1993

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Studies in American Political Development, 7 (Spring 1993), 35–73.
Printed in the United States of America.

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The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*

Theoretical and descriptive studies of the Supreme Court exhibit a curious parallel. Both usually begin from the premise that judicial review is "a deviant institution in a democratic society." Much normative work claims that independent judicial policymaking is rarely legitimate in a democracy because, with few exceptions, elected officials rather than appointed judges should resolve social controversies. In a frequently cited passage, Alexander Bickel asserts that the Supreme Court is "a countermajoritarian force" in our system of government. Much empirical work, by comparison, insists that independent judicial policymaking seldom takes place in a democracy because, with few exceptions, judges appointed and confirmed by elected officials sustain whatever social policies are enacted by the dominant national coalition. Robert Dahl observes that it is "unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[1]

Few studies of the Supreme Court, however, integrate these theoretical and descriptive insights.[2] Indeed, the claim that independent judicial policymaking is rarely legitimate in a democracy is not wholly compatible

*Walter Dean Burnham, Robert Dahl, Wallace Mendelson, Michael Munger, Julia Bess Frank, and numerous reviewers significantly improved the logic and coherence of this paper.

1. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), 128, 16; Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 291.

2. Rogers Smith notes that in contemporary academic law, "questions of fact and law . . . more often go[] in parallel than in real communication with one another." Rogers M. Smith, "The New Institutionalism and Normative Theory: Reply to Professor Barber," in Karen Orren and Stephen Skowronek, eds., *Studies in American Political Development: An Annual* 3 (New Haven: Yale University Press, 1989), 77 n.7.

 ISSN 0898-588X/93 $5.00 + .00

with the claim that independent judicial policymaking seldom takes place in a democracy. Empirical works typically suggest that most normative analyses of the Supreme Court are of little relevance to the actual practice of judicial review in the United States. If, as Richard Funston maintains, "the Court [can] not long block the desires of a dominant political coalition" and if "the Court [will] not often *wish* to block the majority will" (emphasis in original),[3] then very few judicial decisions present instances of the countermajoritarian difficulty and the rare offending ruling will be abandoned shortly after being handed down. The Court may be "the forum of principle" in American life,[4] but the principles that justices articulate, Dahl and others point out, are likely to be those favored by members of the existing lawmaking majority.[5] Normative works, in contrast, question whether empirical analyses of the Supreme Court adequately explain what the justices have historically done. Many of the best-known and most influential exercises of judicial power, academic lawyers recognize, do not simply reinforce the principles favored by members of the existing lawmaking majority. *Dred Scott v. Sandford*[6] did not endorse the slavery policies preferred by mainstream Jacksonian Democrats; *Roe v. Wade*[7] announced abortion policies that were not being championed by either the Nixon administration or the Democratic majority in Congress. Constitutional and democratic theorists find judicial review problematic because, although elected officials appoint and confirm unelected justices, the national judiciary consistently makes decisions that seem different from those previously reached by the national legislature.

This paper contends that both conventional explanations and justifications of independent judicial policymaking are based on inaccurate and incomplete understandings of the relationships between justices and elected officials. Rather than treat judicial review as a practice that either sustains or rejects the measures favored by lawmaking majorities, theoretical and descriptive studies of the Supreme Court should pay closer attention to the constitutional dialogues that take place between American governing institutions on crosscutting issues that internally divide the existing lawmaking majority. Historically, the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to settle some public dispute. The justices in these circumstances do not merely fill a void created by the legislative failure to choose between competing political proposals. On the contrary, prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address.

3. Richard Funston, "The Supreme Court and Critical Elections," *American Political Science Review* 69 (1975): 796.

4. See Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 33–71.

5. See, e.g., Dahl, "Decision-Making in a Democracy;" Paul Brest, "Who Decides?" *Southern California Law Review* 58 (1985).

6. 19 How. 393 (1857).

7. 410 U.S. 113 (1973).

This practice of foisting disruptive political debates off on the Supreme Court is grounded in certain enduring structures of American politics. In two-party systems, mainstream politicians advance their interests by diverting difficult, crosscutting issues to such "peripheral mechanisms"[8] as the national judiciary. Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics. The Supreme Court has proven receptive to these invitations, particularly when the justices share the values of the elite or presidential wing of the dominant national coalition. Legislative deference to the judiciary is, thus, not an isolated occurrence, but one way that established politicians have fought the "conflict between conflicts" that Schattschneider and others recognize as endemic to American politics, if not to any political regime.[9]

"The countermajoritarian difficulty" does not provide an adequate starting point for thinking about an institution that typically makes policies only in response to legislative stalemates and invitations. Scholars might more profitably think about judicial review as presenting "the nonmajoritarian difficulty" when the real controversy is between different members of the dominant national coalition, or "the clashing majority difficulty" when the real controversy is between lawmaking majorities of different governing institutions. The theoretical issues raised by such exercises of judicial power cannot be resolved by such ritual incantations as, "Unelected judges ought not to make policies in a democracy." Rather, on the basis of more realistic descriptions of the forces that influence Supreme Court decision-making, scholars might offer more accurate assessments of the extent to which judicial review in the United States promotes or retards such basic features of democratic governance as deliberate decision-making, majoritarianism, and political accountability.

THE STRUCTURE OF LEGISLATIVE DEFERENCE TO THE JUDICIARY

Judicial rulings present something of a paradox to students of American government. Leaders of the dominant national coalition carefully screen prospective justices to ensure sympathetic judgments, but the federal judiciary nevertheless often makes decisions at odds with the political status quo. Independent judicial policymaking seems both anomalous and countermajoritarian, however, only if scholars assume that legislators wish to bear the responsibility for resolving conflicts that divide the body politic. In fact, mainstream politicians are often more interested in keeping social controversies off the political agenda than in considering the merits of

8. Alvin Cohan, "Abortion as a Marginal Issue: The Use of Peripheral Mechanisms in Britain and the United States," in Joni Lovenduski and Joyce Outshoorn, eds., *The New Politics of Abortion* (London: Sage Publications, 1986), 33.

9. E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (Hinsdale, IL: Dryden Press, 1975), 60–74.

alternative settlements. When disputes arise that most elected officials would rather not address publicly, Supreme Court justices may serve the interests of the political status quo by making policy, taking public responsibility for making policy, and making policy favored by political elites. Judicial policymaking in these circumstances cannot be accurately described as either majoritarian or countermajoritarian; it takes place when and because no legislative majority has formed.

Social scientists and academic lawyers will improve their understanding of much independent judicial policymaking if they examine the strategies adopted by the leaders of dominant political coalitions when confronted with crosscutting issues that threaten to disrupt the existing bases of partisan cleavage. Such politicians, whom I shall call "party moderates," rise to power by articulating or advancing those positions that unite their followers. Ambitious Republicans in 1860 cried, "No new slave territories!" Today, they shout, "No new taxes!" As the example of the antebellum GOP suggests, political aspirants typically champion those policies that have broad support within their coalitions, even when they recognize that the general electorate may not support those positions as enthusiastically as their partisans. Thus, party moderates may be moderates only within their parties; their positions may appear immoderate from other perspectives. Abraham Lincoln may have been regarded as a radical abolitionist by the majority of his contemporaries, but he obtained his party's nomination for the presidency primarily because his position on slavery was closer to that of the median Republican voter than the more extreme proposals proffered by William Seward.

Previous scholarship correctly recognizes that party moderates attempt to forestall any judicial effort that interferes with the achievement of policy objectives that unite their coalition. Members of the lawmaking majority will assert that the Constitution vests the people's elected representatives with the power to settle those social controversies that divide the major parties and to advance fairly specific proposals for resolving those issues. They nominate and confirm prospective justices whom they have good reason to believe share and can be expected to sustain their constitutional and policy preferences.[10] Because the Court rarely disappoints presidents on issues of immediate interest to them and their followers, it rarely challenges the legislative programs enacted by lawmaking majorities. Historically, justices have engaged in classic countermajoritarian behavior only in those relatively brief periods when members of a newly formed dominant national coalition have not yet had the time necessary to install their adherents on the bench.[11]

10. See Dahl, "Decision-Making in a Democracy," 284; Donald R. Songer, "The Relevance of Policy Values for the Confirmation of Supreme Court Nominees," *Law and Society*, 13 (1979); William E. Hulbary and Thomas G. Walker, "The Supreme Court Selection Process: Presidential Motivation and Judicial Performance," *Western Political Quarterly*, 33 (1980): 186, 189.

