

“The Judicialization of the American Political Imagination”

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In the US, nearly all important political and policy actions result in adversarial legal proceedings in the federal courts. Those cases are ultimately settled with reference to a textual interpretation of the constitution. This pattern makes legalism a central feature of political thinking, and produces perpetual uncertainty about the likely effects of policy. The judicialization of politics is a serious obstacle to efforts at structural reform. In the 21st Century, judicial review has overturned major undertakings, such as: congressional efforts to regulate campaign finance, protect voting rights, and broaden access to healthcare; administrative efforts to address climate change and immigration; prosecutors’ efforts to convict corrupt elected officials; and state-level efforts to curb anti-competitive business practices and promote harmonious public sector labor relations. The courts have shown themselves willing but unable to temper the effects of modern partisan gerrymandering, and willing but inexperienced in their review of major agency activity.

The problem is not the courts, but the demand that they confront immense structural problems with inadequate powers and tools—an outgrowth of a long-term process of naturalization of rights-based framings of nearly all ideological perspectives on all important issues. There is now wide acceptance that it is natural and legitimate to discuss these policy questions with reference to the language of constitutional rights, and actors across the political spectrum readily submit such questions to the courts. This problem emerged in the latter 20th Century. The Progressives were vociferous critics of rights talk, and New Dealers fought to insulate administration from direct judicial oversight. The court-led reforms of the civil rights era softened progressive attitudes about the judiciary. Increased polarization has made the courts an appealing forum for the minority party, and waning public trust has left the courts with greater credibility than other institutions. This arrangement is ultimately untenable.