COMMENT ON FEREJOHN'S "JUDICIALIZING POLITICS, POLITICIZING LAW"

MICHAEL C. MUNGER*

I

INTRODUCTION

Professor John Ferejohn's article is a preliminary, yet provocative, examination of some key issues raised by the exercise of legislative power by the judicial branch.[1] Ferejohn argues for a broader perspective on this problem, and includes a comparison of European and United States judicial activity; Ferejohn, however, ultimately restricts his analysis almost exclusively to the situation in the United States.

Let us begin with Ferejohn's definition of legislative power as the capacity to generate binding norms.[2] A grossly simplified outline of Ferejohn's argument might be:

(1) If legislation can happen anywhere in government, and
(2) If legislative power is the most dangerous to liberty and justice, then
(3) The issue of how to control legislative power is the central problem of institutional design in democracies; however there is no single answer. In other words, the solution must be "institutionally unspecific."[3]

The real question, given Ferejohn's real interest, is identifying the circumstances under which, and the extent to which, *courts* exercise legislative power. Read literally, Ferejohn's article depicts the courts' capacity to exercise legislative power as a kind of Brigadoon:[4] If conditions are right, the capacity appears.[5] If the conditions change, then the capacity of courts to legislate may disappear again, perhaps for a long period.[6]

It struck me that the best way to represent Ferejohn's claims is to use a two-by-two matrix, the classic political science representation for a conditional theoretical claim. I was disappointed to see that, since Professor Ferejohn has been

This article is also available at http://www.law.duke.edu/journals/65LCPMunger.

* Chairman, Department of Political Science, Duke University.

1. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41(2002).
2. *Id.* at 44.
3. *Id.* at 47.
4. "Brigadoon" was a Scottish village, immortalized in a 1947 Broadway musical of the same name by Lerner and Loewe, which could be found only one day once every hundred years.
5. Ferejohn, *supra* note 1, at 55.
6. *Id.*

spending more time at law schools, he missed an obvious opportunity to use one of political science's hallmark tools. I hope, however, that I am not too late to save the day with this representation. Table 1, below, is the representation that comes to mind.

TABLE 1

THE DILEMMA OF JUDICIAL LEGISLATION: TOO WEAK, OR TOO BROAD?

Does Court Have Power to Legislate?	It is Appropriate for the Court to Legislate? *Yes*	*No*
Yes	Court exercises power by generating binding norms in areas appropriate for such exercise: *GOOD*	Court exercises too much power in areas inappropriate to such exercise: *BAD*
No	Court is so weak that it cannot exercise legislative power even in areas where it would be appropriate: *BAD*	Court is unable to exercise power outside of appropriate areas: *GOOD*

Table 1 represents the dilemma that the judiciary presents to institutional designers.[7] If, in fact, most legislative power is initially vested in the legislature, then the court may well be too weak. There are, after all (and as Ferejohn rightly points out), some settings in which the generation of binding norms by the judiciary is quite appropriate: "rules that need to be developed in light of repeated experience in use, and that should answer to concerns about equality, due process, and justice."[8] In fact, the capacity of courts to legislate in such settings may be crucial to the proper functioning of the government.

The dilemma illustrated in Table 1 is that the court either has power or it does not. There is an important normative element to the tradeoff being illustrated. In fact, I expect that, though it may not be obvious, this normative tradeoff undergirds many of the key debates in the role of the courts. We want the court to be able to legislate where the generation of binding norms is appropriate, but we want the court to be prevented from legislating in all other areas of policy. As Table 1 shows, however, all that we really can do is pick a level of power for the courts: enough power to legislate or not enough power to legislate.

Suppose we start out with a court that is too weak. The court will often find itself unable to generate binding norms.[9] In this circumstance, legislators and

7. Shaded arrow indicates direction of evolution of formal institutions.

8. *Id.* at 66.

9. What it takes to make a norm *binding* is itself a matter of intense debate. There are two main relevant concepts: (1) incentive-compatible or self-enforcing norms, which create internal incentives for compliance coincident with the goals of participants; and (2) credible commitment, where the entity

others with the power to change the distribution of legislative power among the branches of the government may desire to rectify the situation by affording courts more power. If, however, the power to legislate is provided to the courts, this power may well metastasize into legislative arenas that are not appropriate for the courts. For example, questions of foreign policy, social welfare reform, or other inherently political questions are difficult for courts to decide with any legitimacy. The courts' legitimacy in these areas is suspect because federal judges may be viewed as remote and unaccountable, since they serve life terms and use precedent, rather than popular sentiment or larger conceptions of justice, in making decisions.

Thus, a movement toward more power for the courts is likely to result in giving the courts the capacity to exercise power in inappropriate areas. This has been an important theme for critics of the federalization and judicialization of politics. Ferejohn's explanation, however, is more plausible and less sinister than accounts by other scholars. His claim is simply that we have chosen to accept the tradeoff, leaving the courts with the option of exercising power inappropriately.[10]

There is an important caveat to this argument. While the courts may possess the power to legislate, there is nothing in his theory claiming that the court will always exercise this power.[11] In fact, the courts might have the power, yet forbear for long periods, either through the influence of strongly held internal norms or a concern for the long-run viability of the court as an independent branch of government. I now turn to the importance of this caveat.