11. See Dahl, "Decision-Making in a Democracy;" Funston, "The Supreme Court."

Most politicians in power, however, would not have the federal judiciary defer to all legislative judgments. Party moderates complain of unwarranted judicial activism only when their policy preferences are declared unconstitutional. Members of the dominant national coalition openly approve of judicial policymaking when the courts are asked to protect "the rights of national majorities against local interests" or to strike down legislation enacted by a deposed majority coalition.[12] Such wishes often become the justices' commands. The Supreme Court, not surprisingly, normally supports the winners of American national politics when they lose locally. Judicial policymaking in these circumstances might be described as presenting "the present national majoritarian difficulty." Thus, the Taft Court struck down state laws inconsistent with the probusiness, laissez-faire policies of the Harding/Coolidge administration. Lawmaking majorities naturally do their best to facilitate such favorable judicial policymaking. In recent years, for example, presidents Reagan and Bush have appointed justices who were known to be hostile to local affirmative action policies and possibly interested in using the takings clause of the Fifth Amendment to compensate property owners harmed by neighborhood environmental regulations.

These well-known observations, however, only apply to those constitutional issues that divide the two major political parties. Many prominent cases stem from public disputes that crosscut existing political alignments. When confronted with these controversies, justices cannot legitimate or advance the agenda of the dominant national coalition in any simple sense. Members of the lawmaking majority may be both the leading proponents and opponents of the policy under constitutional attack. The New Deal Democratic party included Southerners committed to maintaining racial segregation and Northern intellectuals who strongly opposed Jim Crow institutions. During the Carter administration, the presidential wing of the Democratic party vigorously objected to legislative vetoes routinely attached to administrative regulations by the legislative wing of that party. Asking the justices in such circumstances to defer to the lawmaking majority begs the question. The justices must either choose between different representatives of the same lawmaking majority or between representatives of different lawmaking majorities.

Judicial efforts to identify the policies favored by the dominant national coalition are also likely to prove unavailing because mainstream politicians do their best to avoid taking firm public stands on those matters that internally divide their coalition. Speeches, issues papers, and campaign promises that call attention to such disruptive disputes distract partisans from their common purpose and threaten party solidarity. Hence, although elected officials constantly trumpet their positions on some matters, they remain eerily silent on others. Republican party leaders in 1860, for example, stressed their common hostility to slavery in the territories

12. Dahl, "Decision-Making in a Democracy," 282, 286–291; Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: The University of Chicago Press, 1981), 22–23.

and suppressed debate over those economic policies that had previously been disputed by the former Whigs and Democrats among their rank and file. In a commentary on abortion politics, Amy Gutmann points out that "rarely have so many public officials worked so hard to say so little about an issue on the minds of so many citizens."[13]

In order to preserve their political coalitions and personal status, the leaders of both the majority and minority party typically, when faced with a crosscutting issue, adopt a variety of "defensive" strategies. James Sundquist notes that

> they try to straddle it, to change the subject, to find policy compromises that will conciliate the polar forces developing within the party, and to nominate candidates who are uncommitted and able to make gestures in both directions, all the while hoping that the issue will somehow solve itself or disappear.[14]

When events demonstrate that a potentially disruptive controversy is not going to vanish, politicians attempt to depoliticize that dispute by developing or making use of various means of conflict resolution that seem far removed from national electoral politics. Waving the banner of federalism, elected officials claim that state majorities bear the responsibility for resolving a crosscutting issue. Local political leaders are able to adopt safe positions on contested national issues because those debates may not splinter their smaller, more homogenous constituencies (or at least the members of their coalitions). Antebellum nominees for governor of South Carolina or Maine could confidently make assertions about slavery that would have ruined a presidential candidate. In *Building the New American State,* Stephen Skowronek identifies another tactic national elites have used in order to avoid making controversial public policies. Late-nineteenth-

13. James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* (revised edition) (Washington, DC: The Brookings Institution, 1983), 79; Amy Gutmann, "No Common Ground," *The New Republic,* 203 (October 22, 1990): 43.

Some formal theorists claim that minority-party moderates, if they are rational, will seek to inject into politics new issues that might splinter the dominant national coalition (William H. Riker, *The Art of Political Manipulation* [New Haven: Yale University Press, 1986]), but history suggests that prominent leaders of the political opposition have a vested interest in preserving the existing bases of partisan cleavage. Realignments have not only changed the balance of partisan strength, they have created extraordinary opportunities for younger insurgents to challenge the seasoned political leadership of the established parties. Al Smith and John W. Davis, the losing Democratic candidates for the presidency in 1928 and 1924, were no more at home in the New Deal Democratic party than were Herbert Hoover and Calvin Coolidge. Their experience (and the experience of the late-nineteenth-century leadership of the Republican party during the Progressive era) suggests that party moderates are either incapable of abandoning the issue positions that they have articulated throughout their careers or are too identified with those issues in the public mind to be able to compete with new political entrepreneurs not saddled with the losing positions of the past. (See Sundquist, 1983, pp. 43–44, 177–180.) Furthermore, leadership in the opposition party does have many rewards. In addition to the perks associated with such positions as House minority whip, political events may occur that temporarily enable the weaker political coalition to control the national government.

14. Sundquist, *Dynamics of the Party System,* 307.

century party moderates, he points out, fought the threat of partisan debate over railroad regulation by creating a nonpartisan administrative agency, the Interstate Commerce Commission, which they charged with reforming the national transportation system, subject only to vague guidelines. Elected officials from then on deflected public demands that Congress adopt industrial policies by asserting that economic regulation was a subject for bureaucratic expertise, and not for political disputation.[15]

Courts offer similar opportunities for pushing unwanted political fights off the political agenda. The judiciary is a preexisting, nonpartisan institution that is constitutionally authorized to resolve specific controversies. Moreover, independent policy entrepreneurs will have already brought (or can easily be encouraged to bring) the relevant issues to the attention of the Supreme Court. As much political science scholarship recognizes, when marginal groups lack the political resources necessary to forge a dominant national coalition, they may use litigation as their primary means of achieving political goals,[16] and elected officials will rarely need to initiate litigation. "Party extremists" will embrace this situation with enthusiasm. Party moderates need only use their influence to improve the chances that federal justices will be willing to resolve those crosscutting issues that are already before the courts or likely to come before the courts in the near future. Indeed, legislative deference at times need consist of little more than refusing to restrain justices already committed to settling a particular political controversy.

Although elected officials cannot force the Court to resolve issues that threaten existing partisan alignments, their appeals for judicial policymaking may not fall on deaf ears. Appointed for life, justices do not run the same political risks that other political actors do when they take strong stands on highly controversial subjects. Moreover, justices are more willing to declare laws unconstitutional after receiving explicit or implicit permission from elected officials. If the Court has retreated during periods of severe legislative hostility to independent judicial policymaking,[17] then legislative encouragement presumably emboldens the Court. Judges can be confident that party moderates who have invited judicial resolution of particular issues will not subsequently take steps that might actually reduce the power or prestige of the Court (although such politicians may grumble publicly about the substance of decisions or generalized abuses of judicial power).

15. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982), 121–162.

16. See, e.g., Richard C. Cortner, "Strategies and Tactics of Litigants in Constitutional Cases," *Journal of Public Law* 17 (1968): 287. However, as Gerald Rosenberg notes, judicial victories may prove fairly worthless without the political resources and support necessary to ensure that favorable judicial decrees are fully implemented. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

17. William Lasser, *The Limits of Judicial Power: The Supreme Court in American Politics* (Chapel Hill: University of North Carolina Press, 1988); Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* (Chicago: University of Chicago Press, 1962).

Mainstream politicians who facilitate judicial policymaking are frequently more interested in having the justices bear the public responsibility for making *some* policy decision than in the particular policy decision that the justices might make in response to their legislative invitation. By holding out the possibility that the judiciary will resolve a disruptive partisan debate, party moderates hope to maintain partisan divisions around their preferred issues while potential party insurgents rush to the courtroom. If activists who feel strongly about the crosscutting issue become convinced that the Supreme Court is the governing institution responsible for settling that controversy, they may continue to vote as they have in the past on the basis of older issues and inherited partisan attachments, while concentrating their political activity on efforts to secure favorable judicial rulings on those matters that most excite them. Needless to say, the more attention and resources political outsiders invest pursuing judicial solutions, the less opportunity they have to challenge the existing basis of partisan cleavage. As civil rights activists are learning, energy spent preparing novel legal arguments is not spent registering new voters.[18] Moreover, while the attention of party extremists is focused on the judiciary, events may occur that weaken the relative salience of their issues. Technological improvements may render obsolete some political debate; an economic recession may return public attention to matters that the two parties are better structured to debate.

