View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Tulsa College of Law

Tulsa Law Review

Volume 53 | Issue 2 Article 8

Winter 2018

Majority Tyranny

David A. Bateman
dab465@cornell.edu

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

David A. Bateman, *Majority Tyranny*, 53 Tulsa L. Rev. 179 (2018).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol53/iss2/8

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

MAJORITY TYRANNY

David A. Bateman

LOUIS FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS (UNIVERSITY PRESS OF KANSAS 2016). PP. 190. HARDCOVER $29.95.

ANNA HARVEY, A MERE MACHINE: THE SUPREME COURT, CONGRESS, AND AMERICAN DEMOCRACY (YALE UNIVERSITY PRESS 2013). PP. 384. HARDCOVER $55.00. PAPERBACK $37.00.

"If a majority be united by a common interest," wrote James Madison, "the rights of the minority will be insecure."[1] This possibility animated liberal political and legal thought during the long nineteenth century, and the specter of majoritarian tyranny that it raised led countless theorists to devise institutional breakers against the cresting waves of democracy.

Madison himself recognized two solutions. The first worked through the representative system, and he famously proposed extending the republic so that the diversity of interests would make it improbable for a permanent majority to form.[2] The second was to create "a will in the community independent of the majority" that could nullify acts of the representative branch. Madison equated this with monarchy and warned that it offered only a "precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties."[3] Many of the Constitution-writers of the early Republic shared Madison's worry about the dangers of a "power independent of society."[4] But, colonial reformers had long asserted the principle that an independent judiciary should stand as a check against the Crown, and for those worried about legislative tyranny, the judiciary appeared as a natural substitute for a discredited monarch.

The role of an independent authority capable of checking the elected branches was transferred from the Crown to the court, and by the mid-nineteenth century the

1. THE FEDERALIST NO. 51 (James Madison).

2. Others championed proportional representation so that the diversity in the electorate would be represented in the legislature; "fancy franchises," to give minority classes greater legislative influence; or apportionment plans that would base representation on interests, occupations, or designated communities.

3. *Id.*

4. ANNA HARVEY, A MERE MACHINE: THE SUPREME COURT, CONGRESS, AND AMERICAN DEMOCRACY 40–54 (2013); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 161 (2d ed. 1998).

Published by TU Law Digital Commons, 2017

independence of the judiciary had come to be seen as a central principle of any just democratic order. "The notion, that the people have no need to limit their power over themselves," wrote John Stuart Mill, "might seem axiomatic when popular government was a thing only dreamed about, or read of as having existed at some distant period of the past."[5] But the United States had shown how majorities could be oppressive, and thus made clear that "precautions are as much needed against these, as against any other abuse of power."[6] This argument, he noted, appealed as much to theorists as to the "important classes in European society," and so the "tyranny of the majority" came to generally be "included among the evils against which society requires to be on its guard."[7]

The argument that rights are best protected by an independent judiciary is at least as pervasive today. Erwin Chemerinsky has argued that to leave the rights of minorities to "the whims of the political majority" would have severe consequences for all those marginalized classes "who have nowhere to turn but the courts—litigants who are, by definition, unable to harness the 'popular' authority for their own constitutional interests."[8] Judicial independence, write Bruce Fein and Burt Neuborne, is a fundamental "safeguard against majoritarian tyranny."[9] The protection of individual rights, Ronald Dworkin argues, requires that "the majority should not always be the final judge of when its own power should be limited."[10] An independent and empowered judiciary has been endorsed by the United Nations as a "Human Rights Priority," while the International Institute for Democracy and Electoral Assistance argues that judicial independence "is critical to preserving the rule of law."[11]

Louis Fisher's *Congress: Protecting Individual Rights* and Anna Harvey's *A Mere Machine* offer two powerful dissents from this tradition, arguing from historical and statistical evidence that this celebration of judicial independence is misplaced and that individual and minority rights have been better and more reliably protected by popularly elected representative legislatures than by independent and insulated elites. Each takes aim at a particular orthodoxy: Fisher that the Court has better protected rights than Congress, and Harvey that the Court is independent and that this is the source of American rights protections. Together they provide powerful evidence that our confidence in judicial independence as a safeguard of rights is ill-founded, and urge us to reconsider the potentially vital role of representative legislatures.

