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Rethinking Judicial Policy Making in a Separation of Powers System

> There is an old adage that you can kill a person with kindness, and this is equally true when applied to proposed legislation.
>
> AFL President Samuel Gompers, *American Federationist*, May 1914, 406

In October 1914, the United States Congress passed and President Wilson signed the Clayton Antitrust Act, the first major revision of federal antitrust policy since the Sherman Act of 1890. The Clayton Act was of great interest to labor organizations because it contained provisions that seemed to prohibit federal judges from using injunctions and the antitrust laws to regulate workers and labor unions. Labor organizations had been demanding such legislation for two decades in an effort to limit the power of federal judges, who at that time had assumed much of the responsibility for regulating labor organizations and workers' collective activities.

The Clayton Act appears to be a significant political victory for labor organizations. Passage came two years after the leaders of the American Federation of Labor (AFL) made a controversial decision to endorse Woodrow Wilson's campaign for the presidency. When Wilson signed the new law, AFL president Samuel Gompers announced triumphantly that the endorsement had paid off. Gompers publicly expressed unqualified satisfaction with the labor provisions, telling rank-and-file readers of the AFL's leading publication that the new law was a "Charter of Industrial Freedom," an "Industrial Magna Carta," and that the labor provisions contained "sledge-hammer blows to the wrongs and injustice so long inflicted upon the workers."[1]

[1] *American Federationist*, November 1914, 971.

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As things turned out, however, the labor provisions in the Clayton Act were less useful than a sledgehammer and the AFL got little more than the souvenir pen that President Wilson used to sign it. The act's advertised modifications in labor policies were never realized. In a pivotal 1921 case, the Supreme Court established a strained, probusiness, reading of the labor provisions that contradicted the expressed expectations of AFL leaders and the stated goals of many members of Congress.[2] As a result, the labor provisions did not produce any substantial changes in labor law. Judges continued to subject labor unions to the antitrust laws, and the rate of injunctions against workers actually increased.[3] In the end, the AFL's greatest legislative victory of the Progressive Era did little to help workers or to curtail the ability of judges to regulate workers' collective activities.

The failure of the labor provisions in the Clayton Act seems to present a classic illustration of an important and troubling structural feature of American democracy: Unelected federal judges can use their institutional powers to influence policy outcomes, often by making choices that appear to conflict with policies favored by elected officials in other branches. Scholars have long been concerned that the capacity of unelected judges to make policy in opposition to the wishes of the elected Congress is a "counter-majoritarian force" and thus a "deviant" part of American democracy (Bickel 1962, 16). Scholars worry that such judicial rulings can block policy victories won through the seemingly more democratic processes in the legislative branch. Some scholars have also been concerned that such judicial rulings have significant radiating effects that distort future democratic processes. For example, recent studies of the development of the labor movement use cases like the Clayton Act to argue that American judges who made rulings that reversed legislative policies also shaped the political consciousness of workers and thus the development of the American labor movement. By consistently thwarting labor's efforts to use conventional political processes in legislatures to achieve policy changes, the courts contributed to the uniquely apolitical labor movement in the United States and the resulting "exceptionalism" in American social and welfare policies.

[2] *Duplex Printing Press Company v Deering* (254 U.S. 443).

[3] Ernst 1995, 190. Forbath (1991, app. B) provides both the best estimate of the number of injunctions by decade during the late nineteenth and early twentieth centuries and the best explanation of why it is so difficult to determine the precise number of injunctions. The Clayton Act itself caused part of the increase because it gave employers a new legal basis for requesting labor injunctions by authorizing private individuals and companies to request injunctions against antitrust violations.

