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What Do Courts Need to Know About Constitutional Structure?

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ABSTRACT

Would understanding the relevant political science about constitutional structure be helpful to
democracies in crisis or where circumstances suggest that democracies are potentially in crises?
If so, what should courts know?

Over the past six decades, an increasing number of constitutions, supreme and constitutional
courts have addressed whether and how democracy should be protected in constitutional law. In
some countries, courts make doctrinally-driven assumptions about the impact on democracy of
the fundamental constitutional structures, federalism, the separation of powers among the
political branches, and the electoral system.

At the same time, work in political science has called into question many of the assumptions
courts typically make. Should courts give way? Should they assume that local knowledge is
more important than inferences from global comparisons? Would knowledge of political science
assist courts, lead them astray, or inject the courts into disputes in which they have no proper
business?

Contents

I. Introduction. ..................................................................................................................2
II. Interpretive Leeway. .....................................................................................................2
III. The Relevance of Political Science. ........................................................................4
   A. The election system. ...............................................................................................5
   B. Federalism. ..............................................................................................................8
   D. Executive Power....................................................................................................10
   E. Tolerance and Intergroup Relations. ....................................................................13
   F. Concentration of Economic and Other Resources. ............................................15
IV. Would the information be helpful to courts?..........................................................17
   A. Will the science be presented in a usable fashion? ..............................................17
   B. Does it matter?........................................................................................................19
   C. What Would the Courts Do with Such Knowledge? ............................................20
Conclusion .....................................................................................................................21
I. Introduction.

I have tried to describe some of the substantive information that might be helpful to courts in the section on the relevance of political science. I have also tried to describe what would happen to that information to the extent that it is brought to courts. Thus, what courts need to know about constitutional structure drives five basic questions:

1. interpretive leeway,
2. the relevance of the science,
3. how the information might be presented,
4. whether it will matter, and
5. what the courts would do with the information.

Interpretive leeway refers to whether courts have the opportunity in their legal systems to explore political science relative to constitutional structure.

The second question this paper addresses is the relevance of political science, which is to say whether political science has something to offer with respect to many of the issues that arise in litigation. I think it clear that it does.

The third question is how the material would be presented to the courts and whether it would prove intelligible. That is the question I started with, did not like my own initial negative answer, and still find frustrating.

The fourth question, driven by Rosenberg’s book THE HOLLOW HOPE, is whether any of it matters, whether what to make available to the courts is a question worth pursuing. The argument here is that Rosenberg overstates his case considerably and that courts do matter even though court decisions do not necessarily produce the judicially desired outcome.

The fifth question is what would the courts do with the information? Would their use of information from political science would be constructive, meaningless or downright destructive to proper resolution of the problems to which they are addressed. This paper will offer some examples.

II. Interpretive Leeway.

Interpretive leeway and whether knowledge of political science fits within the proper role of courts is based on the legal systems in which the courts act, as well as a question of jurisprudence and interpretation. I have dealt with the question of jurisprudence and interpretation in other papers and articles and want purposely to abstract from that issue here in

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order to focus on several other questions. But it is important to note here that some legal systems exclude “external” considerations and are understood to bar exploration of political science and other social science disciplines at least with respect to question involving the proper interpretation of their own constitutions. That has been the position of several members of the American Supreme Court although the Court has not consistently taken that direction. Several constitutions however explicitly ask their constitutional courts to examine questions which would seem to incorporate political science and others may follow their lead. This includes first, constitutions or interpretations of constitutions that direct the courts to examine whether provision are consistent with democracy and its survival. That includes countries like Germany which the Basic Law at several points includes language requiring the Court to protect “the free democratic basic order”, and the Courts have understand that charge expansively. The obligation to be concerned with the requirements of democracy is explicit in the Canadian Charter, section 1 of which provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

South Africa has incorporated that judicial responsibility for democracy in several sections of its Constitution. The first section of the Constitution provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

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2 See Does What We Know About the Life Cycle Of Democracy Fit Constitutional Law? 61 Rutgers L. Rev. 595 (2009) and the ideas about jurisprudence and interpretation in that article will be modified and enlarged as part of a book project on the Roberts Court under contract with NYU Press.


4 The German constitution, known as the Grundgesetz or Basic Law, e.g., Art. 21, and also provides that Germany is a “democratic” state, Art. 20(1).

5 An early example is Southwest State Case, BVerfGE 1, 14 at 32 (1951), in which the Court wrote: “The Basic Law has chosen democracy as the basis for the governmental system: The Federal Republic is a democratic, federal state. The constitutional order in the states must conform to the principles of a democratic state based on the rule of law within the meaning of the Basic Law...”
Article 36 adopts language similar to the Canadian example:

   The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ....

And Article 39 broadens that responsibility to interpretation of the Bill of Rights:

   When interpreting the Bill of Rights, a court, tribunal or forum
   a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b. must consider international law; and
   c. may consider foreign law.

