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BRINGING THE COURTS BACK IN: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making

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Abstract ■ Understanding the role of law and courts in American politics and policy making is inherently complex. The dominant response to this problem has been to specialize narrowly in Supreme Court decision making. The problem is that American politics and policy making are inherently interactive and thus cannot be easily parsed into component parts. Consistent with this observation, a growing literature assumes that courts must be studied from an interbranch perspective, which holds that American politics and policy making emanate from interaction among overlapping and diversely representative forums. The result is studies that analyze how law and courts fit into broader political and policy-making processes and reveal the political significance of seemingly technical legal matters. By redescribing courts and judicial decision making in political terms, interbranch analysis not only enriches the study of judicial behavior but also promises to bring law and courts back into the mainstream of the study of American politics and public administration—where they belong.

[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary. . . . Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

James Madison, Federalist Paper *No. 37 (1788 [1987], p. 244)*

INTRODUCTION

Studying the role of courts in American politics and policy making is inherently complex. Part of the problem is that courts rely on arcane rules and procedures, dense legal jargon, and distinct professional norms of reasoning. American federalism compounds this complexity by creating a tangle of federal and state laws and court systems. As a result, sometimes federal law and judicial decisions trump their

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state counterparts; sometimes they operate separately; and sometimes they work together. Another complicating factor is the breadth of judicial decision making in the United States (see Kagan 2001, p. 8). American judges address issues ranging from politically charged constitutional matters, such as the right to gay marriage and abortion, to highly technical regulatory questions, such as the appropriate safety standards for "retrofitted cell burners" versus "wall-fired utility electricity utility boilers" (Wald 1999, p. 237).

Instead of confronting this complexity head-on, many public law scholars have (understandably) tended to specialize. They have separated the study of courts from other segments of government and have concentrated on decision making within specific courts and often on discrete types of issues, especially the U.S. Supreme Court and matters of constitutional interpretation. Over the past 50 years, this approach has yielded an exemplary research tradition, which features carefully constructed hypotheses, extensive data sets, and rigorous methods (e.g., Pritchett 1948; Schubert 1965; Rhode & Spaeth 1976; Segal & Cover 1989; Segal et al. 1995; Segal & Spaeth 1993, 2002). The result is an elegant model of judicial behavior, known as the "attitudinal model," which holds that "judges decide disputes in light of the facts of the case vis-à-vis their sincere ideological attitudes and values" (Segal 1997, p. 28). Or, "[s]imply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal" (Segal & Spaeth 1993, p. 65).

The problem is that studying the internal workings of the Supreme Court, in general, and the determinants of judicial votes, in particular, isolates judicial decisions from the broader political and policy-making processes that lead up to and flow from court decisions. The resulting scholarship may be rigorous but it often fails to engage a wider audience. Shapiro (1993, p. 366) put the point bluntly, arguing that the "American politics people" stopped talking to "judicial behavior people" because judicial behaviorialists "studied things that had almost nothing to do with everyday politics that American politics people studied." Admittedly, Shapiro's assessment paints with a broad brush that glosses over significant exceptions and potential objections (McCann 1996). Nevertheless, troubling signs of public law's isolation in the discipline remain. Indeed, the latest edition of the *State of the Discipline* series did not include a chapter on law and courts. A central irony follows. In an era when courts reach deeply into nearly every corner of American political and policy-making processes, including elections, agenda setting, problem definition, rule making, and implementation, the study of law and courts has arguably become peripheral to the academic study of American politics and public administration.

In this essay, I review studies that depart from the dominant approach of specialization in judicial behavior and view law and courts from an "interbranch perspective," which assumes American policy and politics emanate from the ongoing interaction among overlapping and diversely representative forums (see Barnes & Miller 2004a,b). To describe this perspective, I begin by briefly setting forth its core features and rationale in general terms and then offer several concrete

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examples from the so-called new institutionalist literature.[1] I next discuss how interbranch analysis has enriched the study of judicial behavior and promises to bring the courts back into the mainstream of the study of American politics and public administration. I conclude by briefly considering the implications of adopting interbranch analysis on public law as a distinct field. It should be stressed that the goal is not to summarize the details of any individual study, offer a comprehensive survey of any segment of the vast public law literature, or provide a set of water-tight compartments for categorizing studies. Rather, this essay seeks to identify divergent styles of analysis that apply an interbranch perspective to the courts and to describe how this perspective offers a useful bridge to other subfields in the discipline.