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This book reaches very different conclusions. After reexamining the circumstances that produced the Clayton Act and three other federal labor statutes passed between 1898 and 1935, I find that scholars have misunderstood several notorious confrontations between Congress and the courts over labor policy. Other scholars have looked at judicial rulings on labor statutes as reversals of labor's legislative victories, and have linked such judicial reversals to institutional arrangements that insulate judges from democratic processes. I find, however, that the appearance of independent judges reversing clear legislative victories is an illusion that masks a more complicated set of strategic interactions. Caught between powerful constituencies with incompatible demands, legislators preferred to avoid the political costs of making clear decisions. Legislators thus decided that their political interests were best served by passing statutes that appeared to make decisive choices but that covertly empowered the courts. With such statutes, legislators could create the appearance of democratic responsiveness while allowing much of the blame for difficult policy choices to fall on less accountable judges. My finding that legislators were deferring to the courts suggests that other scholars have overestimated the independent effects of the courts on the development of the American labor movement because they have overestimated the political success of labor organizations and the responsiveness of legislatures to labor's political demands.

The bulk of the book (chapters 3 to 6) is devoted to a detailed exploration of my case studies of four pivotal federal labor statutes, the Erdman Act of 1898, the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, and the Wagner Act of 1935. The case studies together support an original interpretation of labor politics and American institutional development in the first part of the twentieth century. Before presenting the detailed evidence that supports my interpretation of these cases, I use this introductory chapter to make more general theoretical claims about the importance of uncovering and understanding instances where legislators defer to the courts. Assuming for now that legislators do at least sometimes deliberately defer to the courts, I will make some preliminary observations about why such deference challenges many of the theoretical assumptions made by scholars who study judicial policy making.

THE LEGISLATIVE BASELINE FRAMEWORK AND LEGISLATIVE DEFERRALS

> One of the duties in enacting legislation is to make legislation just as plain and positive as it can be made. Aside from the evils that may result from

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> unwise and unjust laws comes the great evil of the uncertainty of law. . . . We pass laws about which we ourselves differ as to the use and application of the terms, and then courts are criticized because of their interpretation of the laws.
>
> Sen. Wesley Jones (R-WA) floor debates on the Clayton Act, 51 *Congressional Record* 14019

My findings in the labor cases reveal some important problems with the way scholars who study judicial policy making understand judicial power and legislative politics. Most scholars who study judges as policy makers rely upon the same general theoretical framework to understand, measure, and evaluate judicial power. I call that framework the *legislative baseline framework* because its core assumption is that outcomes established by elected legislators form a democratic baseline against which to evaluate decisions made by less directly accountable judges. The legislative baseline framework leads scholars to evaluate the impact and legitimacy of judicial decisions by comparing the position established by judges to a baseline position established earlier by legislators.

The legislative baseline framework is not a particular theory or model of interbranch interaction, but a set of foundational assumptions from which different scholars have constructed competing theories and models. The studies that I group under the legislative baseline framework umbrella sometimes differ fundamentally on important questions. The significance of the framework is not that it always leads to the same conclusions. Rather, the framework is important because it influences scholars' ideas about which questions are interesting, which cases are important, and what evidence can be ignored. Despite its ubiquity, however, the framework is difficult to define. Perhaps because it is so widely accepted, the framework is nearly invisible. The assumptions that I associate with the framework are not typically articulated or defended. As far as I know, I am the first person to give the framework a name.

I will try in the next several pages to identify the theoretical and methodological assumptions that together constitute the legislative baseline framework. I begin by focusing on some basic methodological assumptions scholars use when analyzing particular instances of judicial policy making, I then move to more general levels of analysis by uncovering foundational assumptions about democratic processes and institutional interaction. Some of the assumptions that I list will be more familiar than others, and the degree to which a particular scholar relies on a particular assumption will depend in part on what question that scholar is trying to answer. My hope, however, is that the assumptions I list will seem

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innocuous and uncontroversial. They are, for many if not most cases of interbranch interaction, quite correct and quite useful. I will show, however, that the possibility of legislative deference to the courts reveals some important difficulties for each of the assumptions of the framework.