The European Court of Human Rights has adopted a similar position based on the terms of the governing European Convention on Human Rights together with its amendments and codicils. 6

   To the extent that these are eligible questions in the judicial systems of many countries, it is appropriate to address the remaining questions. Courts render decisions contrary to the developing science of the growth, survival and breakdown of democracy. Would understanding the relevant political science be helpful? If the political science would be helpful to courts, what should they know?

III. The Relevance of Political Science.

   Courts are deeply involved in many areas that bear on what political scientists and other social scientists describe as bearing on the breakdown of democracy. Those areas include the entire machinery of elections, federalism, executive power, tolerance and intergroup relations, and the concentration of economic and other resources. It would not be accurate to say that they are oblivious to political science but most of their research is confined to the eighteenth century, particularly the FEDERALIST and streams of thought that contributed to what the Founders wrote. Should they be exposed to modern political science.

   Just as an example, years ago I represented a group of political scientists as amici curiae in the federal courts. My job was to explain to the courts the implications of the relevant political science for the understanding of the First Amendment. My clients disagreed among themselves about what political parties should do but they agreed that the parties should have the autonomy to do it. The Second Circuit agreed and Judge Oakes even cited his agreement with our brief. Then we went to the Supreme Court. Counsel for the plaintiff came up with a theory of the case in which Thurgood Marshall was the swing justice, likely to be terrified of the implications of our position. [Plaintiff's counsel, David Golub, must have enjoyed shocking people with that

6 See the section on the ECHR below.
one.] He and I had different ways of dealing with the issue but needless to say he got to address
the Court while I sat in the audience. And true to his prediction, Justice Marshall wrote the
opinion and the views that I and my clients had worked hard to explain turned out to be largely
irrelevant! So in that case, the political science was on point, but the Court didn't care.7

I should say at the beginning that I am not a political scientist though I read political science
and frequently raise issues based on political science. My own limitations in addressing the
political science may of course prove to be exhibit A for why lawyers and courts should never be
allowed to discuss political science.

That said, let's look at some areas where political science as it relates to regime breakdown
might be relevant. The first question is whether the political science would be helpful to a wise
decision-maker in the kinds of problems that come to courts. This review will necessarily be
somewhat cursory but my point in this section is to identify the questions.

This paper, and its exploration of constitutional language and judicial decisions in Canada,
South Africa and the European Court of Human Rights grew out of my criticisms of the work of
the American Supreme Court. This section will make brief reference to some of those American
cases; other jurisdictions will be explored in separate sections later in this paper.

A. The election system.

Political science as it relates to the breakdown of democratic systems is very relevant to the
courts in the area of election systems. Political scientists and courts in this area as in most speak
very different languages, and more important, the courts largely ignore political science,
sometimes even when it is presented to them through the efforts of competent attorneys.

Political scientists and others spend a great deal of resources looking at the reliability of the
election system and whether it empowers the winners, or instead picks the winners regardless of
voters' wishes, or their ballots. Courts in many countries back down over election issues, paying
deference to power. But countries with reliable election systems can lose that reliability if the
public does not provide and back the necessary resources to keep it clean. If or when the courts
become part of a corrupt bargain, democratic control can be lost quite quickly.8

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7 Tashjian v. Republican Party, 479 U.S. 208 (U.S. 1986); Republican Party of Connecticut v. Tashjian, 770 F.2d
265, 286 (2d Cir. 1985) (Oakes, J., concurring) (referring to the brief submitted on behalf of James MacGregor
Burns, et al. Naturally, given Judge Oakes brilliant insight I have only the highest opinion of him as a Judge.
8 Michael Trebilcock and Poorvi Chitalkar, From Nominal to Substantive Democracy: The Role and Design of
Election Management Bodies, 2 LAW AND DEVELOPMENT REVIEW 191 (2009); INTERNATIONAL ELECTION
PRINCIPLES: DEMOCRACY & THE RULE OF LAW (ABA Section of Admin. L. & Regulatory Practice, John Hardin
Young, ed. 2009); INTERNATIONAL ELECTION PRINCIPLES: DEMOCRACY & THE RULE OF LAW (ABA Section of
Admin. L. & Regulatory Practice, John Hardin Young, ed. 2009); ELECTION FRAUD: DETECTING AND DETERRING
ELECTORAL MANIPULATION (Brookings Inst. Press, R. Michael Alvarez, Thad E. Hall and Susan D. Hyde, eds.,
2008).
The relation to democracy of keeping election tallies honest hardly needs any elaboration but there may be no education that would change what the courts do. The majority in *Bush v. Gore*, the most public of the cases, did not blush at their obvious partisanship. Beyond that infamous decision, there are actually legions of much more insidious decisions, permitting some groups of the population to be driven from the polls, prevented from registering, or otherwise barred from voting. American courts fought a lengthy battle over aspects of voting practices instigated by nineteenth and twentieth century political machines but the machines no doubt limited the damage by putting their own candidates on the bench. It is fairly clear that democracy did not exist in the segregated South, and to the extent that affected national politics and elections, American democracy was severely compromised. Through that period, many courts cooperated with those controlling the elections and excluding voters. Many areas of election maladministration continue.