Of course, the eventual judicial decision will rarely, if ever, curtail public debate on crosscutting issues. Federal justices, after all, have no particular ability to find compromises that have eluded mainstream politicians. Those parties aggrieved by the Supreme Court's rulings will condemn judicial activism (or passivity) and insist that their elected representatives take steps to discipline an imperial (or insensitive) judiciary. Nevertheless, even though legislative deference to the judiciary may not reduce the intensity of public debate over a crosscutting issue in the long run, that tactic may still diminish the salience of that dispute in electoral politics. Some persons may be satisfied after receiving a fair hearing by an "impartial" judicial tribunal. Others may continue investing scarce political resources in dubious attempts to have the offending decision overruled. More significantly, judicial policymaking may create an additional and safer position for party moderates to take on politically unpalatable controversies. If the Supreme Court does strike down a federal or state statute, politicians may respond by engaging in what David Mayhew calls "position-taking," the art of "mak[ing] pleasant judgmental statements" without having to "make pleasant things happen" on highly contested issues.[19] Party moderates appease judicial losers by agreeing with the substance of legislation declared unconstitutional and by attacking unwarranted judicial activism, but avoid antagonizing judicial winners by refusing to support

18. Rosenberg, *The Hollow Hope.*

19. David R. Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974), 62.

legislation that might limit the judiciary's power to make such policies on the ground that such measures undermine judicial independence. For similar reasons, public officials may justify their decision to implement controversial judicial decisions by pointing to their obligation to obey the law, while insisting that they disagree with the Court's holding.[20] By repeatedly proclaiming that they have no legitimate means of influencing policy on matters that splinter existing partisan alignments, members of the dominant political coalitions aspire to persuade citizens that they should continue voting on the basis of those issues that the major parties are eager to contest.

Although they fervently pray that the electorate will blame the judiciary for making controversial policy choices, members of the dominant political coalition are often less indifferent to judicial output than their public performances suggest. Rather, mainstream politicians may facilitate judicial policymaking in part because they have good reason to believe that the courts will announce those policies they privately favor but cannot openly endorse without endangering their political support. The presidential wing of the dominant national coalition may support policies that the legislative wing is not willing or strong enough to enact. Elites in both parties may prefer policies that their rank and file oppose. In such cases, the aim of legislative deference to the judiciary is for the courts to make controversial policies that political elites approve of but cannot publicly champion, and to do so in such a way that these elites are not held accountable by the general public, or at least not as accountable as they would be had they personally voted for that policy.

When seeking favorable policy through the judiciary, party moderates may take steps that evince some policy commitment, but are not likely to be as well publicized or scrutinized as legislative proposals and policy votes. Because the electorate rarely pays attention or attaches much significance to judicial appointments or to the activities of the solicitor general, elected officials, in particular the president, can maneuver to obtain favorable legal decisions without risking the electoral consequences that might result from sustained legislative efforts to enact the same measures. Recourse to the courts may, thus, serve as a tacit political compromise between party moderates in the legislature and policy activists in the White House. Mainstream legislators who adamantly refuse to disclose their own feelings on some social controversy may be more willing to confirm judicial nominees and justice department appointees who are openly committed to securing a particular legal resolution. When a crosscutting issue divides the party elite from its mass base, officials of the dominant national coalition may improve their chances of desirable judicial outcomes merely by appointing to the Supreme Court prestigious jurists who have never indicated what judicial policies they favor. If such justices later elect to make public policies, the policies they make can be expected to reflect their elite

20. See Walter F. Murphy, and Joseph Tanenhaus, "Publicity, Public Opinion and the Court," *Northwestern University Law Review*, 84 (1990): 986–987, 1017.

status and values. For these reasons, judicial policymaking should normally mirror the beliefs of the presidential[21] or elite wing of the dominant national coalition.

Legislative deference to the judiciary offers one additional benefit to mainstream politicians. A nine-member tribunal that is not politically accountable may be capable of making policy decisions *in circumstances* when elected officials, working within complex legislative rules, are too divided to agree on any particular program. Having a judiciary available to make policy decisions is a particular boon to elected officials whenever they are faced with a strong public demand that the government do something about a pressing problem, but there is no public consensus on a solution. Citizens aroused by reports of political scandals may be more interested in having legislators pass a corrupt practices act than in the merits of any given proposal. In this political environment, politicians best satisfy voters by passing a bill with an appropriate title that allows the Supreme Court to decide the precise policy the national government will adopt. Such actions enable party moderates to take the credit for responding to the public's concern, while leaving them free to blame the justices for any weaknesses in the actual policy chosen. Elected officials opposed to the direction of judicial policymaking can always tell their constituents that the justices misinterpreted the statute they wrote or abused the judicial power by declaring unconstitutional some part of that measure.[22]

If this analysis is correct, then judicial review serves vital interests of both the existing dominant national party coalition and the existing national party system. Federal justices assist the dominant national party coalition by legitimating their policy agenda and declaring unconstitutional inconsistent state and local practices. Federal justices help maintain the national party system by removing from the political agenda issues that are disruptive to existing partisan alignments and by resolving those matters in a way that is consistent with the preferences of elites in both the dominant majority and minority coalitions. Given the stake party moderates in both major parties have in foisting crosscutting issues off on the judiciary, the persons most likely to fight such efforts are not minority-party leaders but minority-party insurgents. The latter politicians have no investment in the political status quo. They reject the policies supported by the dominant national coalition *and the policies of the Supreme Court, which reflect elite preferences in both major parties.* Moreover, minority-party insurgents wish to change the existing bases of partisan competition so that future electoral and legislative political battles will be fought over those issues they feel most strongly about.

21. David Adamany, "The Supreme Court's Role in Critical Elections," in Bruce A. Campbell and Richard J. Trilling, eds., *Realignment in American Politics* (Austin: The University of Texas Press, 1980), 248.

22. More generally, legislative deference to the judiciary may occur whenever elected officials agree that the status quo must be changed, but cannot agree on the best method of change.

To sum up, the causes of much independent judicial policymaking in the United States are inherent in the structure of American two-party politics. Political scientists recognize that "the displacement of conflicts is a prime instrument of political strategy;"[23] legislative deference to the judiciary is simply one tactic that politicians use in their ongoing effort to maintain the hegemony of their preferred issues. The conflict over conflicts is particularly intense during dealignments, when new political controversies arise that fracture old partisan divisions.[24] Such struggles, however, take place throughout the political cycle. Hence, although judicial policymaking might be expected to increase immediately before a critical election, the forces underlying that practice are present in normal politics as well.

CASE STUDIES

The political histories of three prominent instances of independent judicial policymaking illustrate how the phenomenon of legislative deference to the judiciary often offers better insights into judicial behavior in significant constitutional cases than the model of judicial independence presupposed by the countermajoritarian difficulty. *Dred Scott v. Sandford* epitomizes political attempts to steer a disruptive partisan fight into safer legal channels. Rather than take the responsibility for resolving the burning issue of the 1850s, members of the dominant Democratic party coalition openly encouraged the Supreme Court to decide when and whether persons could bring slaves into United States territories. The political maneuvering that resulted in the Sherman Antitrust Act of 1890 is an excellent example of elected officials using legislation as a vehicle for inviting independent judicial policymaking. Party moderates in the late nineteenth century, unwilling or unable to agree on the extent to which powerful monopolies should be regulated by the national government, drafted a bill with exceptionally vague language for the purpose of forcing the Court in the guise of statutory interpretation to determine the scope of the federal commerce power. Finally, the recent abortion controversy demonstrates how legislative deference to the Supreme Court can take place after a major decision has been handed down. Most contemporary politicians did not overtly encourage the justices to take an interest in sexual and reproductive issues, preferring to leave such matters to the states. Many elected officials, however, subsequently took steps to ensure that *Roe v. Wade* would remain in the courts so that they would not be forced to support either prolife or prochoice positions in legislative and electoral forums.

In each case study, the justices did not simply "fill the power vacuum" on their own initiative[25] but rather declared laws unconstitutional with the

23. Schattschneider, *The Semisovereign People,* 70.

24. Edward G. Carmines, John P. McIver, and James A. Stimson, "Unrealized Partisanship: A Theory of Dealignment," *Journal of Politics,* 49 (1987).

25. Paul Allen Beck, "The Electoral Cycle and Patterns of American Politics," *British Journal of Political Science* 9 (1979): 152.

explicit or implicit permission of prominent members of the dominant national political coalition. Hence, although the resulting judicial decisions may be questioned on many substantive grounds, the justices cannot be criticized (or praised) for defeating the will of the legislature; the will of the legislature in each instance was that the justices take the responsibility for deciding what policy should be the law of the land.