Two Basic Methodological Assumptions Used to Analyze Cases

The shared legislative baseline framework shows up most clearly in the way scholars analyze individual cases involving interaction between the courts and other branches of government. The most basic methodological assumption is:

The Policy Assumption: A congressional decision to pass legislation establishes a particular policy position for Congress. This congressional position can be identified and then compared to the positions later taken by judges and to final policy outcomes.

Scholars need to make the policy assumption in order for any legislative baseline framework analysis to get off the ground. To use the framework, scholars need to compare the policy position taken by elected legislators to the policy outcomes that occur in the aftermath of decisions made by unelected judges. If there is no baseline to be discovered, the necessary comparisons cannot be made. Once a baseline legislative policy is found, however, that baseline becomes essential to scholarly conclusions about the legitimacy and impact of judicial decisions. Scholars see judicial decisions that fail to adhere to the policy baseline as potentially substantial barriers to democratic accountability. Since judges (or, at least, federal judges) are not subject to direct electoral controls, organized groups whose interests are hurt by judicial rulings have fewer "democratic" weapons for overcoming them than they have when elected legislators make policies.

The policy assumption is part of the reason that political scientists have devoted so much attention to the power of judges to review and strike down statutes on constitutional grounds. Scholars see the power to strike down statutes as interesting and troublesome precisely because they assume that judicial decisions that strike down statutes reverse policies established by elected legislatures.[4] The policy assumption also

[4] Dahl's (1957) classic article on judicial influence looks only at cases involving judicial review. Bickel 1962 and Ely 1980 are two classic and very influential accounts of judicial review by law professors that are also preoccupied with judicial review as a threat to (and facilitator of) representative democracy. Such accounts pay

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shows up when scholars use the legislative baseline framework to analyze instances where judges influence policy outcomes through their power to interpret statutes. Judges are often called upon to interpret statutes because the general prescriptive rules that legislators articulate in the text of statutes contain ambiguities that create interpretive controversies when the statutes are applied in concrete situations. Such controversies often lead to lawsuits, and the judges who rule on such suits have the responsibility of choosing from among competing interpretations of the relevant provisions. The policy assumption allows scholars to measure the legitimacy and impact of such judicial decisions by asking whether judges followed the intent, purpose, or meaning of the elected officials who created the statute.

The policy assumption does not imply that the policy baseline is always transparent enough to be discovered without effort or controversy. The assumption simply means that ambiguities should be treated as accidents that can be overcome through conscientious application of the correct interpretive principles.[5] The task of the deciding judges is always to use such principles to find the appropriate expression of the legislature's baseline position. Scholars who study statutory interpretation have identified a variety of factors that can lead to ambiguity in statutes. For example, legislators might have never anticipated the circumstances that give rise to the interpretive controversy, or might have simply been careless when creating the general statutory language expressing their new policy commands. (See, e.g., Carter 1998, 37–55; Sunstein 1990, 117–23; Eskridge, Frickey, Garrett 1999, 211–36.)

The importance of the policy assumption is not that it makes scholars of statutory interpretation blind to ambiguity but that it leads scholars to devote their attention to finding the best methods for finding (or inventing or imagining) a baseline legislative position that can be used to test the legitimacy of a judicial decision. Scholars disagree about whether that baseline should be identified in a congressional "purpose" discoverable

little or no attention to the influence judges have through their power to interpret statutes.

[5] This point about accidents is discussed in more detail later in this chapter. The desire to find a legitimating baseline is often the dominant concern for scholars of statutory interpretation, but it need not be the sole concern. Scholars are also concerned about whether competing methods of statutory interpretation are able to preserve the rule of law and respond to general pragmatic concerns associated with regulatory statutes. Eskridge, Frickey, and Garrett 2000, 211–13.

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in the legislative history or simply extrapolated from the isolated legislative text.[6] Few scholars of statutory interpretation ask seriously whether legislators ever wanted to establish a baseline.

A second methodological assumption captures the effect the framework has on the way scholars understand and evaluate political processes.

