THE LEAST EXAMINED BRANCH

Unlike most works in constitutional theory, which focus on the role of the courts, this book addresses the role of legislatures in a regime of constitutional democracy. Bringing together some of the world's leading constitutional scholars and political scientists, the book addresses legislatures in democratic theory, legislating and deliberating in the constitutional state, constitution making by legislatures, legislative and popular constitutionalism, and the dialogic role of legislatures, both domestically with other institutions and internationally with other legislatures. The book offers theoretical perspectives as well as case studies of several types of legislation from the United States and Canada. It also addresses the role of legislatures under both the Westminster model and a separation of powers system.

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The Role of Legislatures in the Constitutional State

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Foreword: Legislatures in the Constitutional State

The distinctive role of legislatures in expressing and pursuing the goals of constitutional democracies is the subject of this volume, and it could not be more important, timely, or wide-ranging. The contributors are prominent scholars who have helped to frame some of the most original perspectives on this subject.[1]

Constitutional democracies form and express their ideals through two mechanisms. First, they contain broadly representative political bodies, which we call legislatures. Second, they are constituted by a constitution (written or unwritten) whose laws support a set of democratic procedures and substantive rights that are more basic than the ordinary statutes routinely passed by legislatures.

This volume considers how legislatures can support both the procedural and substantive goals of a constitutional democracy. Contributors consider the principles that should govern legislation; the ways in which legislatures can serve as lawmakers, law followers, and codeterminers with courts of constitutional law; and how legislatures can engage in productive dialogue with citizens and courts at home and peer institutions in other countries.

The primary reason why this subject is so timely and important is that constitutional democracies have been multiplying throughout the world; yet, theorists and practitioners of constitutional democracy alike have yet to fully grasp just how legislatures and courts should divide up the labor of furthering democratic and constitutional values. The virtue of this volume is that it does not pretend to settle this extremely complex issue, but rather it intelligently explores almost every plausible permutation of an answer.

The contributors present many different answers ranging from legislatures working democratically within constitutional boundaries (typically set by judicial authority) to legislatures being the democratic authority over courts in determining the judiciary's constitutional powers.

A less conventional view explored and defended by many contributors is that democratic legislatures act as partners with courts in an ongoing dialogue that codetermines constitutional boundaries over time. On this view, both legislatures and courts have distinct roles to play in shaping constitutional law, but their roles are interactive rather than exclusive.

[1] I wish to thank Tsvi Kahana for organizing the conference on which this volume is based, and Sigal Ben-Porath and Dennis Thompson for their insightful comments on an earlier draft of my foreword.

As constitutional democracies spread around the world, the diverse ways in which they are structured raises the question of whether there is a single optimal role for legislatures in a constitutional state. More likely, there are diverse roles for legislatures in diverse constitutional states due to historical, socioeconomic, and cultural variations among states. If we are attuned to such variations, we are likely to arrive at different answers to how legislatures can best function in varying societal contexts even as we hold constant the high-level goal of furthering constitutionally democratic values.

Constitutional democracies are different in kind from undemocratic and nonconstitutional states, but there are also significant differences among constitutional states. Some have written, others unwritten, constitutions. Some have multiparty, others two-party, systems. Some contain unicameral, others bicameral, legislatures. There are also vast differences in electoral laws as well as important variations in the substance of constitutional law itself. The actual role of legislatures in different constitutional democracies varies significantly by societal context. Their optimal role is also likely to vary, again depending on context.

Examining the many plausible variations in the division of legislative and judicial labor among constitutional democracies can help us understand when legislators and judges act in ways that are inconsistent with a productive division of labor. Consider the way the two sets of institutions are designed in the United States, a nonexceptional example. Legislatures are designed to be broadly representative and to make general laws. Courts in the United States, as in many other constitutional democracies, are designed to be more insulated from electoral pressures and to hear individual cases, and therefore most often do well when they rule narrowly on the legal (or constitutional) merits of the case. The converse is true for legislatures. Legislatures, being far more representative institutions, are far better designed than courts to determine policies that affect many people. Even if their competence to foresee the consequences of complex legislation is necessarily limited, at least their broadly representative nature offers legislatures the legitimacy to act in the name of the majority when it makes general laws.

