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Progressive Politics and the Courts: Lessons from the United States

Chye-Ching Huang and Brian Highsmith¹

US Supreme Court Justice Hugo Black characterised courts as “havens of refuge for those who might otherwise suffer because they are helpless, weak, [or] outnumbered ...”.² This appealing view of the judiciary — as a reliable guardian of minority rights, and an institutional check on social and economic power — can make giving judges more power over policy decisions a tempting proposition for the left. This essay contributes to the UK debate a survey of recent US developments that are causing deep concern among many US progressives, and that are inconsistent with Justice Black’s depiction of the judiciary. This perspective may temper enthusiasm on the UK left for ceding more policymaking power to the courts.

In recent years, contested political issues in the US have been subject to strategic judicial challenges that attempt to reopen political debates on a more favorable battleground. For example, twice in the four years after Congress and President Obama enacted health reform, legal challenges subjected this progressive achievement to a final veto point: the consent of an ideologically fractured Supreme Court. Conservatives attempted to achieve through the courts — citing novel legal doctrines — a policy goal of enormous consequence, which they could not achieve through the legislature. Party actors used the judiciary as an institutional veto for the political process; a final means to block a policy change that American progressives had for generations fought to secure. Conservatives made similar legal challenges to nearly all of President Obama’s major initiatives, in policy areas including oversight of the financial system, environmental regulation, and immigration.

¹ The authors are writing in a personal capacity.

² *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

Further, recent Supreme Court decisions — particularly the decision securing nationwide marriage equality — may give the appearance that the US left has done well before the courts on ‘social’ issues, but that success may be overstated. And the perception may prove all the more illusory if we are entering an era in which economic policy issues dominate, or if the courts allow economic rights and powers, decided more in line with conservative values, to trump social ones.

The stakes are even higher than particular, monumental policy decisions. Over time, delegating policymaking power to the courts could cause the mechanisms of healthy public participation in democratic decision-making to atrophy. The recent US experience is that the courts are erratic defenders of pillars of democratic participation, such as voting rights and measures against political corruption. Judicial power may also enervate citizens’ knowledge of and participation in far-reaching policy decisions. Judicial policymaking also distorts electoral politics because it increases the stakes of judicial appointments. These possibilities should concern anyone who values strong citizen participation in public life and a healthy democracy. The left should be especially troubled: when democratic engagement falters and policymaking constricts to litigation, progressive aims may be most hurt.

Progressive enthusiasm for social versus economic policymaking through the courts

There is a common perception that the US left is doing better on social issues in the courts than economic issues — and American progressives therefore tend to be more enthusiastic about judges making ‘social’ policy than ‘economic’ policy as they adjudicate disputes. This coincides with recent high-profile successes in advancing progressive social values through constitutional litigation — in particular, the 2015 decision securing nationwide marriage equality.³ And it is a natural response to failures to secure or protect progressive economic aims through the courts. Indeed, the Roberts court is the most likely of any since the Second World War to rule in favor of business interests,⁴ and some see the seeds of a new *Lochner* era in the court’s economic cases.⁵

The contrast is a challenge for progressives who seek a coherent view of the appropriate scope of judicial power. Furthermore, a closer look at this disjuncture gives the left several reasons to be uneasy about ceding both social and economic policymaking to judges, even if one evaluates judicial power purely for its instrumental value in securing progressive policy aims.

³ *Obergefell v. Hodges*, 576 U.S. (2015).

⁴ Posner, RA, Epstein, L, and Landes, WM, ‘How Business Fares in the Supreme Court’, 97 *Minnesota Law Review* 1431, 2013.

⁵ Purdy, J, ‘The Roberts Court Versus America’, *Democracy Journal*, Winter 2012, No. 23.

First, the left's success on social issues in the courts may be overstated. Despite marriage equality, other recent lower-profile decisions have thwarted progressive social policies.⁶ It may be true that relative to the fairly dismal track record on 'economic' issues, the left has recently done better on social issues in the courts. But that does not mean the courts are, overall, a more favorable playing field for progressives than the political arena. Second, even if the left currently has and retains a relative advantage in the courts on social issues, while conservatives do relatively better on economic issues, this is an uneven trade if the US (along with other high-income democratic nations) is entering a phase in which 'culture wars' social issues recede in contentiousness and importance relative to policy responses to economic trends such as growing inequality.⁷ Third, the perception that judges tend to give vulnerable and marginalised populations — whose causes are championed by progressives — a relative upper hand in the social sphere is simplistic and illusory if, over time, the courts rule in ways that allow economic rights to systematically trump the social rights that judges or the legislature have otherwise affirmed.