IN DEFENSE OF CONGRESS

Louis Fisher's *Congress* offers a robust defense of the legislature's role in protecting

5. JOHN STUART MILL, ON LIBERTY 11 (4th ed. 1869).

6. *Id.* at 13.

7. *Id. See also* 2 JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 452, 458 (3d ed. 1858); 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 310 (Olivier Zunz ed., Arthur Goldhammer trans., Library of America 2004) (1840).

8. Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1013–14 (2004).

9. Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 53, 59 (2000); HARVEY, *supra* note 4, at 3.

10. RONALD DWORKIN, FREEDOM'S LAW: A MORAL READING OF THE CONSTITUTION 16 (2d ed. 2005).

11. HARVEY, *supra* note 4, at 3; Nora Hedling, *The Design of the Judicial Branch*, *in* A PRACTICAL GUIDE TO CONSTITUTION BUILDING 223, 225, 235 (Markus Böckenförde et al. eds., 2011).

individual rights and fulfilling the country's collective aspiration to self-government. These two goals, according to Fisher, define the purpose of American constitutionalism, but they were not intended to be functionally allocated to distinct institutions, with self-government assigned to Congress and the president, and the judiciary responsible for protecting rights. Instead, each branch was to pursue these goals as part of an interlocking system, one in which the Framers expected and hoped Congress would be paramount.

It has been awhile since Congress was held in such high regard. Only twelve percent of Americans expressed either a "great deal" or "quite a lot of confidence" in Congress in 2017; forty-seven percent had "very little" or "no confidence."[12] At a moment when Congress can barely be relied upon to fulfill core functions of self-government—such as fund the government, not default on the debt, or fill a vacancy on the Supreme Court without partisan obstruction—one might be forgiven for finding a bit far-fetched the notion that it could be trusted with protecting individual rights. The Supreme Court, by contrast, still commands broad respect, second only to the military among American public institutions.

The great value of Fisher's book is its clear, consistent, and ultimately persuasive message that this denigration of Congress and valorization of the Court is mistaken history and misplaced faith. Through extensive historical examples, Fisher demonstrates that Congress has played a vital role in protecting individual and minority rights, and he provocatively argues that in doing so it has been more effective and reliable than the other branches.

Appreciating Congress's contribution requires that each branch be judged on the basis of its actions, and not, as almost inevitably works to Congress' detriment, on its process or motivation. It is easy to see why this matters. When the Court acts, it explains its actions as mandated by the dictates of the Constitution. When the president acts, it has usually had the appearance of being quick, decisive, and deliberate; the process of political calculation and hemming and hawing tends to happen out of sight. When Congress acts, it is anything but; indeed, the more it has strayed from a slow, grinding, deliberative process, the more it has erred. Moreover, an electoral calculus can almost immediately be inferred from the pattern of support and opposition, creating the reasonable impression that the institution might not have acted had the political vanes pointed a different way. For Fisher, then, the primary issue is neither motivation nor process, but competence and the historical record.

The core of the book lays out the historical record. Chapter Two examines the intentions of the Framers, and each subsequent chapter provides an overview of how Congress and the other branches have handled individual rights in a particular area or for a given category of persons: African Americans (Chapter Three), Women (Chapter Four), Children (Chapter Five), Religious Liberty (Chapter Six), and Native Americans (Chapter Seven).

In each of these substantive areas, Fisher highlights Congress's positive role and contrasts it with the indifference or bungling of the president and, especially, the Supreme Court, the book's primary antagonist. "The capacity of Congress to protect individual and

12. *Confidence in Institutions*, GALLUP (Aug. 2017), http://www.gallup.com/poll/1597/confidence-institutions.aspx.

minority rights has a long and distinguished history," he writes, "both in taking the initiative in safeguarding rights and in passing remedial legislation to correct errors in the courts. Little in the record over the past two centuries offers convincing evidence that courts are particularly gifted or reliable in coming to the defense of individual rights."[13]

Fisher is an effective advocate for Congress, and the book concludes with suggestions on how to strengthen Congress's institutional abilities. For four decades Fisher served as Senior Specialist in Separation of Powers with the Congressional Research Service and as Specialist in Constitutional Law with the Law Library of Congress. He knows and cares about the institution, and believes in the principles of self-government that it is meant to embody.