Slavery

Dred Scott v. Sandford is generally regarded as the worst decision ever handed down by the Supreme Court. Chief Justice Charles Evans Hughes described the case as a "self-inflicted wound." Justice Robert Jackson claimed that by striking down the Missouri Compromise, the Court foreclosed any "hope that American forebearance and statesmanship would prove equal to finding some compromise between the angry forces that were being aroused by the slave issue."[26] Historians, however, agree that the politicians most interested in compromise virtually begged the Supreme Court to decide the constitutional status of slavery in the territories. As Wallace Mendelson notes, the *Dred Scott* decision "was undertaken only upon explicit invitation of Congress."[27]

The Jacksonian party system that dominated American politics from 1824 to 1854 was structured to facilitate debate over internal improvements, not slavery. Indeed, American political parties were originally designed more to exclude slavery from presidential electoral politics than to foster national debate on any other public controversy.[28] Both Democratic and Whig party leaders believed that "national parties and slavery agitation were mutually exclusive."[29] Martin Van Buren, the major architect of that party system, asserted that if the old transectional cleavages between Federalists and Democratic-Republicans were not revived, destructive "prejudices between free and slave-holding states [would] inevitably" result.[30]

Jacksonian party moderates successfully prevented slavery issues from dominating national politics until the Mexican War. Democrats and (to a

26. Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements, An Interpretation* (New York: Columbia University Press, 1928), 50; Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (New York: Vintage Books, 1941), 327. See also, Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press), 91–100.

27. Wallace Mendelson, "Dred Scott's Case—Reconsidered," *Minnesota Law Review,* 38 (1953): 16. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 206; David M. Potter, *The Impending Crisis 1848–1861* (completed and edited by Don E. Fehrenbacher) (New York: Harper & Row, 1976), 271.

28. Sundquist, *Dynamics of the Party System,* 51; Richard P. McCormick, "Political Development and the Second Party System," in William Nisbet Chambers and Walter Dean Burnham, eds., *The American Party Systems: Stages of Political Development,* 2nd ed. (New York: Oxford University Press, 1975), 111–112.

29. John M. McFaul, "Expediency vs. Morality: Jacksonian Politics and Slavery," *Journal of American History,* 62 (1975): 27.

30. Robert V. Remini, *Martin Van Buren and the Making of the Democratic Party* (New York: Columbia University Press, 1959), 131.

lesser extent) Whigs accepted the Missouri Compromise, which forbade slavery in all territories north of the 36° 30′ parallel line, and the gag rule, which prevented Congressional debate on the abolition of slavery. The early Taney Court helped maintain this status quo. Although several justices, Chief Justice Roger Taney in particular, were willing to impose significant constitutional restraints on legislative power to promote or restrict slavery, the Court's plurality in the 1830s and 1840s preferred either to avoid discussing the constitutional status of slavery or to assert that such issues were for elected officials to decide.[31]

The Mexican War seriously threatened these sectional accommodations. In 1847, Representative David Wilmot proposed that slavery be excluded from all territory added to the United States as a result of that conflict, even though most (though not all) of that land was located below the Missouri Compromise line. The Wilmot Proviso greatly strengthened those political movements that wanted national politics to be fought over slavery issues rather than over internal improvements or the tariff. Antislavery forces in the North exercised their new-found power in state legislatures by passing measures endorsing territorial bans on slavery. Energized proslavery forces in the South insisted that the national government enact new measures that would more vigorously protect the constitutional right to establish their "peculiar institution" in federal territories.

National political leaders, eager to preserve federal silence on sectional issues, responded to the demands of proslavery and antislavery activists by advocating both substantive and procedural compromises. Stephen Douglas sought to maintain the unity of the Democratic coalition by raising the banner of popular sovereignty. This proposal allowed the settlers of each territory to determine the status of slavery for themselves without federal interference, and national party moderates would not be forced to vote on that slavery issue. Moreover, Douglas advocated a policy of national expansion designed in part to reduce the salience of slavery as a political controversy by increasing the territory open for both Southern and Northern migration.[32] In addition to these tactics, other elected officials, both Democratic and Whig, sought to depoliticize sectional conflicts by insisting that elected officials had no power to settle the status of slavery in the territories. "Slavery," Senator Sam Houston declared, "[is] a question not belonging to Congress."[33] Constitutional issues had been raised, he and others agreed, that could be resolved only by the Supreme Court of the United States.

The 1848 report of the Senate select committee on the Territories of Oregon, California, and New Mexico demonstrated how Congress might invoke judicial authority to remove divisive sectional issues from electoral politics. The committee recommended that the federal government refuse to pass the Wilmot Proviso or other measure which regulated slavery and

31. *Groves v. Slaughter* 15 Peters 449 (1841); *Prigg v. Pennsylvania* 16 Peters 539 (1842).

32. Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (New York: Doubleday, 1959), 48–49.

33. *Congressional Globe (Cong. Globe)*, June 2, 1848, 812.

instead urged Congress to enact legislation that would facilitate federal judicial review of any complaint or habeas corpus petition that raised the constitutional status of human bondage. The federal judiciary would, thus, become the national institution responsible for choosing between antislavery, proslavery, and popular sovereignty policies. As Senator Clayton, the author of that compromise, claimed,

> this bill resolves the whole question between the North and the South into a constitutional and a judicial question. It only asks of men of all sections to stand by the Constitution, and suffer to settle the difference by its own tranquil operation. If the Constitution settles the question either way, let those who rail at the decision vent their indignation against their ancestors who adopted it.[34]

Congress soon accepted this invitation to divest itself of the burning question of the day. The bills that made up the compromise of 1850 and the Kansas-Nebraska Act of 1854 provided that "in all cases involving title to slaves . . . appeals shall be allowed and decided by (the United States) Supreme Court without regard to the value of the matter." One Senator observed that Congress had "enacted not a law but a lawsuit."[35]

By the time the *Dred Scott* case was reargued before the Supreme Court in 1856, party leaders representing all sections of the country had announced that they would accept judicial resolution of the status of slavery above and below the Missouri Compromise line. Senator Judah Benjamin, an influential Whig from Louisiana, declared that differences between North and South would be settled if all parties "agreed that every question touching human slavery" should be resolved by the federal judiciary. Stephen Douglas claimed that he had always recognized that the status of slavery was "a judicial question." Even Abraham Lincoln reputedly asserted that "the Supreme Court of the United States is the tribunal to decide such questions."[36]

President-elect James Buchanan had long hoped to keep slavery out of national debate. He told his followers that the "great object of [his] administration would be to arrest . . . the agitation of the slavery question . . . and to destroy sectional parties." His inaugural address declared that the status of slavery in the territories was "a judicial question, which legitimately belongs to the Supreme Court of the United States." Buchanan added that like "all good citizens," he would "cheerfully submit" to that decision.[37] Historians have demonstrated that shortly before he

34. *Cong. Globe*, July 18, 1848, 950.

35. 9 Statutes at Large 450, 455–456; 10 Statutes at Large 280, 287; Potter, *The Impending Crisis*, 271.

36. *Cong. Globe*, May 2, 1856, 1093; Appendix, *Cong. Globe*, June 2, 1856, 796; Abraham Lincoln, *The Collected Works of Abraham Lincoln*, vol. II, Roy B. Basler, ed. (New Brunswick, NJ: Rutgers University Press, 1953), 355. (Fehrenbacher disputes the authenticity of the last statement. Fehrenbacher, *The Dred Scott Case*, 645 n.39.)

37. Lawson Alan Pendleton, *James Buchanan's Attitude Toward Slavery* (Ann Arbor: Universal Microfilms International, 1964), 275; James Buchanan, "Inaugural Address," in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. VII (New York: Bureau of National Literature, 1897), 2962.

took the oath of office, Buchanan learned that the Court would declare the Missouri Compromise unconstitutional, and he had urged at least one Northern justice to sign the majority opinion so that the decision would appear to have broad national support.[38] Nevertheless, contrary to some speculation, Buchanan's inaugural address did not ask the country to accept his interpretation of the Constitution. Throughout his career, Buchanan had frequently stated that the Missouri Compromise was "entirely constitutional,"[39] but he also consistently asserted that the question "can only be settled finally by the Supreme Court." In letters to friends and political allies, Buchanan commented that, as a party moderate, he would willingly abandon the Missouri Compromise in the interest of sectional harmony.[40] In short, Buchanan called for public acceptance of the *Dred Scott* decision because he was more committed to removing slavery from partisan debate than to any particular settlement of the issue.