This distinction between judicial and legislative roles is not therefore between principle and policy, because both institutions can and should act in principled ways. It is rather between ruling narrowly and legislating broadly, whether the rulings are a matter of principle or policy. This distinction is fundamental to understanding the difference between how courts and legislatures are typically designed to work and how they work best in supporting a constitutional democracy. Legislatures most often make egregious mistakes when they try to rule on single, high-visibility cases for politically expedient purposes. Courts correspondingly most often make egregious mistakes when they rule in ways that go far beyond what can be confidently inferred from the merits of the actual case or cases at hand.

When this distinction between making general policy and ruling on particular cases is ignored, democratic government ties itself up in knots, as illustrated by what happened in the widely publicized and highly contentious case of Terri Schiavo in the United States. To quickly summarize the facts: Terri Schiavo suffered massive brain damage after heart failure in 1990. For fifteen years, she had been unconscious. Prior to becoming unconscious, she had not prepared a living will.

Her husband and her parents disagreed on whether she would have wanted to be kept alive under such circumstances (and they also disagreed about whether there was reasonable hope of her recovery). Who was to decide?

Her husband, Michael, was her legal guardian. Based on conversations before her heart attack, Michael insisted that Terri would not have wanted to continue living in her unconscious state. Florida courts had jurisdiction over the case, and for years heard and rejected appeals by Terri's parents and siblings, who wanted to keep her alive. Based on well-established legal precedent, the courts repeatedly sided with Michael's right to order removal of the feeding tube. The United States Supreme Court declined to hear appeals of the court rulings.

Starting in February 2000, the local executive and legislative bodies in Florida issued orders to keep her alive each time that the courts affirmed her legal guardian's right to have her feeding tube removed. In October 2003, the Florida legislature passed a bill called "Terri's law" allowing the governor to intervene in her case (to order the reinsertion of her feeding tube). This bill was struck down as unconstitutional by Florida's Supreme Court.

In March 2005, the United States Congress blocked attempts to let Terri Schiavo die. In addition, Congress passed a bill giving the federal courts jurisdiction only in this particular case, and President Bush interrupted his vacation to sign it at 1:11 A.M. on March 21. The law passed the Senate with no debate and with only three members present. The Senate Majority Leader, who led passage of the measure, called it "a unique bill" that "should not serve as a precedent for future legislation."[2] In the midst of this acrimonious partisan struggle, just about everyone could agree that legislating for one person is bad precedent and generally inconsistent with the legislative role. The bill that Congress passed even had a "sense of Congress" resolution at the end, stating that Congress should address this issue as a matter of policy in the future. Congress recognized, in the breach, its responsibility to pass general laws, not ones tailor-made for an individual case.

Not one but four mistakes were made by Congress when it ruled in the Schiavo case. First and foremost, it passed a piece of essentially private legislation, a law that applies to only one case. Second, congressional intervention was ad hoc and untimely. The courts had already taken jurisdiction of the case and for many years had heard and decided many appeals. Third, representatives in Congress who took the lead in intervening appeared to be motivated by the sheer politics of appeasing a vocal and powerful ideological (minority) base. The same representatives had shown no interest in this case or anything like it earlier. Finally, Congress was mistaken on the merits of the case just as the courts would have been had they decided to keep Terri Schiavo alive in the absence of any knowledge of Terri's prior wishes and despite her legal guardian's wishes. Being wrong in this substantive sense, however, is consistent with an institution acting in a procedurally correct way in asserting its authority to decide a case. It is important that we recognize that there is no democratic procedure so perfect as to yield correct substantive results in every case. But when legislatures (or courts) act procedurally in ad hoc ways, which depart from their clear procedural mandate, they increase their odds

[2] This and the next quotations from political actors are from the *Washington Post*, March 21, 2005, http://www.washingtonpost.com/wp-dyn/ articles/ A51402-2005Mar20.html.

of making substantive mistakes. The wrongness of legislative intervention in the Schiavo case therefore was overdetermined.

