiciary Committee, (4) Senate confirmation, and (5) the symbolic signing and delivering of the commission and the taking of the judicial oath of office (Goldman). However, these five stages can quite easily be condensed into the above-mentioned three. For example, Goldman's last three stages can be fused into one, corresponding to Sheldon and Lovrich's final stage of affirmation. Taken together, the first two stages of each scheme roughly correspond to each other.

In the federal system, judicial recruitment is accomplished through executive appointment (by the president) subject to legislative confirmation (by the Senate). Some states follow this model. The vast majority of states, however, employ an election at some point in the process. The merit, or Missouri, plan, adopted by that state in 1940, has been adopted by many states and uses a post facto election. The merit plan is one in which a special commission submits a short list of nominees from which the governor is required to select one. Thereafter, periodical plebiscites known as retention elections are held, allowing the voters to decide whether the judge should be retained on the bench. Slightly more than half of the states use some form of election as their immediate method of judicial selection. A few of these states have a severely restricted electorate; they still use the colonial-style legislative election. The remainder of the states, a plurality, allow popular elections, fairly evenly split between partisan and nonpartisan ones (Goldman and Sarat).

It is often said that processes effect outcomes, though this is not always so. Dubois prefaces his book by claiming that some of the judicial selection methods are supported not for how they perform, but rather for what they are thought to accomplish. "In

particular”, he contends, “most of the arguments mustered against judicial elections have been anecdotal, if not polemical, substantiated more often by mere assertion than by empirical evidence....Similarly, the benefits said to accompany the merit plan have been accepted largely without contradiction, not because of positive demonstrations of their validity but in the absence of research data to the contrary” (Dubois). Each of the judicial selection methods have been criticized on grounds of the quality, independence, and accountability of the judges selected. There is certainly a measure of truth in the various critiques. All of the attributes we typically desire of the judiciary — quality, independence, and accountability, generally speaking — not only are at cross purposes with each other, to some extent, but also can be circumvented either consciously by politicians or inadvertently by the system itself. The bottom line — or in this case, the final opinion — is that “no one selection method produces markedly different decisional results...than another selection method” (Goldman and Sarat).

If it is indeed true, as Goldman and Sarat claim, that the process of judicial selection does not significantly affect the outcomes, then perhaps we should choose methods of judicial selection based on other criteria. For example, we might want a system that most encourages the selection of people from historically underrepresented groups to join the bench, following the affirmative action policy of the Carter Administration and supported by Goldman et al. Or, perhaps, we might want to implement the process which would radiate maximum legitimacy (e.g. nonpartisan elections, the merit plan with legislative approval, or another new method which combines elements of the others). Furthermore, affirmative action and legitimacy can be related in some ways. At present, despite the efforts of Carter, United States judges are a relatively homogenous group. Indeed, “The backgrounds of judges serving in North Dakota and Texas and New York are not dissimilar; and the backgrounds of U.S. Supreme Court justices do not differ greatly from those of federal judges in Florida or state supreme court justices in Tennessee. By and large, judges in America are white, male, Christian, affluent, and well educated at prestigious private schools. They differ in political party backgrounds and in political opinions, but they often share significant political experience prior to joining the bench” (Gates and Johnson, Murphy and Tannenhau; Abraham; Glick and Emmert). The judiciary could become more democratically representative, infusing it with more legitimacy, and therefore augmenting the strength of the institution, by selecting more women and minorities — racial, ethnic, religious, sexual, and physical, though not “mental” as Republican Senator Hruska argued for in 1970 (Murphy and Tannenhau; Gates and Johnson) — to serve on the bench. “Should there be affirmative action for the judiciary?...Yes, we ought to aspire to obtain the ‘best’ people for our judiciary — but the ‘best’ bench may be one composed of persons of all races and both sexes with diverse backgrounds and experiences” (Goldman). This would surely help make good the promise of democracy.

Conceptually, the study of judicial selection processes and the normative and empirical questions that they have given rise to represent a “downward” movement from the judicial apex of the Supreme Court. Yet, this area of study is also strong evidence of an “upward” movement in terms of the sophistication and maturation of the field of judicial politics.

The Galactic Interactions of Interest Groups and Litigation

The study of interest groups and litigation is another good example of the “downward” movement in the field of judicial politics, while interest groups themselves are likewise a good example of the mobilization and movement of interests from the populace to the judiciary.

Interest group participation before the Supreme Court has skyrocketed in recent times. If we use the gauge of percent of cases in which amicus curiae briefs were filed, we can glimpse a graphic view of this phenomenon.⁴ In the 1930’s, the percentage is negligible (1.6%); from the mid-1950’s to the mid-1960’s, it is less than a quarter (23.8%); throughout the 1970’s, it is up to just over half (53.4%); by 1988, amicus curiae briefs were filed in four out of every five cases (80.1%) before the Court; by the 2013-2014 term, it was the rare case that did not attract amicus briefs (Epstein). Some of the reasons which help to explain this upsurge in interest group litigation activity include (1) the growth in the number of interest groups generally and the number of those that use litigation specifically, (2) the increasing activity of interest groups in pursuit of their goals, (3) the increase of money in politics, and (4) the encouragement by the Supreme Court of interest group litigation and amicus curiae participation (Epstein). As Gregory Caldeira and John Wright cogently note, the “rising tide of briefs from not-so-disinterested third parties [amici] is ... tacit recognition that most matters before the justices have vast social, political, and economic ramifications — far beyond the interest[s] of the immediate parties” (Caldeira and Wright).