DEFINITION AND RATIONALE OF AN INTERBRANCH PERSPECTIVE

An interbranch perspective is a set of working assumptions about the nature of American policy making and politics, which provide an analytic foundation for building diverse research agendas on the courts and judicial decision making. As noted above, it holds that American politics and policy making emerge from the continuing interaction among "separated institutions sharing power" (Neustadt 1990, p. 34). It is further assumed that this intricate dispersal of power creates a complex and shifting web of relations among various centers of power, which varies across issue areas and over time (Shapiro 1964a,b; Barnes 2004b; see also Lowi 1972).

These assumptions are hardly controversial. The constitutional design of American government creates overlapping policy-making forums subject to cross-cutting political pressures. In this system of checks and balances, politics and policy making will inevitably involve some back and forth among the relevant actors. Further, public interest groups that combine litigation, lobbying, and other forms of advocacy drive interbranch interactions, as they seek to shape political decision making in competing forums and use the courts to second-guess administrative procedures and rulings (Barnes & Miller 2004a, p. 204; Kagan 2004; Melnick 1994, 2004).

The point is not that the various branches and levels of government will always be at loggerheads. It is that the dynamic tension built into this fragmented system is likely to produce a multiplicity of interinstitutional interactions, including partisan

[1] I use the term new institutionalism advisedly because it has arguably suffered from concept stretching over time (Sartori 1970, Collier & Mahon 1993), now connoting almost any study that uses "institutions" as a variable. By analyzing prominent strands of new institutionalism in light of their assumptions about the nature of American politics and policy making, a secondary goal of this article is to help address this problem by identifying key underlying conceptual similarities and differences within this literature.

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tug-of-war contests, shifting alliances, and games of political "hot potato," in which each branch tries to fob off controversial issues on another (see Graber 1993, Barnes 2004b). Regardless of the specific pattern of relationships, however, an interbranch perspective holds that a structure of redundant and diversely representative policy-making forums creates an integrated system of politics and policy making, which cannot be parsed into separate parts or discrete stages. If one accepts this view, it makes little sense to focus on the behavior of any single actor or on any one point in the process. Instead, the central task is to understand the shifting relationships among these actors across policy areas and over time.

EXAMPLES OF INTERBRANCH ANALYSIS

This task raises the problem of complexity noted at the outset: How can scholars meaningfully study the inherently complex (and variable) role of law and courts in American politics and policy making? The signature response of interbranch analysis is to combine cross-sectional and longitudinal analysis into a single framework by viewing courts along two dimensions, which can be labeled "courts in time" and "courts through time."[2] Viewing courts in time requires locating courts and judicial decision making within particular institutional contexts. Viewing courts through time requires analyzing how these institutional arrangements unfold and engender specific outcomes.

To make these concepts more concrete, consider three examples of interbranch analysis from the public law literature: separation-of-powers games, regime politics studies, and microinstitutional analysis. As discussed below, each of these studies views courts in time and courts through time differently and tends to address different substantive questions (see Table 1 for a summary). Despite these differences, however, each study advances an interbranch perspective and illustrates important alternatives to specialized studies of judicial behavior.

Separation-of-Powers Games

Spatial models of separation of powers, or separation-of-powers games (Segal 1997, p. 28), represent perhaps the most prominent mode of interbranch analysis. These games grow out of a long tradition that applies strategic analysis to the courts (e.g., Schubert 1958, Murphy 1964) and trace their roots to the unpublished work of Marks (1986, 1989), which has been elaborated by a number of scholars (e.g., Gely & Spiller 1990; Eskridge 1991a,b; Spiller & Gely 1992; Rodriguez 1994;

[2]These terms are intentionally adapted from Orren & Skowronek's (2004, pp. 116–17) recent synthesis of the American political development (APD) literature, which maintains that APD at its core involves the study of governance in and through time. By using the terms courts in time and courts through time, I seek to draw attention to underlying parallels between interbranch analysis in the public law literature and APD, even though these literatures often focus on very different outcomes.

TABLE 1 Three examples of interbranch analysis

Name	Courts in time (key concept)	Courts through time (key concept)	Core question
Separation-of-powers games	Spatial models	Rounds in an iterated game	Under what conditions do judges impose their policy preferences on the process?
Regime politics studies	Governing coalitions	Fluid historical eras	How do powerful interests use the courts to advance their interests?
Microinstitutional analysis	Settled divisions of labor among policy makers	Continuously unfolding processes	Under what conditions do settled divisions of labor among the branches promote key democratic values and policy outcomes?