That dynamic may be emerging in the US. For example, progressive groups have warned that the rise of binding arbitration and its enforcement by the courts has effectively eliminated swaths of social rights litigation (e.g. in sex discrimination in employment). Recent Supreme Court decisions that curtail employers' and consumers' access to court have suppressed meritorious claims and significantly thwarted the enforcement of statutory 'social' rights, yet garnered relatively little public attention.⁸ In effect, courts have allowed 'economic' contract and regulatory issues to constrain workers' and consumers' access to 'social' rights.⁹ Another example is the longstanding concern of the left in many countries that international 'economic' obligations allow domestic and international courts to impinge on domestic 'social' regulatory decisions in areas such as public health and environmental protection.

Eroding and distorting democratic participation

When we cede policymaking power to the judiciary, we should be concerned not only about how judges will rule on particular policies, but also how delegating that power to judges may debilitate informed and energetic citizen participation in democratic policy debates.

⁶ See Robinson, RK, 'Unequal Protection', 68 Stan. L. Rev. 151, 2016; Aron, N, and Barry, KC, 'The Case Against the Roberts Court', *The Nation*, September 23, 2015.

⁷ Sitaraman, G, 'America's Post-Crash Constitution', *Politico*, October 5, 2014.

⁸ Silver-Greenberg, R, and Gebeloff, R, *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times, Oct. 31, 2015.

⁹ See Eisenbray, R, 'What Gretchen Carlson and Immigrant Janitors have in Common: Forced Arbitration', *Economic Policy Institute*, July 11, 2016. With respect to consumers, see *DIRECTV, Inc. v. Imburgia*, 577 U.S. (2015).

One reason is that judges may be unreliable protectors of the key mechanisms of democratic participation. US progressives have derided recent Supreme Court decisions allowing money to play a greater role in elections,¹⁰ and weakening the federal supervision of elections to address entrenched racial discrimination,¹¹ but applauded a decision that may restrict racially motivated gerrymandering.¹² This mixed record should concern anyone who values citizen democratic engagement. It should also particularly worry the left, which often pursues policies that, in its view, help to advance the interests of those struggling for economic and political power. Indeed, mechanisms of voter suppression have for some US conservatives become a favored — and sometimes explicitly stated — tool for winning elections and advancing policy aims.¹³

Additionally, the fact of ceding policymaking power to judges — regardless of how they decide particular issues — may dampen public democratic activity. Recent US health policy debates illustrate that judicial power over policy decisions may enfeeble citizen engagement in key policy issues, and, over time, erode the infrastructure for healthy democratic participation.

The health sector is nearly one-fifth of the US economy and it affects every US resident. Under the Affordable Care Act ('ACA'), the share of Americans without health insurance — the primary way that Americans access health care — fell from 13.3 per cent to 9.1 per cent between 2013 and 2015, with particularly dramatic results for people in or near poverty.¹⁴ The legislation received no Republican votes, despite the drafters' efforts to make policy accommodations to garner bipartisan support.¹⁵ The Republican-controlled House of Representatives voted to repeal or undermine the statute more than fifty times,¹⁶ and, in 2013, refused to approve funding for several of the law's functions, causing a prolonged government shutdown. Conservative groups also mounted a series of judicial challenges in an effort to force the judicial branch to enact a policy outcome. In 2012, in *NFIB v. Sebelius*,¹⁷ the court upheld the bulk of the law, but undermined a key aspect of the reform by making optional for states a provision that would have expanded and improved health coverage for low-income households nationwide. Some states' subsequent failure to take advantage of this option has left more than two million

¹⁰ *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010).

¹¹ *Shelby County v. Holder*, 570 U.S. 2 (2013).

¹² *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. (2017).

¹³ Wines, M, 'Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain', New York Times, September 15, 2016, A15.

¹⁴ Broaddus, M, and Park, E, 'The Affordable Care Act has Produced Historic Gains in Health Coverage', Center on Budget and Policy Priorities, 15 December 2016.

¹⁵ See, e.g., Ornstein, N, 'The Real Story of Obamacare's Birth', The Atlantic, 6 July 2015.