The courts have not been reliably devoted to the idea that election rules should be neutral among parties. Yet the failure of the legal system to assist in the delivery of honest results is defeats democracy to the extent that the popular will is thwarted in the central mechanism of democracy – that vote. Moreover failure to stand for honest vote totals leads some to protect themselves outside the political system either by withdrawal and stoic acceptance or by fraud, intimidation and violence. Nevertheless, Ewald and Rottinghaus refer to “the striking ability [of American jurisdictions] to shape electoral outcomes” through disenfranchisement. Indeed much of the American bench has accepted the manipulation of election outcomes as a proper purpose of districting. As Justice Scalia put it in *Vieth v. Jubelirer*, “partisan districting is a lawful and common practice.” A decade earlier, *Bush v. Vera* illustrated the view that manipulation of election outcomes is proper by treating the protection of incumbents from voters as both a valid public interest and good enough to defeat the inference that they had drawn district lines to

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15 Ewald and Rottinghaus, *Introduction*, in *CRIMINAL DENSFRANCHISMENT IN AN INTERNATIONAL PERSPECTIVE*, 4 (Cambridge: Cambridge Univ. Press, Alec Ewald & Brandon Rottinghaus, eds.). At id. 4-5 they describe the major legal precedent underlying the disenfranchisement of prisoners and ex-cons.
advance minority representation, which the Court would have found unconstitutional.\textsuperscript{17}

Disenfranchisement of adult citizens as a way to manipulate election outcomes is a large problem in the U.S. by contrast to the more inclusive examples of many other countries.\textsuperscript{18} A significant part of that disenfranchisement is the disenfranchisement of prisoners and former prisoners. The impact is enormous:

Because it issues far more felony convictions than other nations and disenfranchises a far wider group of offenders, the sheer number of disenfranchised citizens in the United States is staggering.\textsuperscript{19}

Because incarceration is racially patterned, the impact on representation of others sharing their characteristics is similarly large. The impact of the disenfranchisement of prisoners is even more extreme because of the deliberate or sloppy ways that some states seek to remove ex-cons from the voting rolls by matching different computer lists, a process which produces large percentages of false matches because of common names and other data that mislead computers unless carefully double checked.

The result is a group of overlapping issues about the political manipulation of the voter rolls. At its root, both with respect to present and former prisoners and with respect to other groups whose registration is made difficult or whose deletion after registration is accomplished, the issue is essentially the moral issue of the extension and enforcement of equality and universal

\textsuperscript{17}Bush v. Vera, 517 U.S. 952, 965 (1996) (plurality opinion by O’Connor, J., joined by Rehnquist, Ch. J., and Kennedy, J.), citing Karcher v. Daggett, 462 U.S. 725, 740, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983); White v. Weiser, 412 U.S. 783, 797, 37 L. Ed. 2d 335, 93 S. Ct. 2348 (1973); Burns v. Richardson, 384 U.S. 73, 89, n. 16, 16 L. Ed. 2d 376, 86 S. Ct. 1286 (1966). The plurality in Bush v. Vera noted that the U.S. District Court below had described the process of drawing the district lines as “not one in which the people select their representatives, but in which the representatives have selected the people.” 517 U.S. at 963 quoting 861 F. Supp. at 1334. The plurality embarked on an effort to decide whether the districting was unconstitutional because race-based, or constitutional because designed to favor incumbents.


\textsuperscript{19}Jeff Manza, Foreword: Waves of Democracy and Criminal Disenfranchisement, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, xii (Cambridge: Cambridge Univ. Press, Alec Ewald & Brandon Rottinghaus, eds.).
suffrage as fundamental to the morality of democracy. It is not clear how unified and effective the voice of political scientists would be, or how long it might take to affect judicial thought about that moral issue. Even combating wholesale erroneous exclusion of voters has not been universally accepted as essential to democracy. The gamesmanship that has been allowed to rule the registration and voting process remains a barrier.

In these areas, and others that could be explored, the work of political science is quite relevant to what courts have to deal with. But the message has not been getting through. Several years ago I wrote a short article noting that the concept of symmetry had never been argued to the Supreme Court in gerrymandering cases. In the LULAC case several years ago, it was finally brought to the Court’s attention – but only in a friend of the court brief filed by political scientists Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz. One of the attorneys preparing a friend of the court brief, and seeing my earlier article, called to tell me he was going to use the concept in his brief, a decision he ultimately backed away from when he did the mathematics. Nevertheless, the King, Grofman, Gelman and Katz brief was discussed in concurring and dissenting opinions by Justices Kennedy, Stevens, Souter and Ginsburg. Kennedy expressed interest but was not then prepared to adopt it; Stevens espoused it, Souter and Ginsburg were prepared to adopt it, while Breyer dissented from the Court’s acceptance of partisan gerrymandering but remained silent about symmetry. Symmetry is now on the table and will be examined again.