Some of the organizations that propelled themselves into the legal arena with increasing energy in the 1970’s and 1980’s were conservative interest groups. Most studies of interest groups and litigation, however, focused exclusively on liberal ones, especially the NAACP. Based on this methodologically-limited approach, researchers concluded “that interest groups resort to litigation when they view themselves as politically disadvantaged” (Epstein). Susan Olson is not one of those researchers. She critiques the political disadvantage theory and argues instead “that litigation is a function of some initial necessary or sufficient conditions [“includ[ing] situational factors, court access rules, and the group’s opposition”] and the mix of a group’s [perception of its] political and legal resources relative to those of its opponents” (Olson).

Lee Epstein also maintains that the common “assumption” concerning interest groups and litigation is not wholly accurate. Epstein finds that “The idea that only politically disadvantaged groups resort to litigation is actually timebound” (Epstein 1985). She contends that the belief “that interest groups resort to the courts only when they are politically disadvantaged does not accurately describe the activities” of the conservative interest groups that she has investigated (Epstein 1985), although “This assumption indeed describes accurately the behavior both of liberal groups and of early conservative interest groups” (Epstein 1985). She instead argues that conservative

interest groups litigate not “because they feel disadvantaged in other political forums”, but rather due to the fact that “they actually consider themselves to be judicially disadvantaged” (Epstein).

One avenue to gaining great insight into the nexus of interest groups and litigation is the role of the amicus curiae brief. As one of the two major legal strategies available to interest groups,⁵ the filing of amicus curiae briefs is considered relatively inexpensive and relatively effective, and is therefore commonly done. It is important to note, though, that governmental and commercial interests collectively account for practically half (48.6% in the 1987 term) of all amicus curiae participation in Supreme Court litigation (Epstein). Nevertheless, conservative interest groups have used this method of participation in litigation with vigor. Indeed, “conservative interest groups can be characterized by their nearly exclusive participation as amicus curiae” (O'Connor and Epstein).

Overall, interest groups appear to be quite successful in their efforts at litigation, though their effects on decisional outcomes have been challenged. Through the vantage point of amicus curiae participation, we can perhaps best assess the effects of interest groups in litigation. Interest groups file amicus curiae briefs for various reasons, including (1) the desire to have input into a case for which they are unable or unwilling to sponsor, (2) the response to a request from other groups, and (3) the ability “to take a broader perspective” in a “well-crafted brief” in order to “influence the outcome of a Court decision” (Epstein). Many interest groups attempt to plan their litigation, yet “planned litigation” remains largely an ad hoc affair and is therefore still “problematic” for most groups (Wasby).

Regardless, the filing of amicus curiae briefs by interest groups, whether as part of a plan or not, appears to influence at least some of the justices at least some of the time. “Do amicus curiae briefs influence the Court’s decisions?”, Caldeira and Wright query. “The extant research indicates”, they continue, “that the answer to this question is, unequivocally, ‘yes’ at the stage of certiorari or jurisdiction and ‘possibly’ at the merits stage” (Caldeira and Wright). The “yes” is demonstrated by the fact that for most cases “the addition of just one amicus curiae brief in support of certiorari increases the likelihood of plenary review by 40%-50%” (Caldeira and Wright). The “possibly” is suggested by a study conducted by O'Connor and Epstein “report[ing] that one or more justices directly cited an amicus curiae brief in their written opinions in 18% of all cases for which briefs were filed on the merits from 1969 to 1981” (Caldeira and Wright). In sum, interest group activity in the judicial arena does seem to have some effect on judicial outputs, though to varying degrees.

Although “There is no general theory of courts which provides the key to understanding differential court usage” (Grossman et al.; as is correctly claimed, the fact that “liberal groups generally prefer to sponsor cases while conservative groups are more likely to file amicus curiae briefs” (Epstein) can be a conceptual springboard toward formulating

such a theory. Further research in this area is clearly necessary in order to decipher the varied movements of the various interest groups vis-à-vis litigation.

Conclusion

The field of judicial politics itself, along with the judges and interest group litigants within the judicial system, is in constant motion, “outward”, “downward”, and otherwise. Generally speaking, these movements have become increasingly numerous, complex, and sophisticated.

Understanding that the myth of judicial decision making — i.e. that judges merely interpret the law without making policy and without infusing their own personal values and ideologies — is indeed a myth and not nearly reality (Murphy and Tannenhaus), ties together three different yet related phenomena: the movements of the field itself, the recruitment of judges, and the activities of interest groups within the legal arena.

The study of judicial behavior, viewing judges as human, and therefore political, beings and not as interpretative automatons, itself goes a long way toward the development of judicial politics. Moreover, it is precisely because judges are not automatons that phenomena such as judicial recruitment and interest group litigation take on such political salience. Judicial politics is as political as presidential politics or congressional politics, although each moves in sync with its own unique rhythm. In sum, the evolution of judicial politics, along with the studies of judicial recruitment and interest group litigation, represents a physics of judicial politics through their separate but intimately-related movements.

Dan Brook, Ph.D. teaches Political Science at City College of San Francisco. More information about him is available via about.me/danbrook.