Epstein & Walker 1995; Knight & Epstein 1996; Epstein et al. 2004).[3] Like the attitudinal model, separation-of-powers games assume that judges are motivated to maximize their policy preferences. However, the attitudinal model implies that judges vote their sincere policy preferences in light of the facts of each case, whereas separation-of-powers games posit that judges must frequently adjust their decisions to reflect the preferences of other political actors, who have the power to reverse their decisions.

A brief sketch of a simple separation-of-powers game illustrates its approach to conceptualizing courts in and through time. To place courts in time, these models define the universe of policy preferences on an issue. In Figure 1, this space is represented by the horizontal line, which arrays potential policy preferences on an issue from left (and most liberal) to right (and most conservative). Most separation-of-powers games posit a unidimensional policy space, but spatial models need not (e.g., McCubbins et al. 1989, Shepsle 1992).

The vertical lines in Figure 1 represent the most preferred positions—or ideal points—of the players in the game. In denoting these points, it is assumed that actors prefer positions closer to their ideal point over positions farther away and that they are indifferent when choosing between policies that are equidistant from their ideal point, regardless of direction. Under these assumptions, the gatekeeper would be indifferent between policies set at *G(M)* and *C*, because these points

[3]It bears emphasis that separation-of-powers games are only one application of formal theory to the courts and judicial decision making. There are many others (see Hammond et al. 2005). My goal, however, is not to review the contributions of formal theory to the public law literature. It is to describe different (and diverse) modes of interbranch analysis and identify their promise.

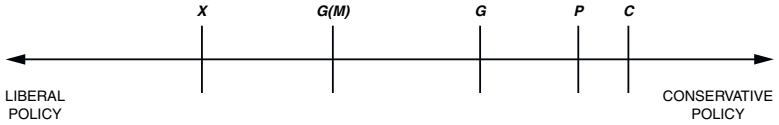

Figure 1 Courts in time: separation-of-powers games (adapted from Eskridge 1991a,b). X is the status quo, assumed to represent the intent of the Congress that enacted the statute; G is the ideal point of the current gatekeepers in Congress, such as committees; C is the ideal point of the median voter of Congress; P is the ideal point of the president; and G(M) is the gatekeeper's indifference point between G and C. It is assumed that preferences are single-peaked and symmetric. Accordingly, utility declines montonically in either direction (Krehbiel 1988, p. 263).

are the same distance from its ideal point. Of course, separation-of-powers games need not specify only one status quo and set of starting preferences; they may posit different status quos and sets of preferences to generate "comparative statics" aimed at capturing the interbranch dynamics of diverse issue areas (e.g., Eskridge 1991b).

These models view political time as rounds in an iterated game that unfold according to a series of simplifying assumptions and pre-existing rules. Common assumptions include that the players have perfect and complete information about the preferences of other actors, the courts cannot reinterpret statutory issues as constitutional issues (and thus change the rules for reversal), and the passage of laws is costless. Figure 2 lays out the standard sequence of play.

Substantively, these games offer a parsimonious framework for conceptualizing judicial independence and the scope of judicial discretion in a policy-making process with multiple veto points. So, given the preferences denoted in Figure 1, $X<G(M)<G<P<C$, the Supreme Court could use its powers to set policy anywhere from *G(M)* to *C* without provoking a legislative response that would override its decision. In the language of these models, the game would be at equilibrium at any point at or between *G(M)* and *C*. Thus, a relatively liberal Court, one whose

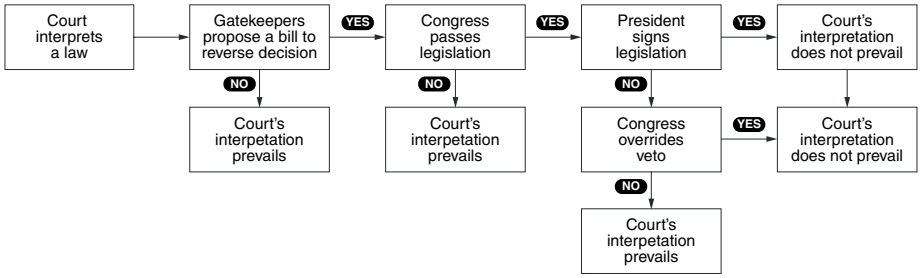

Figure 2 Courts through time: separation-of-powers games.