¹⁶ Baker, S, 'House Votes to Repeal Obamacare, Again', Nat. J., 3 February 2015.

¹⁷ *National Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566 ('*NFIB v. Sebelius*').

low-income people currently without the health coverage that they would have had if the provision had taken effect nationwide as Congress intended.¹⁸

When Republicans won the Presidency along with both Houses of Congress last November, ACA repeal was high on their agenda. One conservative writer observed, “[e]ver since President Obama signed his overhaul of the US health care system into law [...] the elusive goal of repealing the legislation has been the driving force behind Republican politics”.¹⁹ The House, however, failed at its first attempt, in part owing to a groundswell of public engagement with the law leading up to the House’s failed attempt to vote to repeal it, including flooding congressional offices with calls and letters, and local and national protests.²⁰ Favourable views of the ACA, as measured by tracking polls, increased substantially.²¹ Prior polling had shown the public liked most significant aspects of the law, but not the ACA as a whole, suggesting some lack of basic knowledge about its contents — including that the ACA is the same as what Republicans had termed ‘Obamacare’.²² A health policy expert commented when the House’s first attempt at a vote failed, “This is the sweetest because people did it. [We d]idn’t have to depend on a court. All over the country people spoke up and were heard”.²³ The House passed an ACA repeal bill on its second attempt, and repeal then failed in the Senate. Challenges to the ACA in the SCOTUS did not appear to generate similar levels of public engagement or substantially shift public opinion.²⁴

That’s unsurprising because challenges to ‘economic’ policies, such as the ACA, often focus, at least superficially, on arid legal issues rather than on the law’s policy merits and demerits — indeed, courts generally state that such policy considerations are reserved for the legislature and properly beyond their purview. Social movements and other extrajudicial considerations may influence judges, but judicial opinions are justified through citations to legal authority, logical reasoning, and the like. The resulting legalese is often technical, abstruse, and uninspiring — and may be disconnected from the concerns that animated the antecedent political debates. Most citizens may have little to say, for example, about whether a federal law requiring citizens either to have health coverage or pay a penalty is a ‘tax’ under the

¹⁸ Garfield, R. and Damico, A., ‘The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid’, Kaiser Family Foundation, October 19, 2016.

¹⁹ Klein, P., ‘Overcoming Obamacare: Three Approaches to Reversing the Government Takeover of Health Care’, 2015

²⁰ See, e.g., DeBonis, M. and Weigel, D., ‘Activist Muscle Gives Obamacare a Lift’, Washington Post, February 25, 2017.

²¹ Kirzinger, A., DiJulio, B., Sugarman, E. and Brodie, M., ‘Kaiser Health Tracking Poll — Late April 2017: The Future of the ACA and Health Care & the Budget’, Kaiser Family Foundation, 26 April, 2017.

²² ‘After the Election, the Public Remains Sharply Divided on Future of the Affordable Care Act’, Kaiser Family Foundation, 1 December, 2016: Dropp, K. and Nyhan, B., ‘One Third Don’t Know Obamacare and the Affordable Care Act Are the Same’, New York Times, 7 February 2017.

²³ Solomon, J., 24 March 2017: <https://twitter.com/JudyCBPP/status/845366588102578180>

²⁴ See, e.g., Hamel, L., Firth, J. and Brodie, M., ‘Kaiser Health Tracking Poll: Late June 2015 — A Special Focus On The Supreme Court Decision’, Kaiser Family Foundation, 1 July 2015.

constitution (a key issue in *NFIB v. Sebelius*). By contrast, during recent congressional consideration of the ACA, many citizens had lots to say about (and personal experience of) the merits of access to affordable health insurance and care, the costs and benefits of citizens being insured and helping to fund health care, protections against discrimination in health insurance markets, and so on. Legislative debates tend to focus directly on such costs, benefits, and values. Judicial decisions may be just as consequential as legislative lawmaking, but a poor focal point for engaging and informing citizens about policy.

If judicial power over policy systematically crowds out democratic activity, certain muscles of citizen engagement in policymaking may weaken. Delegating policymaking to the courts may reduce incentives for citizens to build and use democratic infrastructure to form opinions on policy and to communicate those views to elected and appointed officials, and other citizens. This could deplete: 1) the mechanisms citizens use to get timely, reliable, and sufficient information on pending policy debates; 2) their knowledge of how to make views heard (including knowing who their elected representatives are and how to contact them); and 3) the depth and strength of civil society — including whether civil society is oriented to engaging and activating citizens or to forming and mounting litigation strategies.