In these and other areas, judicial decisions make elections democratically determine political authority or in the manner of more autocratic states, allow political authority to determine elections, and therefore undermine and threaten democracy at its core. Political science should have an important place in the legal discussion of these and many similarly important issues dealing with elections. In defining the magnitude of the problems, the morality of democracy, and ways to implement important values, political science properly has a role that courts should respect.

Courts should be listening to the rather different perspective from political science. In this author’s view courts should be listening to the moral philosophy of democracy, the universality of the popular base that is the essence of democracy’s claim to allegiance. And they should be listening for the implementation of just standards in clear definitions and statistical or other measures. If the courts would listen it could change the strength of this democracy.

B. Federalism.

Both the courts and political scientists have been engaged with federalism and from very

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22 LULAC, 548 U.S. at 419-20 (Kennedy, J., writing for himself alone in this portion of his opinion); id. at 466-68, 473n (Stevens, J., dissenting); id. at 483-84 (Souter, J., dissenting, joined by Ginsburg, J.); and see id. at 491-92 (Breyer, J., dissenting) (objecting to “entrenchment” without describing a specific test).
divergent standpoints.

Political scientists have a lot to say about federalism, although there are many disagreements among them, and a lot of what they say and write is about the survival and breakdown of regimes.23 There is a lot of support for federalism among political scientists,24 but much less for any specific variant. Perhaps that leads to what courts call a “political question” which they should avoid.

Some urge that boundaries should cut across political fault lines to avoid inflaming the political space.25 Others argue for a modern version of John C. Calhoun’s concurrent majorities to protect local majorities from national ones.26 But whatever the specific political science proposals, all are focused on allowing the federal system to solve problems that can blow a political system apart.

Courts do not talk that language.27 If they were led to think about it, they might handle it by a combination of localism for heated issues and efficiency for other issues. Nevertheless, I’m not aware of any post-Civil War American courts that considered the heat surrounding an issue as a guide to where it should be decided, although the Court properly and specifically rejected the “heckler’s veto” in decisions at the height of the Civil Rights Movement.28 But the courts have clearly addressed efficiency.29 Should they examine the heat surrounding issues?

Instead, as is fairly well known, the U.S. Supreme Court from Hughes to Warren was


24 Larry Diamond, Seymour Martin Lipset and Juan Linz, Building and Sustaining Democratic Government in Developing Countries: Some Tentative Findings, 150:1 WORLD AFFAIRS 5, 12-13 (Summer 1987); Seymour Martin Lipset, Political Man (Baltimore: Johns Hopkins U. Pr., expanded ed., 1981) at 81.

25 See Lipset, Political Man at 81; Powell, CONTEMPORARY DEMOCRACIES.

26 See Arend Lijphart, above.


nationalistic and generally sustained federal power, while the Court from Rehnquist to Roberts has been much kinder toward the states. The usual claim has been that federalism has mattered to the Rehnquist and Roberts Courts, though in fact their federalism decisions appear to reflect other commitments more important to them. But regardless of why they acted, they manipulated the boundaries. And it is also the case that each of those Courts supported the states in some areas and the federal government in others. Many of the disputes deal with relatively obscure issues. But the Court contributed to the decline in state supervision of banking and finance and with them, the decline of many of the consumer-oriented restrictions that had been part of state practice. At the same time the Court has recently been quite friendly to the states in the areas of abortion and intellectual property. The current argument about so-called Obamacare is largely an argument cast in terms of state authority.

The Court writes about federalism conceptually rather than dynamically: this belongs to the federal government and that belongs to the states because the words say so or at least speak to the justices in that clear way whether or not the rest of us hear the same speech. The power “to regulate Commerce … among the several States,” for example, does or does not cover health care, patents, or guns in schools.

Courts should be listening to the rather different perspective from political science. Is it the issue of the heat of argument or something else they should hear? If the issue is heated argument, it could change the judicial approach to deference to legislative bodies.

D. Executive Power.

Here again there is much political science that is relevant and little indication that the courts are resolving the issues with an eye on the kinds of considerations that political science can make available.

35 Art. I, §8, ¶3; and see United States v. Lopez, 514 U.S. 549 (1995) (holding Congress does not have power to regulate the possession of guns in local school zones).
Executive power is a traditional judicial concern. The Burger Court was more afraid of Congress than the President.\(^{36}\) And that pro-executive position has continued, although it may not survive during the period of political antipathy between the Democratic President and most of the Republican nominees on the Roberts Court.\(^{37}\) Yet political scientists have documented the ways that coups d’etat often begin at the top, especially in presidential systems.\(^{38}\) That suggests large risks where courts and legislatures are willing to delegate or ignore large assertions of executive power, not unlike those that have been claimed by both George Bush and Barack Obama in the context of the wars against Iraq, Afghanistan, and terrorism. One would expect that political scientists could illustrate the risks, identify the importance of constitutional restraints and/or the kinds of restraints that would be functionally equivalent and effective with respect to the divergent goals of protection of the American people from external threats and from its own government. And that courts should listen.