The book's strength is its refutation of the often-uninvestigated assumption that democratic majorities in America have little interest in protecting the rights of minorities. Fisher documents how women, children, religious communities, indigenous nations, and African Americans have often found Congress to be a more welcoming branch, and more protective of their interests, than either the executive or the judiciary. It was Congress that tried to prohibit child labor; and it was the Supreme Court that repeatedly stood in its way. It was the Supreme Court that failed to protect the rights of women—"by and large," wrote John D. Johnston, Jr. and Charles L. Knapp in 1971, "the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable"—and Congress which more often rose to the occasion.[14] The Supreme Court narrowed Fourteenth and Fifteenth Amendment protections for African Americans, while Congress tried to defend black rights during and after Reconstruction.

The book's coverage of congressional action and judicial decisions is extensive, and while there could be no real expectation of being exhaustive the book should certainly serve as a useful introduction for students interested in delving further into the particular areas that Fisher examines. It is accessibly written and will be a valuable addition to undergraduate courses on the courts and Congress. More generally, it provides a helpful reminder for students at all levels that no one institution can claim a permanent superiority in protecting individual rights, that there is no historical reason to believe that insulated elites have any greater claim to solicitude in this regard, and that ultimately "a dependence on the people is, no doubt, the primary control on the government."[15] By the conclusion, readers will be fully persuaded that Congress has acted to protect rights, and that it has often acted when the other branches have refused to do so or when they acted in ways that narrowed rights protections.

Congress is a spirited defense of the institution in an area where it has few defenders, and a call for the most important branch in the American constitutional order to not cede its rightful terrain in defining and protecting rights. But the book's defense of Congress is in comparison to the other branches, and while this is a useful exercise it does mean that the text often reads more as a critique of the Supreme Court. It is the belief that the Court is uniquely empowered or best able to protect rights and interpret the Constitution, and

---

13. LOUIS FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS, at xi–xii (2016).

14. *Id.* at 77; John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U. L. REV. 675, 676 (1971).

15. THE FEDERALIST NO. 51 (James Madison).

that the appropriate posture of members of Congress is to respectfully submit to whatever it happens to decide, that seems to animate much of Fisher's critique. "Why give one-third of the government the final say?" he asks.[16]

The positive case for Congress, then, is not so much that it has amply protected individual and minority rights, but rather that it has usually done more than the other branches. Fisher makes a strong case for this claim, but it is hardly reassuring to those whose worry is not which institution will protect rights but whether those rights will be protected at all.

Fisher concedes that "in times of perceived emergencies and fears of disloyalty at home, all three branches have failed to protect individual rights."[17] To this qualifier could be added 'in times of peace and prosperity, for long expanses of American history, so long as the rights to be protected were those of African Americans.' Fisher's summary of congressional actions to protect African Americans during Reconstruction, and the various ways in which these actions were restricted or overturned by the courts, is important history that is known to specialists but less well-known to others. It is a point worth stressing: during the Civil War and for at least three decades after, the rights of African Americans had more committed partisans in the representative branches than they did on the Court.

But it would be a mistake to cast Congress in *too* heroic a role: in 1884 Congress declined to reauthorize portions of the now struck down Civil Rights Act of 1875; it failed eight years later to pass legislation to protect the right to vote; and even before the *Plessy v. Ferguson* decision, Congress had affirmed the principle of separate-but-equal in education by allowing states to set up segregated institutions using federal money.[18] It was Congress that repealed the federal election laws, refused to enforce the Fourteenth Amendment's representation clause, declined to pass anti-lynching legislation, and which designed its internal rules with the intent of giving white southerners an effective veto. If the Supreme Court made life difficult for advocates of racial equality in the late nineteenth century, it was Congress which did next to nothing during the first several decades of the twentieth.

It turns out that none of the branches were particularly willing to protect black Americans' rights, except for when it was politically expedient. Congress has probably been better on balance, and this is an important point to recover. But ultimately the question of whether Congress or the Court has better protected African American rights can only be answered by another: which Court and which Congress?