II

CONDITIONAL POWER OF COURTS

For the sake of argument, Ferejohn makes a claim that may seem overly simple, but which I think is both theoretically powerful and empirically accurate. That claim, following Ferejohn and Shipan,[12] is that courts are only capable of acting independently when the constitutional legislature is "disunified."[13] He claims that courts, rather than agencies, are likely to dominate during periods of such disunity.[14] In other work, I have argued, half in jest, for a simple

---

that creates the norm commits itself to monitoring and enforcing the norm, even if such action appears not to be in its interest. *See* B.R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245-47 (1997). Binding norms for courts are much more likely to be of the first type, as in the creation of common law. Common law is entirely created by courts, but is binding on all economic actors because, as a group, economic actors recognize the value of a predictable and efficient system that can resolve, say, assignment of ownership rights in property disputes or assignment of liability in tort cases.

10. *Id.* at 66.

11. *Id.* at 66-67.

12. John Ferejohn & Charles R. Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy*, *in* CONGRESS RECONSIDERED (Lawrence C. Dodd and Bruce I. Oppenheimer eds., 4th ed.1989).

13. Ferejohn, *supra* note 1, at 63.

14. *Id.*

definition of disunity: Disunity occurs when the status quo position is supported by less than a two-thirds majority in both houses of Congress.[15] Since, under these circumstances, Congress cannot override presidential vetoes, there is at least some space for the exercise of legislative power by other entities, including the courts.[16]

Ferejohn, I believe, would reject this narrow definition of disunity, but he does touch upon a fundamental observation: Courts can exercise power only when the legislature gives up power.[17] What is interesting about this argument is that there is a difference between *having* the power and *using* the power to legislate. If there is a solution to the dilemma illustrated in Table 1, it would have to come from within the courts themselves. Internal norms, generated by the courts or by those who practice the law, would be of the following sort: They would support large abstract powers for the judiciary, but would limit the scope and content of these powers to address policy areas outside those deemed appropriate by the legal guild. While I have no doubt that the legal profession tries to inculcate its members with such values, these norms are binding only if members of the bar genuinely internalize them. To be more succinct: If forbearance by courts is a requirement for the optimal extent and scope of the exercise of legislative power, it is at best a fragile equilibrium. The reason is that this "equilibrium" is based simply on a self-imposed norm, whose maintenance requires constant attention and nurturing.

III

POLITICIZATION, JUDICIALIZATION, AND DELIBERATION

Perhaps the most impressive thing about Ferejohn's paper is the purchase his approach gives him on a number of pressing questions in judicial politics. I will limit my discussion to his two main points in this regard:

(1) Why is the political process increasingly judicialized?

(2) Why are courts increasingly politicized?

A. Judicializing Politics

The chief difference between judicial and congressional legislation is that the legislature, at least traditionally, has not been obliged to give reasons for its decisions or to be bound by precedents set by previous legislatures. If a majority of members wants to overturn a law, it can do so simply by voting. Courts, on the other hand, must pay lip service to, and are in fact in many cases bound by, the body of precedents addressing the same issue. Judicializing politics, ac-

15. Irwin Morris & Michael Munger, *First Branch, or Root? Congress, the President, and Federal Reserve*, 96 PUB. CHOICE 363-80 (1998); Michael C. Munger, *Pangloss Was Right: Reforming Congress is Useless, Too Expensive, or Harmful*, 9 DUKE ENVTL. L. & POL'Y F. 133 (1998).

16. Morris & Munger, *supra* note 15, at 375-76.

17. Ferejohn, *supra* note 1, at 63-64.

cording to Ferejohn, blurs this distinction in favor of the form that judicial legislation uses.[18]

He notes that the trend in judicial decisions has been toward an "opening" of the political process, as politicians come under a set of requirements imposed by judges.[19] A brief list of these rules would include intrusion into election rules and apportionment, due process requirements injected into legislation, and equal protection considerations. Further, the courts have sought to impose "deliberation" requirements on the legislative process itself. This line of cases, involving the *Lopez-Morrison-Garrett* decisions by the Court, has held that the legislature is not fully empowered to decide on issues within its purview.[20] Rather, Congress must provide reasons and must decide issues by a transparent process of deliberation.

This last point, it seems to me, is the most important. The idea of "legislative intent" is enshrined in much of the legal literature, but is rightfully questioned among political scientists. The literature on collective choice makes it clear that there may be no coherent "intent" in the legislature, because of the indeterminacy of cycling legislatures.[21] What this means, of course, is that judges may search for some aspect of the debate that supports the view the judge wants to legislate. However, as Judge Harold Leventhal is noted as saying, the use of legislative history is similar to "looking over a crowd and picking out your friends."[22] The requirements for "deliberation" are actually no more than a way of forcing the legislature to provide judges with a broader menu of choices for arguments to use in support of a written decision. A few selective quotes from the debate, and *voila!* There's your legislative intent.