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ideal point is to the left of *G(M)*, would set policy at *G(M)* that is as far to the left as possible without risking reversal. The reason is that the gatekeeper would be indifferent between the Court's decision, which would set policy at *G(M)*, and override legislation that Congress would pass and set policy at *C*. As a result, the gatekeeper would not act, and the game would end. By a similar logic, a relatively conservative Court—one whose ideal point is to the right of *C*—would set policy at *C*, the farthest point to the right that does not risk reversal. The implication is that the Supreme Court will be most strategically constrained when the other branches are ideologically cohesive and will enjoy greater policy-making discretion as ideological divisions among the elected branches widen.

Regime Politics Studies

Regime politics studies represent another prominent mode of interbranch analysis, one that is gaining momentum in the literature (see Clayton & May 2000, Clayton 2002, Gillman forthcoming; see also Clayton & Gillman 1999, Gillman & Clayton 1999). On the surface, regime politics studies and separation-of-powers games share significant common ground. Both tend to focus on U.S. Supreme Court decisions and seek to embed the Court's decisions in the context of preferences of the elected branches of government. Both tend focus on strategic dynamics in the sense of the instrumental use of judicial power. Both provide crucial insights into the nature and causes of judicial independence in the fragmented American political and policy-making process.

Digging deeper, however, reveals core differences in how these studies view courts in and through time. Separation-of-powers games place the Supreme Court in time using spatial models with an eye toward mapping strategic interaction among competing actors with divergent ideal preferences. Regime politics studies, by contrast, locate the Court and its decisions within loosely interlocking sets of partisan interests. As such, regime politics studies turn separation-of-powers games on their head. Whereas separation-of-powers games examine the conditions under which the Supreme Court imposes its preferences on the other actors with competing preferences, regime politics studies explore how other powerful political actors use the Court to further *their* interests, revealing a complex landscape of interbranch relations even when the policy preferences of key actors align.

Regime politics studies also substantially differ from separation-of-powers games in their treatment of courts through time. Separation-of-powers games envisage political time as rounds in games that unfold under carefully specified sequences of moves among policy-maximizing actors. The result is depictions of political processes that abruptly shift between periods of equilibrium and disequilibrium. Regime politics studies view political time in terms of fluid eras or periods in American history characterized by shifting coalitions that seek to advance their agendas instrumentally under evolving understandings of the meaning of preferences and the rules of the game. The result is depictions of intricate—and often richly ironic—political processes in which the forces of stability and change

exist side by side. One such portrayal is Powe's (2000) masterful account of how the Warren Court both advanced the goals of liberal Democrats during the Great Society era and helped to lay the foundation for President Nixon's use of "law and order" politics to unseat Democrats in the 1968 election.[4]

Dahl's 1957 analysis of Supreme Court decision making, which can be seen as the fountainhead of contemporary regime politics studies (Gillman forthcoming), helps illustrate these underlying differences. In contrast to separation-of-powers games, which stress ideological conflict among the branches, Dahl stresses ideological compatibility among the branches, arguing that the Court is unlikely to disagree with, much less contradict, a well-functioning legislative majority on Capitol Hill. The reasons are simple: National party leaders always seek to appoint justices who will be sympathetic to their interests, and, on average, a new Supreme Court justice is appointed about every two years. Thus, an existing majority should be able to appoint enough justices during a single term of an administration to tip the balance on issues that closely divide the Court.

To probe this argument, Dahl (1957) reviews a long list of Supreme Court constitutional decisions and finds that the Court had almost never struck down laws passed by a current legislative majority as unconstitutional. Instead, it targeted laws passed by majorities that were no longer in power. From this vantage, the Supreme Court should not be seen as an independent policy maker that seeks to impose its preferences on other actors (or, for that matter, a champion of the rights of discrete, insular minority interests). Rather, the Court is a member of the dominant law-making majority, which uses its power of judicial review to legitimate the actions of current majorities and weed out laws from previous or weak governing coalitions.