Fisher also suggests that when the Court does act it tends to make a mess of things, creating problems which ostensibly could have been avoided had the matter been left to Congress. I am sympathetic to the argument that the legislative branch is better suited to many of the tasks of rights protections, including balancing conflicting rights and devising more durable and effective policy protections.

But this is of little value if the legislature is not actually acting to protect the right in question. Consider the case of abortion rights. The legislative branches might have devised

16. FISHER, *supra* note 13, at 28.
17. *Id.* at 19.
18. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

a better framework than the Court established in *Roe v. Wade*, which Fisher argues was essentially unworkable.[19] But even if more state legislatures had been poised to protect the right to an abortion, at least some American women would have been denied control over their bodies, precisely because no one believes that all states would have acted or that Congress would, or could, have done so in their stead. *Roe v. Wade*, whatever its faults, had the virtue of protecting a right for women without the distinctions of geography and class that would have occurred had it been left to the elected branches.

This applies more generally. If a particular claim is and ought to be a right, and Congress is silent, surely the Court should act, even if in doing so it devises a policy framework that is less effective than what Congress might have produced. I expect Fisher would agree; indeed, it is implicit in his comparison that the Court is also under a mandate to protect rights. But it does make concerns over the coherence of a Court's action a distinctly secondary matter. If the Court acts to protect rights where Congress has failed, this might represent a "decline in the power of the people the legislature represents" and "a loss of self-government,"[20] and perhaps ought to be regretted on that ground or on grounds that it is less coherent and durable than congressional action.[21] But if the legislature will not act, the Court must.

The best hope, then, is perhaps that which was expressed by Alexis de Tocqueville: that the courts would "serve to correct the aberrations of democracy," and while never "thwarting the impulses of the majority" they might nonetheless "slow them down and guide them."[22]

But as Anna Harvey makes clear, this hope too is probably misguided.

THE DEPENDENT COURT

If the Supreme Court in *Congress* is an unreliable protector of rights, in Anna Harvey's *A Mere Machine* it is reduced to a mechanical agent of the legislature. Harvey takes aim at two of the most enduring beliefs about the Court: that it is an independent agent whose decisions reflect some combination of justices' preferences and their interpretation of the Constitution; and that such independence would be a good thing if it were true.

Harvey argues instead that the Supreme Court is highly responsive to the preferences of the political branches, and in particular to the House of Representatives. And, more provocatively, she argues that rights are better protected because of this judicial *dependence* than they would be with a more independent judiciary. Harvey's argument is subtle but guided by a powerful logic, and with her careful empirical analysis she makes a compelling case and an important contribution in the study of judicial behavior.

The basic outline of the argument and summary of the findings is provided in Chapter One. The courts, Harvey suggests, were not designed to be independent. They were instead made dependent on the goodwill of the House, which was given the authority to initiate impeachment proceedings and originate appropriations bills. "The Constitution

19. FISHER, *supra* note 13, at 82 (citing Roe v. Wade, 410 U.S. 113 (1973)).
20. *Id.* at 30, 161.
21. *See* DWORKIN, *supra* note 10, at 16.
22. TOCQUEVILLE, *supra* note 7, at 331.

leashed these judges," Harvey writes, and "the House of Representatives holds the leash."[23] Most existing studies have found no evidence for such a leash, but these have generally been based on problematic measures. Once more "objective" measures are used, Harvey finds a strong positive association between the preferences of the median Representative and the decisions of the Court.

Harvey then asks a broader question: "what's so great about independent courts?"[24] She notes, quite rightly, that the logic by which independent courts should provide better rights protections than elected officials is not entirely clear. "After all," she writes, "political leaders who are held accountable to such majorities provide significantly higher levels of civil rights and liberties than do their more 'independent' counterparts."[25] I expect Louis Fisher would agree.