The Political Power Assumption: The relative level of political power attained by different organized groups can be measured by examining the legislation Congress passes. A decision in Congress to pass legislation signals that the group sponsoring the legislation has attained a significant level of political influence through the electoral processes that influence legislative decisions.

The political power assumption is important because it allows scholars to simplify the task of analyzing the political context in which judges make policies. The assumption allows scholars who are interested in the impact of judicial decisions to focus on the effects of what judges do *after* legislation passes without worrying very much about the political processes that occurred in Congress before passage. Scholars who use the assumption will admit that legislative branch outcomes are not always perfect indicators of underlying political conditions, but are nevertheless willing to accept legislation as the best available proxy for the positions that emerge victorious from electoral processes.

The political power assumption shows up most clearly in some classic works that try to measure empirically the impact of the courts on democratic processes (Dahl 1957, but see also Casper 1976). However, the assumption also influences the work of scholars who focus on normative questions about the legitimacy of judicial decisions. The assumption is also the reason so many scholars worry that judicial policy making is a threat to the democratic accountability. However, in normative studies, the political power assumption often shows up in the form of its corollary: If the position favored by judges differs from the position favored by legislators, the difference must be a result of the fact that judges are insulated from the electoral pressures that determine legislative branch outcomes.

Legislative Deferrals and the Policy and Power Assumptions

The policy and political power assumptions provide a useful framework for understanding and analyzing a wide range of cases involving

[6] For overviews of the literature on statutory interpretation, see Eskridge and Frickey 1987, ch. 7; Eskridge 1994, p. 2; Katzmann 1997, 49–64; and Carter 1998, ch. 3.

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interbranch interactions. Unfortunately, the success of the assumptions in many straightforward instances of judicial policy making has led scholars to apply the assumptions across the board to all instances where judges and legislators participate together in policy-making processes. The findings in this study suggest that there are some circumstances that present opportunities for judicial policy making that are not well suited to these conventional assumptions. In particular, there are instances where the opportunity for judges to influence policy arises because legislators deliberately avoid making choices about policies and instead allow judges to make those choices. Legislators sometimes expand the power of judges to make policy by including provisions in statutes that assign the courts broad oversight responsibilities or provisions that enable affected parties to enlist the aid of judges by making it easier to file lawsuits. In the more subtle (and perhaps more devious) instances that I call legislative deferrals to the courts, legislators empower judges by creating deliberately ambiguous statutory language.

It may initially seem unlikely that legislators would ever deliberately give away power to independent judges. However, there are a variety of reasons why legislators might sometimes create conditions that allow judges to influence policy (Graber 1993, Gillman 2002, Rogers 2001). Legislators might create a role for the judges because they think that the best way to resolve certain intractable policy questions is to give judges the discretion to apply flexible principles as they design outcomes that meet the unique circumstances of individual cases. (Some criminal sentencing may fall into this category.) Or, legislators might empower judges to reject administrative decisions because doing so provides additional oversight of executive branch agencies and an additional guarantee of due process.[7] In other instances, legislators may not particularly want judges to make policy decisions, but will nevertheless defer to the courts. For example, deliberate ambiguity might help to break a stalemate in Congress if legislators on both sides of an issue estimate that their best chance for achieving their policy goals is to support an ambiguous law and hope that their side

[7] Strauss 1989 and Shapiro 1988 provide overviews of judicial oversight of administration. There may be a constitutional dimension to judicial oversight. Some judges or scholars might claim that the due process clause requires legislators to provide some judicial oversight when they delegate to the executive branch. Shapiro's overview of the development of judicial oversight indicates, however, that it is not solely constitutional concerns that drive legislators to provide for judicial oversight of administration. Moreover, legislators can avoid any constitutionally required judicial oversight of administrative processes by declining to delegate.