To a point, one could argue that Dahl's account merely offers descriptive evidence of separation-of-powers games, which imply that the Supreme Court will be tightly constrained when Congress and the president are ideologically united. However, subsequent scholars have built on Dahl's foundation and explored the diverse role of courts in national political coalitions (see Gillman forthcoming). Some analyze how judicial decisions not only legitimate the actions of national governing coalitions but actually advance their agendas by serving as policy-making partners (Graber 1993, Powe 2000, Frymer 2003, McMahon 2003, Kersch 2004) and helping political leaders make credible commitments to their coalition partners (Landes & Posner 1975, Ferejohn 1999). Others illustrate how national governing coalitions use courts to avoid divisive issues (Graber 1993, Lovell 2003), shift costs and blame (Burke 2002), and bring regional outliers into line (Casper 1976,

[4]One might add that regime politics studies and separation-of-powers games tend to differ methodologically. Regime politics studies typically rely on pattern tracing and detailed historical analysis, whereas separation-of-powers games use formal models and rational choice. This difference, however, is superficial, as some regime politics studies fruitfully incorporate both rational choice and formal models to explore how and why political actors use the courts to advance their agendas (e.g., Ginsburg 2003, Ferejohn 1999, Landes & Posner 1975).

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Shapiro 1980, Klarman 1996). Still others explore how tenuous majorities use the courts to entrench their power and extend their influence (Balkan & Levinson 2001; Gillman 2002, 2006). By detailing the various roles courts play in the context of governing coalitions, these studies move beyond Dahl's emphasis on the Court's role in legitimating the actions of powerful interests and beyond the relatively thin account of the Court's role during periods of partisan alignment in separation-of-powers games.

Microinstitutional Analysis

Microinstitutional analysis represents a third approach to interbranch analysis, which sharply differs from both separation-of-powers games and regime politics studies (Shapiro 1964a,b, 1968; Rubin 1996; Melnick 1983, 1994; Kagan 2001; Barnes 2004b). A core difference is that microinstitutional analysis makes fewer simplifying assumptions about courts in time than do the other types of interbranch studies. It posits that courts operate in a wide range of institutional contexts at any given time and thus play different roles in the policy-making process. Sometimes courts play a secondary role limited to adapting general rules to specific cases; sometimes courts take the policy-making lead; and sometimes courts compete for power (Barnes 2004b). In this way, microinstitutional analysis resonates with what Orren & Skowronek (2004, p. 113) call "intercurrence"—the concept that multiple orders simultaneously operate in the American politics and policy-making processes. Put differently, microinstitutional analysis embraces a greater level of institutional variation at any given time than do separation-of-powers games (which typically assume that courts act as first movers in clearly ordered games) or even regime politics studies (which locate courts in loosely constructed national governing coalitions).

Microinstitutional studies also conceptualize courts through time differently than do separation-of-powers games and regime politics studies. Whereas separation-of-powers games treat political time as rounds in an iterated game and regime politics studies see fluid historical eras, microinstitutional analysis sees continuously unfolding processes that settle into patterns, as actors within the relevant policy communities develop shared understandings of the meaning of rules, their respective roles in the process, and what constitutes good practice. As such, microinstitutional analysis draws on a long tradition of law and society scholarship that assumes the law is socially constructed over time (e.g., Burke 2004; within the vast literature on "legal pluralism" and "legal consciousness," see, e.g., Ewick & Silbey 1998).

Given these core analytic differences, it is not surprising that microinstitutional analysis tends to focus on different substantive issues than either separation-of-powers games or regime politics studies. Specifically, instead of asking about the scope of judicial discretion or whether judicial decisions advance the political agendas of other actors, microinstitutional analysis asks: How do different settled patterns of institutional arrangements advance key democratic values and policy

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outcomes over time? This question often leads microinstitutional analysis to focus on regulatory and statutory interpretation processes, which typically unfold primarily in the lower courts—a substantive focus that stands in striking contrast to a field that is often preoccupied with Supreme Court decisions and constitutional interpretation.

These tasks are highly context-specific (see Komesar 1994, Williamson 1995, Rubin 1996). As a result, microinstitutional analyses often rely on detailed case studies that trace the policy-making process in specific areas. Shapiro's early work on free speech laws (1961) and labor law (1964b) pointed the way. Other leading examples are Melnick's account of courts and environmental politics (1983) and welfare rights (1994), as well as Feeley & Rubin's (1998) account of judicial policy-making in the prison reform cases.