The remainder of the book expands upon these points. Chapter Two debunks common arguments in favor of judicial independence, either as the intent of the Framers or as an accurate description of reality.[26] Chapter Three analyzes judicial decision-making as a function of the preferences of the median justice and median members of the House and Senate.[27] Chapter Four introduces the puzzle of the "two Rehnquist Courts," namely the surprising liberalism of the early Rehnquist Court followed by its sharp move to the right in the mid-1990s.[28] Chapter Five introduces new measures that allow this shift to be identified and explained, connecting it to the Republican takeover of the House in 1994.[29] Chapter Six subjects this finding to a more systematic analysis, controlling for economic conditions and public opinion.[30] Chapter Seven provides evidence that when the preferences of the Court and House diverge, the Court reduces the number of cases it hears, avoiding a choice between its own preferences and those of the political branch.[31] Chapter Eight reinterprets the Roberts Court in light of the book's findings, and Chapter Nine extends the argument cross-nationally.[32]

Perhaps the first question that arises is why Harvey finds evidence of judicial deference when so many previous studies—including that in Chapter Three—find none? Previous studies, it turns out, have been relying on a problematic coding scheme. The standard measure of judicial decisions used in the literature is the U.S. Supreme Court Database, which codes each decision as either liberal or conservative based on a structured assessment protocol.[33] The problem, argues Harvey, is that the subjectivity of the process allows the codings to be contaminated by the expectation of judicial independence: in short, a decision might be coded as "liberal" because it was issued by a Court known to be

---

23. HARVEY, *supra* note 4, at 291.
24. *Id.* at 23.
25. *Id.* at 25.
26. *Id.* at 35.
27. *Id.* at 77.
28. HARVEY, *supra* note 4, at 107.
29. *Id.* at 141.
30. *Id.* at 191.
31. *Id.* at 223.
32. *Id.* at 249, 264.
33. U.S. SUPREME COURT DATABASE, http://supremecourtdatabase.org (last visited Oct. 10, 2017).

liberal and which is assumed to decide cases based on its own preferences.[34]

Harvey introduces alternative measures based on Keith Poole and Howard Rosenthal's DW-NOMINATE, on the partisan control of the enacting Congress, and on the estimated medians of the enacting chambers under divided government. In the first, the final passage votes for statutes struck down or upheld by Congress are identified and the ideological direction of the statute is determined by looking at how it was arrayed on DW-NOMINATE economic liberalism dimension. Relatively few policies, however, receive a final passage vote. For this reason, Harvey constructs a second measure, which assigns a conservative or liberal coding to a statute based on which party was in control of Congress: unified Democratic control results in liberal legislation, while unified Republican control results in conservative legislation. This still leaves out statutes passed under divided government, and so Harvey assigns each a location along an ideological dimension by inferring that it fell at the midpoint between the House and Chamber median for the enacting Congress.

We are on tricky terrain here. Consider the first measure. DW-NOMINATE scores are invaluable, but they are not an "objective" measure of the ideological direction of policy. The scores are based on the assumption that legislators vote according to a spatial model in which individual preferences are arrayed along an ideological dimension. But we know that ideology is not the only determinant of vote choice, and that party and other factors can lead legislators to vote for bills that they would otherwise oppose.[35] As a result, we cannot know a priori whether any given vote is an ideological one, a partisan one, or something else. To determine whether any given vote is better described as liberal or conservative in the DW-NOMINATE framework requires close inspection and, ultimately, a subjective evaluation. Far from perfect, Harvey's measures do provides a new and valuable perspective on the ideological direction of Supreme Court decisions.

And what is most striking is that across several different measures, and across numerous model specifications, Harvey persistently finds that Court decisions are responsive to House preferences. It is a robust finding, and given the different approaches used it cannot be written off as an artifact of the coding decisions.

The next question is why the House, and not the Senate or some combination of the two? To be clear, it is not public opinion: Harvey shows that the Court is not responsive to shifts in an aggregate index of public support for conservative policy positions, nor to the shifting economic and social indicators—such as the crime rate or unemployment—that we might expect help drive public mood. It is the House to which the Court responds, and not the people that this House ostensibly represents.

Harvey argues that this is because the Constitution requires appropriation bills to originate in the House and assigns this chamber responsibility for initiating impeachment charges.[36] While the House has not impeached a Supreme Court Justice since 1805, it has impeached federal judges at other levels; and besides, it is possible that the dearth of

34. HARVEY, *supra* note 4, at 143.

35. As the vote on Medicare Part D made clear, sometimes conservatives vote for liberal policies, and liberals vote against them. Poole and Rosenthal initially labeled the first dimension of DW-NOMINATE a "party loyalty" dimension. KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997).