B. Politicizing Law

In Ferejohn's view, the politicization of law is mostly a consequence of the judicialization of politics.[23] The politicization of law has an obvious focus: contests over appointments to the bench.[24] As the court grows more powerful and is able to impose increasing influence over political matters, political groups have come to recognize that appointments are the "moving parts" of influence.[25]

---

18. *Id.*

19. *Id.*

20. United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).

21. Richard D. McKelvey, *Covering, Dominance, and Institution-Free Properties of Social Choice*, 30 AM. J. POL. SCI. 283-314 (1986). For a review, see MELVIN J. HINICH AND MICHAEL C. MUNGER, ANALYTICAL POLITICS (1997), chapters 3-4.

22. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1982) (recounting a personal conversation during which Leventhal made this remark to her). I thank Chris Schroeder for pointing out the quotation, and for providing the reference.

23. Ferejohn, *supra* note 1, at 64.

24. *Id.*

25. *Id.* at 65.

Ferejohn is fairly sanguine about this development—in keeping with his view that the judicial process is inherently political in the first place.[26] If legislation is the generation of binding norms, then the courts legislate. When a court decides a case, the implied rule or precedent binds other isomorphic fact patterns by analogy. Application of the decision beyond the parties in the immediate litigation has political implications, however, at least if "political" is understood to mean (1) a choice that affects behavior or property rights, and (2) a situation in which those doing the choosing are in some way accountable to those affected by the choosing.

There is an infelicity in the way in which this point is stated. Ferejohn says, "disputes about what rules we live with and under are political disputes in which everyone has a stake in seeing that they are decided rightly."[27] I do not believe that he intends to compare decisions to some objective, universal standard of right, but that is precisely what this passage seems to imply. The problem is that legislation may have distributive or even redistributive consequences, in which case it is true that I want, and you want, the decision to *be* right, but we irreconcilably disagree about what *is* right. This disagreement is still political, I believe, and this latter phrasing is exactly more consistent with Ferejohn's other work on the judicialization of politics.

IV

CONCLUSION

Ferejohn's contribution has three parts. While he does not prove any part of the argument in this preliminary piece, it puts forth an important set of claims, each of which deserves scrutiny.

First, legislation can "happen" anywhere in government.[28] In fact, it is prohibitively difficult to prevent the exercise of all legislative power, and so it is inevitable that such power will be diffuse. Further, the imperfect controls designers do have at their disposal are not universal; different controls will have different levels of effectiveness in different branches or parts of government.[29] Consequently, a general theory of legislative control and delegation is probably beyond our grasp: Controls are institutionally specific, but the problem is general.

Second, there has been a trend toward "judicializing" politics.[30] It is by no means clear that Ferejohn is correct in his empirical claim that there is a secular trend, rather than just some isolated incidents, in this direction. Still, the general point is fundamentally important and is of great interest both for scholars of the law and of politics.

---

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

Chief Justice John Marshall famously observed that "it is emphatically the province and duty of the judicial department to say what the law is."[31] The "judicialization" of politics would, however, considerably expand the scope of judicial power. Judicialization implies that the legislature must supply a legitimating rationale for why the law is, to assist judges in their finding of what the law is. It is not enough for the members of Congress to rely on the fact of their election, so that a majority of votes creates prima facie legitimacy. Rather, the courts may be able to place conditions on the legislature, obliging members to give reasons and explanations. In the *Lopez-Morrison-Garrett* line of cases, the judiciary has made demands on Congress, requiring a reasoned justification for the exercise of federal authority.[32] If this perspective is correct, then prima facie legitimacy no longer exists; Congress must give reasons the Court accepts as adequate for the existence of a compelling national interest.

Third, and finally, Ferejohn closes the circle by contemplating the politicization of courts.[33] This phenomenon, particularly the political struggle over appointments and judgments of qualifications, is hardly new, but the problem is given new piquancy by Ferejohn's observation that courts have become more powerful.[34] That is, even if the politicization of the courts is simply a struggle for power metastasizing back into the choice of personnel, the feedback from the judicialization of politics will make the struggle more bitter and intractable. As Ferejohn rightly points out, the things that count, or need to count, in judicial debate are not very useful in political conflict. There is no obvious mechanism for effecting log rolls or trades, and the very attempt to negotiate political compromises may sully an institution which relies on the giving of reasons for its legitimacy.

By endowing the courts with more legislative power, or by allowing the exercise of such power, we ultimately may change the nature of the courts themselves. One of the most interesting, though tantalizingly underdeveloped, threads of Ferejohn's argument is the potential capacity for the courts voluntarily to forbear.[35] Under what circumstances, out of concern for their long-run power and prestige, might the courts choose not to exercise legislative power, the exercise of which cannot be externally denied? What norms, internal yet binding, might act to preserve a balance of power among the branches? Since we do not understand such norms well, either in terms of creation or maintenance, the problem of reform should give us all pause.

---

31. Marbury v. Madison, 5 U.S. 137, 177 (1803).

32. United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).

33. Ferejohn, *supra* note 1.

34. *Id.*

35. *Id.*