Microinstitutional analysis, however, need not rely on case studies. Kagan's work, for example, draws on the comparative legal systems literature (e.g., Damaska 1986, Attiyah & Summers 1987) to create ideal types of policy-making arrangements, which are intended to bring the role of law and courts in American policy making into analytic focus. He argues that the United States features a high level of "adversarial legalism"—a mode of policy making and dispute resolution characterized by two institutional attributes (Kagan 2001, pp. 9–10). One is formal legal contestation, in which contending interests readily invoke pre-existing legal rights and the threat of litigation. The other is litigant activism, in which the underlying parties and their lawyers dominate the assertion of claims, framing of disputes, and gathering and submission of evidence. He then draws on a large body of policy studies to assess the implications of relying on adversarial legalism versus other, more hierarchical modes of policy making in terms of each system's relative administrative efficiency, predictability, and innovativeness. In my own work on the override process, I create a typology of normatively distinct court-Congress relations based in the logic of pluralism, hyperpluralism, and capture theory. I differentiate among interbranch relations according to the degree to which they feature participation among diverse interests and engender legal certainty. I then explore the distribution of these patterns in a random sample of 100 overrides using "large-N process-tracing," a technique that studies a relatively large number of cases in detail along a small number of theoretically important dimensions (Barnes 2004b, p. 20).

THE PROMISE OF INTERBRANCH ANALYSIS

Interbranch analysis offers important contributions on at least two fronts. First, interbranch analyses, especially separation-of-powers games, have enriched the study of judicial behavior by identifying potentially missing variables and encouraging new avenues of inquiry. Second, interbranch analysis promises significant conceptual gains through "redescription" (Rorty 1989, p. 9; Gillman 2004, pp. 379–80)—the recasting of seemingly technical legal processes in political terms. Or, to use Shapiro's language, interbranch analysis often teaches "American politics people"—as well as American public administration people—the ways in

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which law and courts are essential to everyday politics and policy making. Each contribution is discussed in turn.

Interbranch Studies and the Study of Judicial Behavior

Within the field of public law, interbranch studies have raised important issues about the nature of judicial decision making and, in the process, pointed to variables missing from traditional models of judicial behavior. Separation-of-powers games, for instance, have raised basic questions about strategic behavior on the Supreme Court: Do Justices vote their sincere ideological preferences, as posited by the attitudinal model, or do they adjust their decisions in light of the preferences of other actors?

This debate, in turn, has proven fertile ground for generating new hypotheses about the strategic behavior of the Supreme Court at all levels of the decision making process, ranging from the decision to grant certiorari to final votes on the merits (e.g., Hammond et al. 2005; Maltzman et al. 2000; Epstein & Knight 1998). It has also caused some leading scholars to incorporate new variables into their models of judicial behavior that measure the preference of other actors. The evidence of strategic behavior (to date) is somewhat mixed, as some find strong evidence of strategic voting on the Court (e.g., Spiller & Gely 1992, Maltzman et al. 2000, Epstein et al. 2004) and others find relatively little (Segal 1997, 1998). There is no doubt, however, that this strategic turn in the judicial behavior literature has been theoretically fruitful, nor that incorporating other branches enriches our understanding of constitutional interpretation (e.g., Epstein et al. 2004; see also Whittington 1999a,b; Reed 2001; Fisher 2004).

An Interbranch Perspective and the Redescription of Law and Courts

Interbranch analysis does more than add variables to existing models of judicial behavior. Indeed, its greatest promise lies in redescribing the law and courts in theoretically promising ways by (*a*) asking questions that are more relevant to other subfields than questions related to the determinants of judicial decision making, and (*b*) challenging scholars to incorporate the law and courts into their analyses of central political and policy-making processes.

The first point is straightforward. Because interbranch analysis explicitly embeds courts and judicial decision making into processes that involve other political actors, it tends to ask questions that are relevant to scholars who are not court specialists. For example, separation-of-powers games model how strategic interaction among ideologically diverse actors in a fragmented system of government creates opportunities for judicial policy making, issues that are clearly relevant to the general literature on governance in an era of divided government (see, e.g., Binder 1999, Epstein & O'Halleran 1999, Mayhew 2005). Regime politics studies push farther, recasting questions about the scope of judicial discretion as questions about how courts serve the interests of other political actors. This reframing of the issues concerning judicial independence, in turn, raises a host of questions that

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are central to other fields; for example, how do powerful interests use institutional arrangements to legitimate their actions, make credible commitments, shift costs and blame, and entrench and extend their influence?

The second point is perhaps less immediately obvious, but no less important. The work of Shapiro, which lays the foundation for microinstitutional analysis, offers a useful starting point (for insightful reviews of Shapiro's early work, see Kritzer 2003, Gillman 2004). Shapiro recognized early on that the Supreme Court should be seen as another forum of interest group advocacy. He maintained that civil rights advocates found that "the immediate alignment of groups in the South disfavored their goals," so they "used Supreme Court litigation to broaden the issues and attention" and build support among other centers of power (Shapiro 1964b, pp. 304–5; see also Frymer 2003, McMahon 2003; but see Rosenberg 1991).