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wins in the courts. In other cases where legislators are badly divided by conflicting demands from well-organized constituencies, legislators may decide to empower judges for reasons that have little to do with their policy goals. In such cases, legislators might be willing to give up some certainty about policy goals in order to achieve important political goals. Some legislators may not care how judges resolve the controversy so long as judges take the blame for contentious and potentially unpopular decisions. A coalition supporting a deliberately ambiguous statute might include legislators responding to a broad range of motives. Legislators with strong preferences on the policy issues might agree to defer to judges because they hope to win in the courts. Other legislators may not be sure what choice judges will make, but will support the ambiguous law because they think it will force judges to absorb some of the blame from unhappy constituents.

For my purposes in this chapter, it is not yet crucial to sort out the different implications of each of these different possible motives for empowering judges. Regardless of whether legislators defer for policy or political reasons, the essential point here is that legislators who make such choices recognize that their decisions expand judicial discretion. In some of the cases I look at here, legislators decided to enact ambiguous statutes even though they knew that judges were the institutional actors who would be called upon to settle the meaning of open-ended statutory provisions. This essential point is what makes the policy assumption inappropriate in such cases. While the policy assumption can accommodate cases where ambiguities arise by accident, cases where judges rule because legislators deliberately refrain from making policy choices deserve to be treated as an entirely separate category.

A less obvious, but perhaps more troubling problem with the policy assumption is that it has led scholars to develop interpretive conventions for reading legislative records that make it very likely that scholars will misinterpret cases involving deliberate deference to the courts. These conventions for handling evidence disguise deliberate deferrals as accidental ambiguities, and thus lead scholars to mistake legislative deference to the courts as cases that fit the conventional framework. Of course, scholars disagree about precisely which conventions are appropriate. Some scholars allow judges to look at committee reports and speeches by floor leaders. Other scholars worry that such records contain distortions, and urge judges to look only at the text of statutes while ignoring all other records of congressional deliberations. Significantly, however, all scholars seem to agree that judges should ignore the overwhelming majority of

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legislative records. The forbidden records include most floor speeches, transcripts of committee hearings, rejected alternative proposals, and records from earlier congresses. Such sources record the expressed views of individual legislators, but are said to be unreliable as sources of information regarding the collective intent, meaning, or purpose of Congress.[8]

The demand that judges ignore such evidence works out well in cases where legislators collectively decide to establish a fixed policy baseline. However, such interpretive conventions will produce misleading results in situations where legislators refrain from making important choices and instead defer to the courts. Consider, for example, the convention that tells judges that they can look at committee reports and the speeches of floor leaders, but that they should ignore the remaining evidence of congressional deliberation. This is the convention that the Supreme Court followed in the crucial 1921 case on the Clayton Act (*Duplex Printing v Deering*, 254 U.S. 443 (1921)). The convention is supposed to prevent judges from being swayed by the distracting statements of individual legislators who do not speak for Congress as a whole. The problem, however, is that the convention leads scholars to ignore the most likely sources for evidence of deliberate ambiguity. My findings in this study suggest that committee reports and floor managers' speeches are the least likely place in the congressional records to find evidence of deliberate deference to judges. Because committee leaders and floor managers are likely to have a large stake in holding together a successful coalition built through deliberate ambiguity, they are much less likely to call attention to ambiguity than disgruntled backbenchers who want to disrupt that coalition.

The emerging rival convention telling judges to ignore *all* legislative records and look only at the text of statutes is even more misleading. Those who promote this convention claim that it limits judicial discretion by making it harder for judges to use distorted legislative records to promote their own policy preferences.[9] Ironically, however, the convention *maximizes* judicial discretion in cases where legislators deliberately write text that is ambiguous enough to support two contradictory interpretations. A judge who assumes that the legislators who wrote such text were trying to limit the influence of judges by making clear choices will

[8] On these conventions, see previously cited sources in note 6.

[9] The most prominent defender of this rival convention is Justice Antonin Scalia. See his opinion in *Hirschey v Federal Energy Regulatory Commission* (777 F. 2d 1, 7–8 (D.C. Cir. 1985)) or Scalia (1997).

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