Courts ordinarily address questions arising from incarceration and punishment, and sometimes issues of the locus of authority. Courts are less likely to address issues of security although lawyers sometimes do.\(^{39}\) Political scientists addressing risks of regime change often focus on issues that courts have been less likely to address: how best to organize policing for security\(^{40}\) on the appropriateness of privatization of security, war, and intelligence,\(^{41}\) or the

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\(^{36}\) *Immigration And Naturalization Service v. Chadha*, 462 U.S. 919, 947 (1983) (describing “the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”)

\(^{37}\) Under President Bush, Roberts, Scalia, Thomas and Alito showed more concern to protect presidential powers, cf. *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding prisoners on Guantanamo had the right to habeas corpus and concluding that the proposed system of military trials was inadequate) with *id.* at 801 (Roberts, C.J., dissenting) and *id.* at 826 (both dissents agreeing that prisoners did not have the right to habeas relief and the system put in place by the executive should have been sustained); and cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Breyer, J., concurring) (Trial by military commission raises separation-of-powers concerns of the highest order.) with *id.* at 678 (Thomas, J., dissenting) (saying the majority “openly flouts our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs.”).

\(^{38}\) See Power, CONTEMPORARY DEMOCRACIES, ...


oversight of the military.\textsuperscript{42} But the enormous powers claimed by contemporary presidents to deal with contemporary problems, including execution by drones, imprisonment without charges or trials, accumulating information with no apparent limit, all suggest that the traditional answers are failing us. The checks and balances in place for American democracy were once clearly distinguished from those applicable in parliamentary systems.\textsuperscript{43} Both presidential and parliamentary systems have changed from the patterns of 1787. Presidents in some areas have the freedom of action more typical of a prime minister without the restraints. Should courts be listening to what measures might reinstitute the function of checks and balances in ways that are appropriate for the modern world? If so courts might be able to respond to arguments that assume the need to choose among freedom, democracy \textit{and} security, by insisting that government and counsel come up with proposals that will accomplish \textit{all} of those goals.

Political scientists might explore the risks to democracy from their study of the history of corruption and the ways that chief executives or legislatures have corrupted the machinery of the state.\textsuperscript{44} Surely there are lessons there for courts. Should we tell them?


\textsuperscript{43} On theories of the presidency drawn from political science, see Raymond Tatalovich and Thomas S. Engeman, \textit{The Presidency and Political Science: Two Hundred Years of Constitutional Debate} (Baltimore: Johns Hopkins Univ. Press 2003).

Although other methods are well known, five of the members of the current U.S. Supreme Court generally approach issues linguistically or conceptually. So they are likely to declare what is “executive”, or “legislative” on the basis of whether the words usually refer to the matter under consideration as one or the other. Or they are likely to take a step back and try to understand why something is thought of as executive or legislative. A third step back brings the Court to address why some things were given to either the executive or legislature by the framers of the Constitution. To take a fourth step back and address how to understand those concepts and choices under different conditions is both more difficult and controversial. Indeed it is fundamental to the current battles over the proper methods of interpretation. Nevertheless, when courts address the separation of powers by looking at current crises and the need to get things done, they tend to favor the executive. Focusing on the survival of free government, by contrast, tends to favor the legislature.

E. Tolerance and Intergroup Relations.

James Gibson written eloquently about the dangers of intolerance for a democratic society. Some of us think that the courts have been fanning the flames of intolerance. Since 1986 when William Rehnquist became Chief Justice and Antonin Scalia joined the Court, the Court’s strategy of dealing with racial problems has been either to ignore it or to exclude solutions. Actually there are multiple factors, some legal, some not, that have been fanning the developments occasioned by political corruption; and see David A. Dilldine et al., A Bibliography of Case Studies of Bosses and Machines (Monticello, Ill.: Vance Bibliographies, 1978); Robert G. Vaughan, Principles of Civil Service Law § 1.4, at 1-38 to 1-45 (New York: Matthew Bender, 1976); Vaughn, “Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond”, 44 Geo, Wash. L. Rev. 516, 527-40 (1976).

51 Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654-55 (1952) (Jackson, J., concurring) (“preserving free government ... [requires] that the Executive be under the law ... made by parliamentary deliberations.”), with id. at 667 (Vinson, Ch. J., dissenting) (emphasizing the “power to act in time of crisis”).
flames of intolerance and the extremism we have been witnessing in politics. But there is little in the Court’s work that calms troubled waters. And much in political science that should be relevant.