Several justices in the *Dred Scott* majority declared that these same political pressures led them to consider the constitutionality of the Missouri Compromise (as Justice Nelson's opinion pointed out, the case could have been resolved on politically safer choice of law grounds). Justice Wayne's concurrence asserted that "the peace and harmony of the country required the settlement" of the status of slavery in the territories "by judicial decision."[41] Although such assertions should, perhaps, be taken with a grain of salt, members of the *Dred Scott* majority later refrained from independent policymaking when the political climate became inhospitable to such endeavors. Taney, for example, never found a suitable occasion during the rest of his years for making public an opinion he had drafted declaring the Civil War unconstitutional along with such Civil War measures as the draft and the Emancipation Proclamation.[42]

This brief political history demonstrates that the Taney Court did not thwart political efforts to find a compromise on slavery that would have maintained the basis of partisan cleavage in the Second American party system. Rather, in deciding *Dred Scott,* the Court was carrying out the wishes of Jacksonian moderates who desperately hoped that persons aggrieved by whatever decision the justices eventually made might nevertheless be more disposed to accept constitutional principles announced by a "neutral" judiciary than public policies enacted by elected officials. In fact, the Compromise of 1850 was not an absolute failure. The legislative decision to invite judicial policymaking enabled the majority Democratic coalition to run successfully as a national party in 1852 and 1856. During this time, a more durable compromise might have been forged or such outside events as a foreign war could have mitigated the impact that slavery had

38. Philip Auchampaugh, "James Buchanan, the Court, and the Dred Scott Case," *Tennessee History Magazine* 9 (1929).

39. Pendleton, *James Buchanan's Attitude,* 112 n.7, 70–72, 94–95, 118–120, 141.

40. Ibid., 283, 131–131, 362–363.

41. *Dred Scott v. Sandford,* 493.

42. Fehrenbacher, *The Dred Scott Case,* 553–555, 574–575.

on political allegiances. Moreover, the Supreme Court's decision that slavery was unconstitutional in the territories did not precipitate the destruction of either Jacksonian political coalition. The Kansas-Nebraska Act of 1854 had already finished the Whigs. The Democrats broke up over "bleeding Kansas" and the Lecompton Constitution in 1857 and 1858.[43] Significantly, critics of *Dred Scott* never point to any alternative maneuver or compromise that would have successfully removed slavery from electoral politics in the 1850s.

Dred Scott is best understood as a failed effort to resuscitate Jacksonian politics rather than as a cause of its death. On the other hand, the attempt by party moderates to salvage existing partisan alignments by removing slavery issues to the judiciary was clearly futile. Too many Northerners proved no more willing to tolerate proslavery constitutionalism when articulated by Chief Justice Roger Taney and the Supreme Court than when dictated by Senator John C. Calhoun and the Congress of the United States. In the hands of Abraham Lincoln and other Republicans, *Dred Scott* merely became one more weapon that could be wielded to annihilate Jacksonian party politics.

Antitrust

United States v. E.C. Knight is another commonly cited example of alleged judicial usurpation. Justice John Marshall Harlan was only the first of many critics who charged that the Court "defeated the main object" of the Sherman Antitrust Act by holding that Congress had not and could not have intended to regulate monopolies engaged solely in the production of goods.[44] Five years earlier, however, Senator Orville Platt had accused his colleagues of ignoring "the question of whether a bill would be operative, of how it would be operative, of how it would operate, or whether it was within the power of Congress to enact it." In his eyes, and in the eyes of many historians, the Fifty-first Congress intended only "to get some bill headed 'a bill to punish trusts' with which to go to the country."[45] The

43. On the breakup of the Whigs, see William W. Freehling, *The Road to Disunion: Secessionists at Bay 1776–1854* (New York: Oxford University Press, 1990), 550–562. On the breakup of the Democrats, see Kenneth M. Stampp, *America in 1857: A Nation on the Brink* (New York: Oxford University Press, 1990).

44. *United States v. E.C. Knight* 156 U.S. 1, 42 (1895) (Harlan, J., dissenting). *E.C. Knight* must be read as an instance of statutory interpretation and constitutional decision-making. Chief Justice Fuller's majority opinion held that the Sherman Antitrust Act did not license federal prosecution of the sugar trust because Congress "did not attempt . . . to assert the power to deal with monopoly directly." Fuller reached this conclusion, however, solely because he believed that a broader interpretation of the Sherman act would have required the justices to declare that measure unconstitutional. Thus, the bulk of the *E.C. Knight* opinion purports to demonstrate that the *"constitutional* power to regulate commerce . . . is a power independent of the power to suppress monopoly." "It was in the light of [this] well-settled principle[]," Fuller asserted, "that the act of July 2, 1890, was framed." *E.C. Knight,* at 16, 12, 16. Justice Harlan also thought that the *E.C. Knight* opinion rested on the Court's interpretation of the commerce power. *E.C. Knight,* at 22 (Harlan, J., dissenting). For more on the case of *U.S. v E.C. Knight* see, e.g., McCloskey, *The American Supreme Court,* 127.

45. *Congressional Record (Cong. Rec.)* (March 27, 1890): 2731. See Hans Birger Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Baltimore: Johns Hopkins Press,

"main object" of the Sherman act, scholars agree, was to enable Congress to defer to whatever antitrust policy that the federal courts decided to make.

Skowronek describes post–Civil War America as "the triumph of the state of courts and parties." Political parties distributed the spoils of government; courts made the substantive rules.[46] Political power in this regime was based on the control of patronage rather than on the ability to articulate attractive visions of the American polity. Party identification typically reflected personal or familial experiences during the Civil War, rather than the conflicts generated by the emerging industrial order. Although that order increasingly divided Americans sectionally and occupationally, the Third American party system never incorporated these new cleavages. Established politicians successfully waved "the bloody shirt" whenever crosscutting economic issues threatened to disrupt existing political alignments.[47]

In the years immediately after the Civil War and Reconstruction, national leaders ignored repeated demands for federal economic policy. Scattered individual political entrepreneurs did propose various regulatory measures, but neither major party was willing or able to develop a comprehensive industrial program. Nevertheless, by the late 1880s, mainstream Republican and Democratic politicians had realized the economic and political necessity of some centralized effort to curb the power of trusts and monopolies. Industrial, agricultural, and mercantile interests all called for some form of federal regulation. Economic issues became increasingly salient in local elections and third parties running on specific commercial platforms were gaining strength.[48]

National political leaders responded to these pressures in part by expanding federal judicial power over interstate commerce. Legislators sponsored measures that proclaimed the existence of federal industrial policy but which did not clearly describe the nature of that policy. Although, as was the case with the Interstate Commerce Act, administrative agencies were sometimes given the first opportunity to translate vague statutory commands into public policy, Congress vested final policymaking power in the federal bench. Political leaders hoped that courts would develop a national regulatory program while ostensibly engaging in statutory interpretation.

The Sherman Antitrust Act was the most prominent legislative attempt to increase judicial policymaking power. John Sherman advertised his proposals as declaring no new principles of law. Their purpose, he declared,

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1954), 229; Donald Grant Morgan, *Congress and the Constitution: A Study of Responsibility* (Cambridge: Belknap Press of Harvard University Press, 1966), 142; William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Anti-Trust Act* (New York: Random House, 1965), 54.

46. Skowronek, *Building a New American State,* 24–31, 39–42.

47. Sundquist, *Dynamics of the Party System,* 108, 123; Wallace Mendelson, "The Politics of Judicial Activism," *Emory Law Journal* 24 (1975): 49.

48. Sundquist, *Dynamics of the Party System,* 120–133.

was merely to "appl[y] old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." Sherman recognized that American common law did not draw a "precise line between lawful and unlawful combinations." Rather than provide more specific guidelines, however, Sherman and other senators insisted that such a task "must be left open for the courts to determine in each particular case."[49] Thus, judges would inevitably have to make antitrust policy when "interpreting" just what commercial activity was prohibited by the proposed enactment.

Senators debating the Sherman act were mindful of the specific problems that antitrust prosecution of the E.C. Knight Company might present. Nevertheless, they refused to write a bill that would clearly indicate whether (or which of) that monopoly's practices were illegal. In early legislative debates, Sherman argued that Congress possessed the power to regulate any manufacturer whose monopolistic practices affected prices on the interstate market. He specifically mentioned the E.C. Knight sugar-refining trust as an example of a monopoly that his bill would prohibit.[50] Opponents of the original antitrust bill declared that the Constitution did not permit Congress to regulate firms that only engaged in in-state production, even if their goods were later shipped out of state by third parties. Senator George Edmunds explicitly pointed to the sugar trust as an example of a monopoly that could not be regulated by a constitutional antitrust bill.[51] Unable to resolve the debate, but committed to passing antitrust regulations, the Senate referred the constitutional question to its judiciary committee. Five days later, the committee returned with a rewritten version of Sherman's proposal. The new bill declared unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States." The meaning of "restraint of commerce among the several States" was never explained, and no senator discussed whether the sugar trust could be lawfully prosecuted if the amended statute were enacted. Instead, Senator Edmunds, the chair of the committee, declared that the bill "would leave it to the courts in the first instance to say how far they could carry it."[52] Remarkably, debate over the constitutional scope of congressional power ceased, and what had been a highly controversial bill passed with only one dissenting vote.