36. The House sets the agenda in both. *See* HARVEY, *supra* note 4, at 57.

impeachments is because the "mere existence" of the power has induced "judicial deference to elected branch preferences."[37] While federal judges are constitutionally protected from diminishment in pay, they are not protected from a diminishment of pay in *real* terms. As a result, we are told, "Federal judges must go cap in hand to the elected branches every year in an effort to assemble majorities supportive of judicial salary increases."[38]

Indeed, federal judges—including Supreme Court justices—often do lobby for increased pay, and legislators have often been quite reluctant to listen.[39] More generally, fights between judges and legislatures over salaries are a persistent feature of American state politics, suggesting that constitutional provisions against pay reductions do not induce legislative solicitude toward judges' social and economic standing.[40]

The claim that this is what induces judicial deference is ultimately speculative; it is compatible with the finding of House influence but not tested directly. Indeed, it is difficult to think of how it might be tested, at least without turning to a historical examination in which the threat of pay reductions or impeachment can be shown, through process tracing or other approaches, to have influenced judicial decisions. In any case, the possibility that judicial deference is induced by a constitutional leash held by the House is provocative, theoretically supported, and deserving of more research to supplement the careful empirical evidence brought to bear by Harvey.

Harvey's finding of judicial responsiveness to House preferences would stand as a major contribution on its own. But she goes further, arguing that this responsiveness to the House is a good thing, that the Court's dependence has helped limit the danger it would otherwise pose, and that judicial dependence on democratically elected branches is associated with stronger rights protections around the world.

Here too she is dissenting from an established body of research, one that finds evidence of a positive relationship between judicial independence and rights protection. This result, Harvey argues, is due to particular coding decisions and modeling choices. In this case, Harvey argues that measures of judicial independence do not fully account for the subtler forms of dependence that she has identified in the American case, and that most accounts fail to consider how the relative level of rights protection afforded by the judiciary might be conditional upon the democratic quality of a country's political institutions.

The conditional argument was nicely summed up by Thomas Jefferson:

> In England, where judges were named and removable at the will of an hereditary executive, from which branch most misrule was feared, and has flowed, it was a great point gained, by fixing them for life, to make them independent of that

---

37. *Id.* at 12.
38. *Id.* at 58.
39. Lyle Denniston, *Major Victory—and Pay Raises—for U.S. Judges,* SCOTUSBLOG (Oct. 7, 2012, 12:48 PM), http://www.scotusblog.com/2012/10/major-victory-and-pay-raises-for-u-s-judges.
40. Chief Justice Roberts and Justice Kennedy raised hackles with their insistence that judges need to be paid more, pointing to the growth in salaries of non-judging peer groups. *See, e.g.*, JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2007), https://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf; Dahlia Lithwick, *Courting Cash: Kennedy Weighs in on the Crisis in Judicial Pay*, SLATE (Feb. 14, 2007), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/02/ courting_cash.html.

> executive. But in a government founded on the public will, this principle operates in an opposite direction, and against that will.[41]

In short, independent judiciaries should enhance rights protections when the legislature or executive is not subject to popular control. Where these branches are elected, however, they will be more solicitous of popular rights and independent courts relatively less so.

Here too the argument is persuasive and the findings are robust to different specifications. This is especially true of the finding that judicial independence is positively associated with rights protections in less democratic countries and negatively associated in more democratic countries. It is best, it seems, to be in an extensively majoritarian regime, one in which small elite bodies are either not able to overturn legislation or cannot do so without being subjected to the control of the elected branches. The worst regimes for rights protections are, unsurprisingly, non-majoritarian and non-democratic. But in this case an independent judiciary is, all things considered, a net positive. The much-praised virtues of judicial independence are not illusory; but they are conditional on the democratic character of the government.

A Mere Machine advances a compelling argument that the Court does defer to popular majorities, not through some mystical ability to gauge public opinion but through the control that the House of Representatives can bring to bear upon it. It is an excellent example of how careful empirical analyses, informed by theory, can lead to new and interesting discoveries. It will be essential reading for graduate and undergraduate students in public law and American institutions.