If the potential for judicial power to dampen and distort citizen engagement in policy debates is not reason enough for the left to eschew it, there are reasons to believe progressive aims may be hurt the most. If the channels for broad public participation deteriorate, interest groups with funding and greater ability to coordinate may have more relative access to and influence on legislators. The right may also be better at shaping policy through the courts for reasons including the resources needed to mount complex litigation. For example, partisan and conservative civil society political backing for challenges to the ACA helped move various legal claims behind the challenges from being ‘off-the-wall’ to fair game for courts.²⁵ Republican State Attorneys General coordinated to file claims and craft arguments and strategy, and conservative civil society groups funded and mounted a number of the main challenges.

Recent US experience starkly illustrates another way judicial power can distort democratic politics. Ceding policymaking to judges threatens to change fundamentally the role of the judiciary, which will tend to function — and be treated by political actors — as a new institutional veto point for the political process. As Ferejohn has observed, “[w]hen courts can make politically consequential and more-or-less final decisions [...] those interested in judicial

²⁵ See Balkin, JM, ‘From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream’, *The Atlantic*, June 4, 2012.

decisions have reason to seek to influence and, if possible, to control appointments to the courts and other legal institutions”.²⁶ The standoff over the recent Supreme Court vacancy following the death last year of Justice Antonin Scalia then illustrated how this could raise the stakes of judicial appointments and changes the emphasis of democratic politics.

When Justice Scalia died in February 2016, congressional Republicans broke with precedent and refused to consider President Obama’s nomination of Merrick Garland until after the November 2016 elections. Republican former House Speaker John Boehner noted ahead of the election: “The legislative process, the political process, is at a standstill and will be regardless of who wins. The only thing that really matters over the next four years or eight years is who is going to appoint the next Supreme Court nominees [...] because more and more issues [that] can’t be dealt with legislatively are going to end up in the court system”.²⁷ Donald Trump’s ability to appoint a long-serving justice who would presumably rule in line with conservative preferences presumably gave some conservatives a reason to support his candidacy and presidency, despite his extreme policy positions that often conflict not only with conservative intellectual traditions but also the rule of law. Upon President Trump’s election, Republicans eliminated another longstanding precedent — the legislative filibuster — to confirm his nominee, Neil Gorsuch, to the long-vacant seat. During all this, the *New York Times* observed that the Supreme Court is devolving into a “nakedly partisan tool”.²⁸

The policy stakes are enormous. Every progressive legislative achievement for the next generation may now be subject to an additional veto point of a deeply conservative, unaccountable Supreme Court majority. Ambitious progressive economic policy goals — a system that moves closer to universal public healthcare, mandated paid leave, a carbon tax, fixing money in politics, stronger anti-trust enforcement, strengthening unions, and worker representation on boards and more — may all be subjected to future legal challenge, and face the possibility of being struck down under this new court.

Again, the disregard for democratic norms and the potential distortion of electoral politics should concern anyone who has a stake in the strength of the democracy. And again, the left has more reasons to worry. It is possible that progressives are just as apt as conservatives to maneuver partisan politics and roll over norms to secure favored judicial appointments. But even if progressives can imagine stacking the highest courts with long-tenured, left-leaning justices, the gain

²⁶ Ferejohn, J, ‘Judicializing Politics, Politicizing Law’, *Law & Contemporary Problems*, Vol. 65, No. 3: Summer 2002, 42, 63.

²⁷ Giaritelli, A, ‘Former Speaker John Boehner Is Standing By Trump for This One Reason’, *Washington Examiner*, 12 Oct 2016.

may be asymmetric. Part of the nature of being ‘progressive’ may mean that judges with long terms and reasonably consistent preferences may, over time, begin to lag behind what is considered by the political left to be progressive. That is, courts may be structurally conservative in ways legislatures are not, so court stacking may not deliver the same policy gains to the left as to the right.

Conclusion

The UK left may be attracted to constitutional arrangements that give the judiciary greater policymaking power through frustrations with political processes and court decisions on policy issues that advance progressive aims. But a view from the US — a mature system, in which judges already have much policymaking power — should temper that attraction. Recent US developments suggest that judicial policymaking does not reliably secure progressive goals, and, in the long run, could enfeeble democratic participation and debate in ways detrimental to democracy as a whole and progressive aims in particular.