Legislators in the House debate (which lasted less than a day) similarly approved the discretionary power that the Sherman act vested in the courts. The floor leader for the bill, Representative D.B. Culbertson, clearly recognized that the Sherman act, like the compromise of 1850, was better described as a potential lawsuit than as a law. "Just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of trade or commerce mentioned in the bill," he informed his

49. *Cong. Rec.* (March 21, 1890): 2456, 2460.
50. *Cong. Rec.* (March 21, 1890): 2459.
51. *Cong. Rec.* (March 27, 1890): 2727–2728.
52. *Cong. Rec.* (April 2, 1890): 2901; *Cong. Rec.* (April 8, 1890): 3148.

colleagues, "will not be known until the courts have construed and interpreted this provision." When a skeptical representative asked him to describe a specific practice that would be considered illegal should the statute be passed, Culbertson responded that he "did not know, nor can any man know, just what contracts will be embraced by this section of the bill until the courts decide."[53]

The subsequent history of *E.C. Knight* belies one common distinction between statutory interpretation and constitutional decision-making. In theory, the former use of judicial power is more flexible and democratic than the latter. Ordinary legislative majorities, the conventional wisdom goes, are free to pass more specific statutes when they are dissatisfied with judicial interpretations of existing law; an exercise of judicial review, however, can be overturned only by the supermajority necessary to pass a constitutional amendment. In practice, the difference between these two forms of judicial policymaking is not as clear cut. Scholars have shown that efforts to amend statutes in light of judicial decisions have historically proven more difficult than efforts to pass the original proposal.[54] Moreover, when elected officials wish to resume their responsibility for resolving issues on which they formerly had sought to invite judicial policymaking, the justices often distinguish or abandon previous constitutional rulings that might otherwise inhibit the present lawmaking majority. When in the wake of the critical election of 1896 the executive branch began to enforce a more coherent antitrust policy, the Supreme Court responded by consistently finding that federal prosecutions were within the commerce power, even in factual situations very similar to *E.C. Knight.*[55] When Americans overwhelmingly voted to support national industrial policy in 1936, the justices responded by abandoning *E.C. Knight* completely.

Abortion

Roe v. Wade is the contemporary case most often compared to *Dred Scott v. Sandford.* Opponents of that decision claim that the Burger Court should have respected state decisions regulating abortion in local communities, just as the Taney Court should have respected federal decisions regulating slavery in American territories.[56] Social science research, however, suggests a different parallel between the two cases. Like slavery, abortion may be "the kind of 'bullet' issue that legislators have avoided when possible." Joni Lovenduski and Joyce Outshoorn observe that mainstream politicians in virtually every Western democracy responded to the emergence of the abortion issue by adopting strategies which emphasize "abstinence, post-

53. *Cong. Rec.* (May 1, 1890): 4089.

54. Beth Henshen, "Statutory Interpretations of the Supreme Court: Congressional Responses," *American Politics Quarterly* 11 (1983); Harry P. Stumpf, *American Judicial Politics* (San Diego: Harcourt Brace Jovanovich, 1988), 417.

55. *Addyston Pipe & Steel Co. v. United States* 175 U.S. 111 (1899); *Northern Securities Co. v. United States* 193 U.S. 197 (1904).

56. See, e.g., Charles E. Rice, "The Dred Scot Case of the Twentieth Century," *Houston Law Review,* 10 (1973).

ponement, and depoliticization." Judicial review, Alvin Cohan suggests, is merely the particular device that American public officials have used to remove this politically unpalatable issue from electoral debate.[57] Just as national party leaders did in the 1850s, contemporary political leaders encouraged judicial resolution of an issue that threatened existing partisan alignments.

Abortion is admittedly a more complex and substantially different instance of legislative deference to the judiciary than either slavery or antitrust. Owing perhaps to advances in communication technologies that enable citizens to learn what their representatives say in Congress merely by watching the evening news or reading the morning paper, politicians no longer openly admit that they would rather see the judiciary resolve highly contested public policy issues. Instead, party moderates feign great interest in controversies that they secretly wish would disappear. Politicians most often express their actual reservations about having to make public choices about abortion in off-the-record or unattributable remarks to journalists and scholars. Maris Vinovskis's investigation of abortion politics in the House of Representatives, for example, found that "attempts to pass a constitutional amendment to prohibit all abortions have become annual events that most members of Congress privately dread but publicly welcome."[58]

Unlike slavery and antitrust, abortion became a significant threat to the established party system only after the Supreme Court had engaged in independent judicial policymaking. National party moderates did not invite courts to start making abortion policy. Rather, most simply ignored the issue and hoped judges would do likewise. Nevertheless, many elected officials responded to *Roe* by quietly taking steps to ensure that courts, rather than legislatures, would continue to be the forums responsible for resolving debates over whether the law should permit women to terminate their pregnancies. For this reason, the most interesting instances of legislative deference to the judiciary in recent years occurred after the Supreme Court announced that abortion was a constitutional right.

Struggles over economic issues dominated American party politics in the middle of the twentieth century. Democrats generally favored public welfare spending; Republicans urged less interference with private market forces. By the end of the 1960s, however, the party system that had dominated political life since the 1930s was rapidly decomposing.[59] Although

57. Eva R. Rubin, *Abortion, Politics, and the Courts: Roe v. Wade and its Aftermath,* revised ed., (New York: Greenwood Press, 1987), 84; Joni Lovenduski and Joyce Outshoorn, "Introduction: The New Politics of Abortion," in Joni Lovenduski and Joyce Outshoorn, eds., *The New Politics of Abortion* (London: Sage Publications, 1986), 1–2; Cohan, "Abortion as a Marginal Issue."

58. Maris A. Vinovskis, "Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior," in Carl E. Schneider and Maris A. Vinovskis, eds., *The Law and Politics of Abortion* (Lexington, MA: Lexington Books, 1980), 224.

59. Walter Dean Burnham, *The Current Crisis in American Politics* (New York: Oxford University Press, 1982); Walter Dean Burnham, "American Politics in the 1970's: Beyond

the two major parties were still divided over the legacy of the New Deal, albeit in a "compressed" fashion,[60] voters were becoming more concerned with such issues as law and order, race, and social lifestyles.[61] The dominant Democratic party was torn between liberals who were attracted to new understandings of gender roles and sexual practices, and traditionalists who were repelled by such attitudes. (The Republican party was also internally divided over those issues, but to a lesser degree, at least initially).[62] These developments did not please leading officials in both major parties who had made their reputations fighting for and against new social entitlements. Traditional Democrats and Republicans continued to dispute the extent to which government should regulate economic activity (at least at the margins), but many mainstream politicians wanted to avoid those social issues that threatened to transform the party system to their detriment.

Abortion and birth control were successfully organized out of American electoral politics from the 1930s until the 1970s. With most politicians unwilling to take strong public stands on whether women had a right to terminate their pregnancies, proponents of statutory reform lacked the power to repeal existing restrictions, and proponents of those restrictions lacked the power to have them enforced.[63] The result was that contraception and abortion were both illegal and widely tolerated. The Supreme Court accepted this status quo in *Poe v. Ullman*[64] by dismissing a constitutional attack on Connecticut's birth control regulations on the ground that there was no substantial threat that the state would actually prosecute contraceptive users.

When debate over these social issues intensified during the sixties, some elected officials began to look to the judiciary for relief. Thomas Emerson, the noted civil libertarian then representing advocates of contraception and abortion rights, sensed that many politicians "preferred to have the Court, rather than themselves, make the decision to eliminate" statutory restrictions. State attorneys helped Planned Parenthood design and stage a test case on birth control rights that judges could not easily dismiss on jurisdictional grounds.[65] Shortly thereafter, the Supreme Court in *Griswold v. Connecticut*[66] held that states could not regulate the use of contraception,

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Party?" in William Nisbet Chambers and Walter Dean Burnham, eds., *The American Party Systems: Stages of Political Development,* 2nd ed. (New York: Oxford University Press, 1975); Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* (New York: Norton, 1970); Edward G. Carmines, John P. McIver, and James A. Stimson, "Unrealized Partisanship: A Theory of Dealignment," *Journal of Politics* 49 (1987): 376.