The critical point is not a bland recognition that fragmented power provides multiple access points. It is that viewing courts through the prism of interest group politics reveals important aspects of American political and policy-making processes that would otherwise go unnoticed under a fog of legal jargon. Consider the rules of justiciability. As a legal matter, these rules are a cluster of doctrines governing which cases are appropriate for court review. These doctrines include standing, which lays out when a claimant has a sufficient stake in a controversy to sue; ripeness and mootness, which determines whether the underlying controversy is too premature or too settled for adjudication; and the political question doctrine, which holds that some controversies are better left to the other branches. At first blush, these doctrines seem very far removed from everyday politics and policy making. However, once litigation is recognized as a form of interest group politics, these legal doctrines—along with jurisdiction, venue, and others—become central to understanding a particular mode of agenda setting, one that has been critical to advocates for civil rights, women's equality, environmental protections, states' rights, and the list goes on. Under these circumstances, understanding how litigation is initiated is not just a topic for first-year law students in their civil procedure classes; it is essential to political scientists interested in agenda setting in the United States.

This type of redescription is not limited to agenda setting. Consider contingency fees from the perspective of interest group mobilization. From a purely legal perspective, contingency fee arrangements are a means to fund litigation, which allows lawyers to take a percentage of any eventual settlement or successful verdict—hardly the stuff of everyday politics. However, from the perspective of interest group mobilization, contingency fee arrangements create a class of policy entrepreneurs with a material stake in notifying claimants of their rights and organizing them for action. As such, contingency fees represent a potential antidote to the collective action problem and have, in fact, been instrumental in mobilizing a wide range of consumer groups, including smokers, the victims of asbestos, the users of Vioxx, and many others.

A parallel set of arguments could be made with respect to class action lawsuits. From a legal perspective, a class action lawsuit is a complex procedural mechanism

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for aggregating similar individual claims into a single lawsuit. From the vantage of interest group mobilization, they are a tool for lawyers-as-policy-entrepreneurs to mobilize disparate interests whose individual claims are too small to warrant action into a group whose aggregate demands are significant. Following this line of reasoning, recent federal legislation that placed some limits on the filing of state class action lawsuits was not merely a tort reform measure that tweaked the rules of civil procedure. It was the outcome of a fight over access to the fragmented American policy-making process and a significant form of consumer advocacy—topics that should resonate far beyond the field of public law.

This is not an exhaustive list. Microinstitutional analyses have recast prison reform cases as a striking example of institutional reform (Feeley & Rubin 1998) and Chapter 11 bankruptcies as a form of policy retrenchment, which provides corporations an exit strategy from the tort system as well as a tool for shifting costs and risks (Barnes 2006). These arguments dovetail with a growing literature on the multiple pathways of institutional change underlying the development of modern welfare states both in the United States and abroad (e.g.,Weir 1992; Clemens & Cook 1999; Schickler 2001; Hacker 2002, 2004; Thelen 2003; Streeck & Thelen 2005). The bottom line: By locating courts in broad institutional contexts and ongoing political and policy processes, interbranch analysis not only advances the study of judicial behavior but also challenges scholars interested in a wide range of topics—such as agenda setting, interest group mobilization, institutional reform, and policy retrenchment—to incorporate law and courts into their analyses.

WHITHER PUBLIC LAW?

One might counter that, by treating courts as just another actor in the political process, interbranch analysis in general and microinstitutional analysis in particular threaten to *further* marginalize public law as a distinctive field. Some argue that an interbranch perspective shifts scholars' focus from careful analysis of judicial decision making to standard political narratives about interbranch relations, partisan politics, and policy-making processes. In the process, the field of public law may lose exactly what makes it distinctive—its focus on law and courts (see McCann 1996). Admittedly, interbranch analysis does require scholars to reject traditional separation-of-powers notions and view the courts as one of several centers of power (Barnes 2004a). It is also true that interbranch studies often recast legal processes in political terms. But that does not mean that interbranch analysis treats judicial policy making as the same as its counterparts in other branches of government. To the contrary, interbranch analysis often underscores how courts perform basic political functions differently than other policy-making forums and thus emphasizes the need for expertise in both law and judicial processes.