This is an area that has had a lot of study since the defeat of the Nazis. Stouffer studied tolerance among American troops during the War in Europe before turning his attention to Sen. Joseph McCarthy. The understanding of intolerance has increased exponentially since his work. Where I think this leads, stated very briefly, is that the so-called “contact hypothesis” has some validity but is far from automatic. To work, it requires collaboration at the leadership level. Overall, though certainly not meeting expectations, it did work in this country over a period of several decades to improve attitudes and working relations among racial groups, aided by powerful ideological traditions. But in many parts of the country we are moving backward. Could any of this inform the courts? There is no record of the Court mentioning


63 There is an enormous literature on the resegregation of America. A piece of it was deliberate. See Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 203-15 (New York: Oxford Univ. Press 1985) (describing how “[the] FHA exerted segregation and enshrined it as public policy”); Douglas S. Massey and Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 54-55 (Cambridge, Mass.: Harvard Univ. Press 1993) (summarizing the FHA’s role in imposing residential segregation); Melvin L. Oliver and Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 17-18, 51-52, 150, 174 (New York: Routledge 1995) (tracing the continued impact of the FHA’s racial preference in enhanced white wealth today); see also National Commission on Urban Problems, Building the American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States (Washington: U.S. Govt. Print. Off. 1969). “There was evidence of a tacit agreement among all groups – lending institutions, fire insurance companies, and FHA – to block off certain area of cities within ‘red lines,’ and not to loan or insure within them.” Id. at 101.

“redlining” or the research on the deliberate discrimination and redlining by federal agencies although it has been mentioned in briefs to the Supreme Court.63

By contrast to the work discussed above on contact and integration, Michael Walzer has kind words to say about separate communities,64 and Nathan Glazer argued against affirmative action on grounds of its effect on the society.65

There certainly has been a great deal of science that bears on the question whether the judicial approach retards racial reconciliation or calm troubled waters.

F. Concentration of Economic and Other Resources.

Political scientists have many different theories about the relationship between the concentration of economic resources and the survival of democracy. Many studies, beginning with Aristotle, have focused on the correlation between wealth and democracy.66 Dahl stressed that it was relative advantage and deprivation that made a difference.67 Others have developed the correlation between economic development and participation68 or the longevity of constitutions.69 Still others have focused on attitudes about democracy and the relationship to wealth.70 The State Failure Task Force, now renamed as the Political Instability Task Force,

of the Underclass (1993)) (citing Charles Abrams, Forbidden Neighbors: A Study of Prejudice in Housing 229-37 (1995) (“FHA adopted a racial policy that could well have been culled from the Nuremberg Laws.”)).

Recent evidence establishes the obvious consequence. To cite one study among many, Erica Frankenberg, Chungmei Lee and Gary Orfield, “A Multiracial Society with Segregated Schools: Are We Losing the Dream?” The Civil Rights Project Harvard Univ. (Jan. 2003) available at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (June 22, 2007), report: “The desegregation of black students, which increased continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades [Later they pinpoint 1968]. Although the South remains the nation’s most integrated region for both blacks and whites, it is the region that is most rapidly going backwards as the courts terminate many major and successful desegregation orders.”

63 See Brief Of Lawyers’ Committee For Civil Rights Under Law, National Fair Housing Alliance, And Naacp Legal Defense And Educational Fund, Inc. As Amici Curiae In Support Of Petitioner, Cuomo v. Clearing House Ass’n, 2008 U.S. Briefs 453.

64 Michael Walzer, On Toleration (New Haven: Yale, 1997) (discussing the Ottoman Empire).


67 ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 10, 45-46 (Univ. of Cal. Press 1985).


70 Robert MacCulloch, Income Inequality and the Taste for Revolution, 48 J. L. & ECON. 93 (2005), reports from polling data that the preference for revolution increases with inequality.
found that high infant mortality, itself highly correlated with poverty, was an index of preceding state failure to provide necessary services, and also one of the most powerful predictors of the breakdown of democracy. Another group of studies concluded that large disparities in wealth has led the wealthy to circle their wagons against more popular parties, and that wealth creates incentives to fight against democracy. Conversely the vulnerability of the poor and the relative size of the military population make revolution likely. Breakdown can be understood opportunistically as the result of conditions which can be taken advantage of by revolutionaries. That can be generalized into a kind of Murphy’s law of the breakdown of democracy, in which the unequal distribution of resources makes takeover possible. Despite their differences, political scientists from Aristotle to the present don’t seem to dispute that the distribution of wealth matters, and that too much concentration is likely to destroy democracy.