60. Mendelson, "The Politics of Judicial Activism": 59; Burnham, *The Current Crisis,* 295.

61. Sundquist, *Dynamics of the Party System,* 352–412.

62. Burnham, "American Politics," 315.

63. Bickel, *The Least Dangerous Branch,* 146; Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), 40–54; Rubin, *Abortion,* 36.

64. 367 U.S. 497 (1961).

65. Thomas I. Emerson, "Nine Justices in Search of a Doctrine," *Michigan Law Review* 64 (1965): 219 n.2; C. Thomas Dienes, *Law, Politics, and Birth Control* (Urbana: University of Illinois Press, 1972), 187, 162–163; Rubin, *Abortion,* 39.

66. 381 U.S. 479 (1965).

a decision that apparently inspired hope among governmental officials that the justices might also be willing to make abortion policy. Two studies of abortion politics indicate that by the end of the sixties, politicians in many states were eager to have the judiciary remove that divisive issue from electoral politics. Even opponents of the constitutional right of privacy recognized that most elected officials were privately pleased when in 1973 the Supreme Court struck down all significant state restrictions on abortion. John Hart Ely, for example, concludes his scathing attack on *Roe* by noting "the sighs of relief as this particular albatross was cut from the legislative and executive necks."[67]

In the aftermath of *Roe v. Wade,* many politicians who had previously ignored the abortion controversy joined the struggle to keep the debate over privacy rights in the courtroom and out of electoral politics. Although most national officials in the seventies and eighties expressed qualms about abortion on demand, enough uncommitted legislators voted with prochoice representatives to prevent Congress from enacting statutes or proposing constitutional amendments that would deny women the right to terminate their pregnancies. Late-twentieth-century politicians proved particularly successful when fighting against proposals that would strip the Supreme Court and lower federal tribunals of the jurisdiction necessary to make abortion policy. Prolife efforts to divest the national judiciary of its power to adjudicate abortion issues never received any substantial support in either the House of Representatives or the Senate. Even William French Smith, President Ronald Reagan's first attorney general, publicly criticized proposals that would limit federal jurisdiction over abortion.[68]

More generally, Congress avoided creating the sort of legislative record to which courts might intelligently defer. House and Senate debate on abortion was unusually truncated, and most issues were tabled rather than voted on.[69] Although prolife representatives introduced hundreds of constitutional amendments in the years following *Roe v. Wade,* only one of them was reported out of committee. Significantly, that proposal, the Hatch Amendment, would neither criminalize nor legalize abortion, but merely require that state legislatures decide when women could lawfully terminate their pregnancies. Thus, "without actually moving to outlaw abortion," Frederick Jaffe and associates note, national "legislators could

67. Rubin, *Abortion,* 84–85; Lawrence M. Friedman, "The Conflict Over Constitutional Legitimacy," in Gilbert Y. Steiner, ed., *The Abortion Dispute and the American System* (Washington, DC: The Brookings Institution, 1983), 21; John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade,*" *Yale Law Journal* 82 (1973): 947.

68. Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," *Stanford Law Review* 36 (1984): 902; Lasser, *The Limits of Judicial Power,* 238, 241.

69. Roger H. Davidson, "Procedures and Politics in Congress," in Gilbert Y. Steiner, ed., *The Abortion Dispute and the American System* (Washington, DC: The Brookings Institution, 1983), 45–46; Vinovskis, "Abortion and the Presidential Election," 226, 229; Rubin, *Abortion,* 91–92; Bob Packwood, "The Rise and Fall of the Right-To-Life Movement in Congress: Responses to the *Roe* Decision, 1973–83," in J. Douglas Butler and David F. Walbert, eds., *Abortion, Medicine, and the Law,* 3rd ed. (New York: Facts on File, 1986), 6–9.

demonstrate their concern about it, while at the same time disposing of this troublesome issue by throwing it back to the states."[70]

Politicians frequently refused to serve on legislative committees whose jurisdictions might force them to take up privacy rights. Dan Quayle, for example, avoided the Judiciary Committee when first elected to the Senate. "They [were] going to be dealing with all those issues like abortion," he told an interviewer, and Quayle "want[ed] to stay as far away from them" as he could.[71] Even congressional committees whose responsibilities touched on abortion did their best to avoid that controversy. Members of a House Select Committee on the Population of the United States charged with considering such subjects as contraception and teenage pregnancy informed the experts testifying before them that witnesses would not be permitted to discuss abortion and would be silenced if they did so at any length.[72]

The only abortion issue that Congress consistently considered at length in the years following *Roe* was whether Medicaid funds could be used to pay for abortions. This issue tied abortion questions to those social welfare issues that have divided the national parties since the New Deal. Hence, mainstream politicians, particularly those in the Republican party, were able to point to their general opposition to governmental welfare spending when explaining their willingness to deny financing to indigents seeking abortion. Significantly, some prochoice members defended their decision to support the appropriations measure to which the Hyde Amendment was attached by expressing their certainty that the judiciary would reinstate Medicaid funding for abortions. Senator Birch Bayh announced that he was voting for the omnibus bill because many of its features were desirable and he was "confident that any court ruling will hold [the abortion provision] unconstitutional."[73]

Abortion debate has always been more intense in state legislatures than in Congress. Even before *Roe,* prochoice forces in some communities were strong enough to repeal all restrictions on abortion. Prolife forces in others were strong enough to pass measures immediately after *Roe* renewing their state's commitment to regulating abortion.[74] Local officials can frequently take firmer stands on reproductive rights because their smaller

70. Frederick S. Jaffe, Barbara Lindheim, and Philip R. Lee, *Abortion Politics: Private Morality and Public Policy* (New York: McGraw-Hill, 1981), 115.

71. Richard F. Fenno, Jr., *The Making of a Senator: Dan Quayle* (Washington, DC: CQ Press, 1989) 20; Michael C. Munger, "Allocation of Desirable Committee Assignments: Extended Queues versus Committee Expansion," *American Journal of Political Science* 32 (1988): 335. President Bush apparently shares this concern. See Fred Barnes, "White House Watch: Prenant Silence," *The New Republic* 205 (August 19 & 26, 1991): 12.

72. Henry P. David, "The Abortion Decision: National and International Perspectives," in James Tunstead Burtchaell, ed., *Abortion Parley* (Kansas City: Andrews and McMell, 1980), 59.

73. John T. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* (New York: The Free Press, 1979), 107. See Rosenberg, *The Hollow Hope,* 339–340.

74. For a good summary of legislative activity in the years following *Roe,* see Glen Halva-Neubauer, "Abortion Policy in the Post-*Webster* Age," *Publius* 20 (1990): 32–34.

constituencies share their political preferences. Persons seeking political office in urban college towns safely advocate abortion on demand; candidates wishing to represent poorer, rural districts take few electoral risks when they condemn such policies.

Nevertheless, several studies suggest that most local officials are not eager to take full responsibility for making abortion policies. One state legislator described the Ohio House of Representatives as consisting of "ten strong pro-choice people, ten strong pro-life, and 79 legislators who would rather the issue would go away." Another local representative commented that "none of us but the fringe players [advocates] want to vote on this." A survey of Minnesota legislators found that only ten percent thought abortion policy should be made in the states. More than half of the representatives surveyed stated that abortion should either not be a public policy issue or that the federal judiciary should resolve the matter. Indeed, a Minnesota state legislator who sought to force a floor vote on abortion was threatened with loss of district benefits by other representatives not eager to take public stands on that issue.[75]

Local officials who publicly identify with either the prolife or prochoice movements frequently seem uninterested in the policy consequences of those restrictions on abortion being debated in their state legislatures. Many socially conservative representatives support tough bans on abortion that please prolife activists, but they spend little energy constructing policies that might satisfy constitutional standards. Eva Rubin observes that these legislators "often seemed little concerned with the constitutionality of their product and passed the buck with alacrity to the courts."[76] Because from 1973 to 1989 the Supreme Court generally declared restrictive abortion policies unconstitutional, proponents of abortion rights did not waste precious political resources fighting such measures in the state legislature. Indeed, some prochoice activists asked socially liberal representatives to eschew efforts to moderate severe restrictions on abortion because the revised legislation might better withstand constitutional challenge in federal courts.[77]

For fifteen years, this implicit compromise served the electoral needs of most public officials. Many persons opposed to abortion did not blame their state representatives for not implementing restrictions on abortion because they perceived that the courts were the institution responsible for making prochoice decisions. Many persons who favored abortion rights

75. Patricia Bayer Richard, "They'd Rather It Would Go Away: Ohio Legislators and Abortion Policy," paper presented at the 1991 Annual Meeting of the Midwest Political Science Association, Chicago, IL, April 18–20, 1991: 7–8; Janna C. Merick and Stephen I. Frank, "Single-Issue Politics: The Case of Abortion in Minnesota," paper presented at the Midwest Political Science Association Convention, Chicago, IL, April 24–26, 1980; Raymond Tatalovich, and Bryon W. Daynes, *The Politics of Abortion: A Study of Community Conflict in Public Policy Making* (New York: Praeger 1981), 202–203, 216 n.172; Glen Halva-Neubauer, "Abortion Policy in the Post-*Webster* Age: The Case of Minnesota," paper delivered at the Midwest Political Science Association Meetings, Chicago, IL, April 18–20, 1991: 41.