Even if Congress had not been wrong on the last three grounds, it still would be subject to criticism for passing private legislation. But that it was wrong on all these grounds is not pure coincidence. The many ways in which Congress was wrong reveal the many risks incurred by legislatures when they rule in very particular cases, rather than for the sake of making general legislation. It is a warning sign when a legislature takes up a very particular case – little or no good is likely to come of it, and damage is likely to be done to the legitimacy of the institution. Legislatures have very broad latitude in what they can do, but passing private legislation strains their institutional legitimacy.

This volume does not settle the question of what the precise role of legislatures should be, because it admirably represents a wide range of well-reasoned perspectives that are still in play, in both theory and practice. But, it does give readers good reason to criticize legislatures when they pass laws that apply to only one case, or legislation – such as earmarking, tax code amendments for particular individuals or corporations, and pork barrel bills – that defy a general justification. Historically, private legislation has been closely associated with legislative corruption, often by individual legislators who were beholden more to the interests of a few powerful individuals than to a majority of their constituents.

Yet, it is important to recognize that no single legislator who passes private legislation must be corrupt for the institution to be acting in a self-corrupting way. Even if no legislator has done anything that is individually corrupt, private legislation and laws that defy a general justification may be considered a form of institutional corruption. By acting in a way inconsistent with a general justification or defensible division of labor between legislatures and courts, the legislature contributes to its own corruption as a democratic institution and weakens its otherwise legitimate authority in society.

Fortunately for the future of constitutional democracy, examples of legislatures acting in ways consistent with their productive and essential role in a constitutional democracy abound. The United States Congress typically passes general laws, which is why the Schiavo case seems so exceptional. It is. Legislatures far more typically pass general laws that guarantee civil rights, balance budgets, reform welfare, raise or lower taxes, and establish trade agreements between countries. Of course, when legislatures pass general laws, there is no guarantee that we will find the content of those laws defensible, which is yet another reason why knowing what we should expect of legislatures at their best is so important. Laws that on their face lay claim to defending civil rights and to balancing state budgets can actually (on further analysis and evidence) violate individual rights and imbalance budgets.

When courts adjudicate individual cases, they too may or may not arrive at the right results. Those results may reside in the realm of basic constitutional rights or interpretations of more routine (and common) legislative mandates. Reasonable people disagree over when legislatures and courts actually get matters right. And so it is in every democracy that a host of challenges is brought to the doorstep of legislatures as well as courts, many of which are not clear-cut in either theory or practice.

Perhaps the greatest virtue of legislative processes – and the deepest source of ongoing frustration with them – is that they are designed to respond to gray areas of interests and expectations of complex constituencies. Often, when a tax or welfare reform is under legislative consideration, it is impossible to know without careful probing whether the legislative majority would be acting in a majority's or minority's interests in supporting the reform. And, which majority or minority is the legislature representing? It is often also impossible to know simply on the face (or by the text) of proposed legislation who the relevant constituents are whose interests should be represented. It typically takes careful deliberation for even its most avid proponents to understand the consequences (and therefore effects on the interests of individuals) of a free trade bill, a balanced budget amendment, or a welfare reform proposal.

Legislatures therefore generally do well when – rather than passing legislation without debate – they act deliberatively, bringing to bear the best evidence, reasoning, and perspectives of the widest range of representatives. A still broader aspiration is to deliberate across institutional and geopolitical boundaries. Such aspirations are crucial for keeping constitutional democratic ideals alive in practice as well as in theory. Nothing less is at stake than the well-being of present and future generations and the future of constitutional democracy.

Amy Gutmann

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