WIGS OR DEMOCRATS?

Both *Congress* and *A Mere Machine* share an appreciation for representative democracy, at least when compared with the alternative of judiciaries accountable to no one but themselves.

Their arguments, however, are not entirely compatible. If Harvey is correct that the Supreme Court mechanically follows the House, then a good portion of the blame Fisher directs toward the Court should rightfully rest with Congress. Again, the case of black Americans' political and civil rights is illustrative: the long indifference of the Court to black rights, from *Plessy* to *Brown*, comes after the defeat of congressional Republican efforts to protect the vote and after the federal government, through Congress, has given its imprimatur to racial segregation in education. If the Court follows the House, then the House's preferences had been made clear by the time *Plessy* reached the docket. This, of course, shifts the weight of responsibility back to Congress.

And it is here where responsibility ultimately lies. This strikes me as the unavoidable implication of both texts: if Fisher is right, Congress does rights protection better, and ought to be more active in this domain; if Harvey is right, the House is responsible for Court decisions anyway, with the slack in the Court's leash more likely to result in a downward ratcheting of rights rather than their enhanced protection.[42]

This is not, for me at least, a conclusion that inspires much optimism. Fisher is

---

41. HARVEY, *supra* note 4, at 274 (citing Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (copy on file with the Tulsa Law Review)).

42. *Id.* at 291.

entirely persuasive that democratic institutions often protect rights more than unelected institutions. Yet, it is also apparent that they often neglect, and not infrequently oppress, minority or politically weak groups. Indeed, in both texts one gets the sense that the rights that are most effectively protected by democratic majorities are those in which those majorities share the benefits.[43] In Harvey, this takes the form of an occasional transformation in the object of analysis, with "rights protections" becoming the provision of "public goods."[44] For Fisher, the strongest evidence of congressional activism comes in the area of religious liberty: "religious interests often fare well in the political marketplace," he writes.[45] It seems likely that this is in part because, while most Americans are religious and Christian, no one denomination has been demographically dominant. So long as "Christian" did not have the political relevance of "Catholic," "Presbyterian," or "Baptist," we tended to be in Madison's world, where no majority group is united in a common interest against the minority. But the treatment by Congress and state legislatures of Mormons,[46] Jehovah's Witnesses,[47] and Muslims,[48] serves as a cautionary tale about the caprices of majority rule, and the limits of both the political marketplace and the judiciary in protecting *minority* rights.

Courts, it seems, are not very reliable protectors of what John Hart Ely called "society's habitual unequals."[49] But neither are representative institutions, unless there is a good reason for them to be so, rooted in the political configuration of a given place and time and in the electoral interests of its members. To paraphrase, and contradict, Ronald Dworkin, the United States is a more just society than it would have been had its constitutional rights been left to the conscience of unelected judiciaries rather than majoritarian institutions.[50] And it would have been more just still had those majoritarian institutions themselves possessed more of a conscience.

Where does this leave us? Parchment rights are no salvation, nor are independent judiciaries. However uncertain, bitter, and polarized, active engagement in democratic politics remains our best hope.

---

43. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 20 (1985) ("[T]he Congress and the President can be counted upon to defend most of us from the infringement of fundamental liberties, because the political majorities to which those departments of government answer demand such protection.").

44. In the book's index, the entry "Public Goods" simply says, "See Rights protection." HARVEY, *supra* note 4, at 292, 361.

45. Of the book's approximately 111 pages devoted to the case studies, forty-four are focused on religious liberty once one includes religious issues in other chapters than that on religious liberty itself. FISHER, *supra* note 13, at 103–13, 115–35, 137–39, 146–56.

46. *Id.* at 126–27.

47. *Id.* at 104–11.

48. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, LEGISLATING FEAR: ISLAMOPHOBIA AND ITS IMPACT IN THE UNITED STATES 59–74 (2013), *available at* https://www.cair.com/islamophobia/legislating-fear-2013-report.html.

49. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 453 (1978).

50. RONALD DWORKIN, LAW'S EMPIRE 356 (1986).