The early scholarship of Shapiro once again leaps to mind. Shapiro argued that courts perform parallel functions as agencies in the process of policy formulation and implementation. At the same time, he maintained that judicial and

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administrative policy formulation and implementation were likely to differ. Judges tend not to be policy specialists; they enjoy greater protections from removal than political appointees in agencies; and they often exercise negative power by striking strike down laws through judicial review, as opposed to positively shaping policy through the promulgation of specific regulations (Shapiro 1968, pp. 47–48, 52, 60). Feeley & Rubin make a similar point in their analysis of the prison reform cases. They argue that policy making is a routine judicial function. However, judicial policy making differs from other modes of policy making, in part because the rule of law requires judges to use specialized legal reasoning to convince other judges to adopt their decisions (Feeley & Rubin 1998, p. 242).

A parallel set of observations could be made about agenda setting. Both Congress and the courts provide forums in which to raise issues, but these forums obviously structure the process very differently. Whereas congressional agendas are largely discretionary and interdependent, judicial dockets are largely nondiscretionary and discrete. Moreover, given the complex jurisdictional rules governing the bringing of lawsuits, plaintiffs often have a choice of forum, which can help them maximize their chances of finding a sympathetic hearing for their claims. Similarly, Chapter 11 reorganization can be seen as a mode of policy retrenchment, as businesses use bankruptcy to curtail individual private rights of action and shift the costs and risks of litigation to others. But this mode of retrenchment differs from retrenchment of rights through the legislative process—retrenchment via Chapter 11 is more ad hoc, less publicly transparent, and subject to fewer checks and balances than is retrenchment via legislation.

In short, interbranch analysis is not a recipe for marginalization of public law. It is a way for public law scholars to explore how legal rules and procedures shape ongoing political and policy-making processes as well as how courts perform core functions during these processes in distinctive ways. One cannot meaningfully engage these issues without a deep understanding of the law and the internal workings of the courts.

CONCLUSION

Law and courts play shifting and complicated roles in American politics and policy making. To make the analysis of law and courts more tractable, many scholars have concentrated on judicial decision making, especially within the Supreme Court. Admittedly, this approach has produced a superb research tradition that continues to bear fruit, but specialization has its price. Substantively, American politics and policy making are not created on an assembly line; they are interactive processes among overlapping and diversely representative policy-making forums. As a result, snapshots of judicial decision making—however sophisticated the lens—can provide an incomplete picture. In addition, a tight focus on the determinants of judicial decisions arguably contributes to the isolation of public law as a subfield because it does not consider how the courts and judicial decisions fit into broader political and policy-making processes.

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A narrow specialization in judicial behavior, however, is not the only way to handle complexity. A growing number of scholars seek to study the role of law and courts in American politics and policy making more holistically by adopting an interbranch perspective. This perspective recognizes that the American fragmented system of government does not establish branches and levels of government with clearly defined niches that can be studied in isolation. Rather it creates a continuing colloquy within a bramble of policy-making forums, each of which has a voice in making, interpreting, and legitimating the law. By explicitly embedding law and courts into the "matrix of governmental process" (Shapiro 1964b, p. 333), an interbranch perspective precludes the separation of courts and judicial decision making from other branches as a research strategy. Instead, it requires analysts to place courts in time and identify the specific institutional contexts of judicial decision making, as well as to analyze courts through time and trace how these arrangements unfold.

The cost of adopting this approach is often—but not always—a loss of parsimony and generalizability. However, the benefits are a fuller conceptual understanding of judicial decision making as well as the role of law and courts in political and policy-making processes. Indeed, through an interbranch perspective, the political significance of even seemingly arcane aspects of the litigation process comes into focus, opening new vistas of inquiry for scholars of public law as well as American politics and public administration. For example, from an interbranch perspective, the rules of justiciability not only affect the number and types of cases on judicial dockets but also shape a distinct type of agenda setting. Contingency fees not only fund litigation but also create a class of policy entrepreneurs. Class actions not only aggregate small claims into large (and potentially lucrative) lawsuits but also provide a means for overcoming collective action problems. Chapter 11 reorganizations are not only a means to rationalize the claim process against financially distressed companies but also a tool for businesses to retrench private rights of action on an ad hoc basis. These types of redescriptions, in turn, challenge those interested in core aspects of American politics and policy making to bring law, courts, and litigation back into their analyses—where they belong, given their centrality to the daily practice of American politics and policy making.

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