The Supreme Court seems dead set against the distribution of wealth and resources – or perhaps it would be better to say that the Court has participated in the redistribution upward. It has protected banks from state laws against usury, has protected corporate officers from responsibility for corporate disasters like Enron, protected corporations against their employees and against the antitrust laws. The list is growing and seems endless. Yet the

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72 See THE BREAKDOWN OF DEMOCRATIC REGIMES (Juan J. Linz & Alfred Stepan eds., 1984), and Nancy Bermeo, ORDINARY PEOPLE IN EXTRAORDINARY TIMES: THE CITIZENRY AND THE BREAKDOWN OF DEMOCRACY (2003), who focused more tightly on the leadership.
75 James D. Fearon & David D. Laitin, Ethnicity, Insurgency, and Civil War, 97 AMER. POL. SCI. REV. 75, 88 (2003).
76 This has been a staple theme in the work of Tatu Vanhanen, DEMOCRATIZATION: A COMPARATIVE ANALYSIS OF 170 COUNTRIES (2003).
political science for better than two millennia tells us the upward distribution of wealth poses a serious risk to democracy.

Plainly the Court cannot be responsible for all the changes. But the metric is not quite that simple. It is difficult to separate the Court’s work from other influences in society, a set of relationships which work in two directions. The Court is a prophet of the redistribution of American wealth. And as a major decision maker with the other branches often locked in a fight to nowhere, they have encouraged an industry of law firms trying to move the economy still further all of which play a part in legitimating the shift. And economic processes or shifts can be self-reinforcing. What seems clear is that there is relevant material that could be placed in front of the folks in the black robes.

IV. Would the information be helpful to courts?

A. Will the science be presented in a usable fashion?

Some of the political science which is relevant to the relationship of law with the survival of democracy yields, up to a point, fairly clear and agreed generic results. That appears to be true of the importance of a reasonable distribution of wealth and the maintenance of a healthy middle class, although there are differences in detail. But even where the generic conclusions are clear, whether it should affect the results in a specific case or area of law is a matter of judgment. Other areas may be more problematic, yielding competing lines of thought.

American lawyers have been presenting social science to the courts for more than a century, though with uneven results.

Obviously, where the political science is well-established and the conclusions widely shared, this problem is easier to handle. Where the political science is contested, the relevance of political science to law is much more doubtful.

_Frye v. United States_, set the rule dominant from 1923 to 1993, that scientific evidence would be admitted only if “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” That before they can discover the loss); _Circuit City Stores, Inc. v. Adams_, 532 U.S. 105 (2001) (used a counter-textual interpretation of the 1925 Federal Arbitration Act to bar covered employees from their federal statutory remedies).  


293 F. 1013 (D.C. Cir. 1923).
changed for the federal courts in 1993 in *Daubert v. Merrell Dow Pharms.* when the Supreme Court decided instead that:84

the trial judge must determine … whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Under the *Frye* rule the question was general acceptance by people in the field whether or not their judgment had a sound scientific basis. That would make it difficult to introduce material if there were disagreements in the relevant field. Under *Daubert*, general acceptance is no longer required but scientific validity and proper application to the facts does, though the Court admitted that acceptance might be relevant.85 *Daubert* implies that courts will deal with contested science but will use rule of science to decide what should be trusted.

*Daubert* also assumes the use of trial testimony. John Monahan and Laurens Walker propose that briefs discussing written papers would be a better substitute:

Courts should place confidence in social science research to the extent that the research (a) has survived the critical review of the scientific community, (b) has used valid research methods, (c) is generalizable to the legal question at issue, and (d) is supported by a body of other research. Finally … appellate courts should also not be bound by trial courts' conclusions about empirical research: De novo review is the appropriate standard.86

The Monahan and Walker formulation has the virtue of directing attention to the body of social scientific literature in more carefully stated and well-organized presentations than the testimony of expert witnesses.87

Nevertheless scientific information is generally difficult for courts to evaluate.88 David

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85 “A ‘reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community,’” citing United States v. Downing, 753 F.2d at 1238.
Faigman comments that in *Daubert* “The scientific revolution finally had reached the law.” But that is not to say that the information will prove understandable, or usable, by courts. That is as much about the courts, judges and justices and their preconceptions and preparation as it is about the specific facts and theories that political science has to offer. I find that hard to generalize about except to say that the current Supreme Court seems to have values that are somewhat inconsistent with where the science would take it. That kind of dissonance always makes it difficult to communicate accurately.

**B. Does it matter?**

There is the Rosenberg approach – it doesn't matter. Rosenberg argued that major decisions like *Brown* and *Roe v. Wade* do not change society. There are good arguments to be made that Rosenberg overstated his case. He did not of course dispute that courts matter to the parties.

As illustrated above, courts have been deeply involved in the operation of the system of elections, the distribution of powers among the national and state governments, the separation of powers among the three branches, and the distribution of economic resources. Courts can respond fairly directly to those threats to democracy dealing specifically with election law. So to some extent the issue is beside the point because, for better or worse, courts are involved.

It is also fairly plain that courts can and have made a difference, although the extent of the impact of judicial decisions is always contextually dependent. In the electoral area, the political implications of *Baker v. Carr* have been enormous. The impact of judicial decisions on federal and state power is an often told story, holding back the impact of the Progressive Movement, especially in Congress.

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A common objection is that courts cannot successfully and properly deal with distributive justice, in light of the powerful control by other political actors over distributive issues. Nevertheless, courts matter even with respect to distributive justice. In fact, courts in the U.S. have shaped the economy much more extensively than most recognize. Courts provide one of the important “forms of government regulation, the judicially fashioned common law and state regulatory practices.” And by their interpretation of state and federal statutes and constitutions, state and federal courts have helped to shape public discussion of economic issues in their respective jurisdictions. Courts have an impact by what they forbid or discourage, by what they embolden and legitimate and by the extremes they allow or encourage. In effect the courts are an important cultural and political institution, not in control over culture or politics but nevertheless a powerful force in shaping it.

Should courts address these issues? My response is both based on the ethos of democracy and on the consequences of the courts’ work.

The inconsistency of the work of the U.S. Supreme Court with the ethos of democracy contrasts sharply with courts in other jurisdictions. And as I have argued elsewhere, functionalism in favor of democracy is justified and important; there is a conflict between a democratic society and courts barred from taking democracy seriously.

The argument for judicial consideration of the lessons to be drawn from science, political or otherwise, depends on the instrumental approach to law, and on the probability that the courts can improve the consequences.

In fact, American courts have a good deal more latitude than most foreign courts, given the breadth of many constitutional provisions, and the politics of judicial appointment.

C. What Would the Courts Do with Such Knowledge?

I have argued elsewhere that courts are not conduits for sacred old decisions – each judge and justice has a philosophy of law, whether or not they can articulate it, and each is therefore

96 Rabin, Federal Regulation, 38 Stan. L. Rev. at 1192.
97 See, e.g., notes 73-76 above.
98 See e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (environmental regulation of coastal construction was a taking requiring compensation of affected owners unless they did not have the right to build because of state common-law nuisance law).
99 needs citations ___
100 needs citations ___
101 See Gottlieb, Life Cycle Of Democracy above. This author is currently working on a manuscript developing the economic rights jurisprudence in the courts of Germany, India, South Africa and the European Court of Human Rights. See also cases collected in
102 See Gottlieb, Life Cycle Of Democracy above.
pre-programmed to see things as right or wrong before the briefs are filed. Indeed there's lots of evidence that it is very difficult for people to look at arguments and data without squeezing it beyond recognition through their own ideological wringers. So maybe courts matter but our submissions don't.

And even if the judges and justices do manage to hear the political science and get it intact through their ideological wringers, there's little evidence they'll understand it. For one reason or another, they'll probably get it wrong.

That's the easy part. We know that the average of what students understand falls woefully short of what we try to teach and these folks have long since passed the point in their lives where they are used to acquiring knowledge of new fields. It is likely that they'll get it wrong.

Another consideration is both harder and more serious – is it possible that the judges could do worse, with the benefit of some of the insights from political science about the breakdown of democracy, than they are already doing or are likely to do without that information? John Stuart Mill suggested the hypothesis that more information would improve the accuracy of the findings. The evidence for Mill’s proposition is strongest if one compares positions across centuries or where the evidentiary process is well organized as in some court trials. On the other hand, statistically, even though people most often reject what they find uncongenial, the only information that has potential to change opinions is information that does not fit the hearer’s original mold. If one believes that the justices are headed in the wrong directions, their conclusions might not be any worse as the result of new information, but the rhetorical consequences are much harder to judge and could result in greater future rigidity.

There we have some evidence from other courts, particularly courts in Germany, South Africa and the European Union. None of those are in political systems or cultures very much like the U.S., other than that they are broadly democratic. Unfortunately, a decent treatment of the ways the courts in those countries have addressed these problems would require more than space constraints for this paper allow. But each of those courts takes the future of democracy seriously. Canada, South Africa and the European Union have constitutional language that requires courts to look at the consequences for democracy of at least some of their rulings. And it would certainly be appropriate to study them closely.

Conclusion

So, based on what we know about the political science of democracy, what American courts have done on those issues, and what foreign courts have done with the future of democracy, though not specifically based on political science, do we want our fingerprints on the

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104 Chief Justice Rehnquist famously insisted on the title "Justice" and reprimanded counsel who referred to him as "Judge" though Stevens once rescued a flustered lawyer by telling her that "the Constitution makes the same mistake" [in Art. III, §1], Jeffrey L. Fisher, My Boss, Justice Stevens, The New York Times April 11, 2010, §4, p. 11.
mistakes American courts are likely to make with evidence from political science regarding the future of democracy? “Never?” Unfortunately it violates the rules to send briefs in anonymously. Perhaps one could cite some other persons’ work, befoul someone else’s reputation with the greasy touch of whatever comes out of those empty robes. That is surely a poor attempt at humor but it highlights, I hope, a serious and difficult problem. I think this is a sensitive issue that will call for very careful presentation.