76. Rubin, *Abortion,* 130–131.

77. Debra W. Stewart, and Jeanne Bell Nicholson, "Abortion Policy in 1978," *Publius* 9 (1979): 165.

did not blame their elected officials for passing prolife legislation because they believed they could trust the judiciary to protect those rights. Politicians who did not wish to be clearly identified as being prochoice or prolife could make pointed comments about the *Roe* decision that avoided clearly stating their position on the underlying abortion issue.[78] Thus, although *Roe* clearly disrupted normal politics at first, legislative efforts to keep abortion in the courts minimized the damage. Rubin points out that as a result of continued judicial policymaking, the abortion conflict was "tamed, limited, and confined by the ritual dance, back and forth, between legislatures and courts."[79]

In the 1980s, prolife forces did succeed in dominating one national political institution, the presidency. Republican candidates who campaigned against *Roe* won three consecutive presidential landslides,[80] while in the White House, President Reagan and (to a lesser extent) President Bush announced their hostility to abortion, occasionally proposed legislation restricting access to abortion and appointed movement "profamily" conservatives to visible domestic policymaking positions. Prolife activists were particularly pleased when President Bush interpreted federal regulations as forbidding governmental assistance to any program that even mentioned abortion as a reproductive choice.

Nevertheless, Republican executives hostile to abortion had significant difficulty convincing mainstream legislators to challenge judicial decisions legalizing prochoice policies. In retrospect, the Reagan/Bush administration was apparently far less committed to making abortion policy than many of its public statements indicated. The successful enactment of Reagan's massive tax and domestic spending cuts suggests that his failure to obtain legislation undermining *Roe* cannot be attributed to any general weakness in the governing majority that dominated American politics from 1980 to 1982. Rather, in order to preserve the united coalition necessary to sustain their attack on the welfare state, President Reagan and his associates deliberately chose to deemphasize legislation and constitutional amendments that might expose and exacerbate internal divisions within the Republican party (and among Democratic "boll weevils") over abortion. As James Sundquist observes, "in order to get on with his pressing economic agenda," the president "had to avoid, postpone, and subordinate divisive conflicts over the social and moral measures of the New Right."[81]

President Reagan did attempt to overturn *Roe* by placing many socially conservative justices on the federal bench,[82] a strategy that was fairly

78. Rubin, *Abortion,* 95–98.

79. Rubin, *Abortion,* 145.

80. Though studies suggest that abortion had very little to do with those electoral triumphs. Vinovskis, "Abortion and the Presidential Election," 200–201; Donald Granberg, "The Abortion Issue in the 1984 Election," *Family Planning Perspectives* 19 (1987): 59–61.

81. Sundquist, *Dynamics of the Party System,* 442. See Lasser, *The Limits of Judicial Power,* 219; Rosenberg, *The Hollow Hope,* 185; Davidson "Procedures and Politics in Congress," 35.

82. David M. O'Brien, "The Reagan Judges: His Most Enduring Legacy?" in Charles O. Jones, ed., *The Reagan Legacy: Promise and Performance* (Chatham, NJ: Chatham House, 1988);

successful during the first six years of his presidency. Many Senators who were unwilling to take a strong open stand against abortion proved willing to confirm Reagan's judicial nominees because their votes were either not publicized or not interpreted as policy decisions on abortion.[83] The Reagan administration's attempt to place Judge Robert Bork on the Supreme Court, however, proved an exception to this rule. The Senate quashed that nomination, in part, because prochoice activists were able to convince the public that a vote for Bork was a vote to overturn *Roe v. Wade.* Nevertheless, senators quickly demonstrated that their rejection of Bork could not be understood as signifying their approval of constitutional abortion rights. The next justice approved by the Senate, Judge Anthony Kennedy, never stated that he favored any specific reproductive liberty, but talked vaguely of recognizing some freedoms that were not explicitly mentioned in the Constitution. While a senator voting for Bork voted to overrule *Roe,* a senator voting for Judge Kennedy voted to leave that decision to the nominee. By rejecting Bork and unanimously confirming Kennedy, the Senate, in effect, voted fifty-eight to forty-two to keep abortion out of electoral politics.

Judicial rulings hostile to abortion rights did not prove to be beneficial overall for the GOP. Indeed, in the wake of *Webster v. Reproductive Health Services,*[84] many Republican elites made renewed efforts to find some safe way of removing abortion from national politics. In a manner reminiscent of the Democrats in 1856, prominent national Republican officials now declared that their party had no position on abortion (other than, perhaps, popular sovereignty) and proclaimed the wish to campaign on the party's traditional economic positions. Responding to increased prochoice sentiment in the public and within the GOP, Lee Atwater and other leaders of the Republican party announced that their coalition was a "big tent" under which proponents and opponents of abortion on demand were both welcome.[85] President Bush professed not to know or care what his judicial nominees, Judges David Souter and Clarence Thomas, thought about abortion. Many Democrats, meanwhile, like the Whig/Republicans in 1856, seemed more interested in emphasizing their position on abortion (cf. slavery) than in calling for the kind of state-sponsored welfare programs that have previously united their political coalition. The Democratically controlled Senate Judiciary Committee, for example, focused much of its energy elucidating Judge Souter's and Judge Thomas's position on

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Walter F. Murphy, "Reagan's Judicial Strategy," in Larry Berman, ed., *Looking Back on the Reagan Presidency* (Baltimore: Johns Hopkins University Press, 1990); Rubin, *Abortion,* 178–179.

83. O'Brien, "The Reagan Judges," 71.

84. 492 U.S. 490 (1989).

85. Robin Toner, "Room in G.O.P. for Abortion Rights, Quayle Says," The *New York Times* (national edition) 141 (October 9, 1991): A9 (Vice President Quayle endorses the "big tent"); Debra L. Dodson and Lauren D. Burnbauer, *Election 1989: The Abortion Issue in New Jersey and Virginia* (NJ: Eagleton Institute of Politics 1990), 85; Halva-Neubauer, "Abortion Policy," 42.

abortion, and rarely exhibited concern about how those jurists might rule on the legal and constitutional rights of labor unions or the poor.[86]

THE PERSISTENCE AND TACTICS OF LEGISLATIVE DEFERENCE

A brief survey of American history indicates that these three case studies hardly exhaust historical instances of legislative deference to the judiciary. Case studies of specific Supreme Court decisions and litigation campaigns routinely acknowledge that mainstream politicians relied on a wide variety of overt or subtle devices to encourage or facilitate judicial declarations that significant federal or state policies were unconstitutional. In his account of *Fletcher v. Peck*,[87] C. Peter Magrath notes that "at all times the claimants had the covert support of the Jefferson administration and strong support within Congress." Gerald G. Eggert demonstrates that lawyers in President Cleveland's justice department consciously adopted strategies that strengthened the constitutional case against the income tax.[88] Likewise, when confronted with complex crosscutting issues, elected officials have frequently insisted that these policy decisions should be made by the federal judiciary. Republican party moderates in 1865 and 1866 decided to let the Supreme Court determine the scope of federal power under section 2 of the Thirteenth Amendment.[89] In 1904, the House Committee on Elections stated that Congress should not determine whether a disputed South Carolina election had violated the Fifteenth Amendment, but that the Supreme Court was the "proper forum for the decision of constitutional and other judicial questions."[90] Further examples fill out the story of Congress considering and enacting legislation that purposely failed to answer relevant constitutional questions. In the late nineteenth century, Senator Lindsay, attempting to resolve a policy dispute between the eastern and western wings of the Democratic party over the income tax of 1894 refused, along with other party moderates, to accept amendments that would have specified what earnings were subject to the statutory levy. Lindsay maintained that "it is better to let the courts settle this question than by attempting to enumerate fail to include the whole scope of constitutional limitation."[91] During the legislative debates

86. Dodson and Burnbauer suggest that Democrats are now able to present a fairly unified front on abortion because "pro-life voters who care passionately about the issue have already defected to the Republican party." Dodson and Burnbauer, *Election 1989*, 86.

87. 6 Cranch 87 (1810).

88. C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Cases of Fletcher v. Peck* (New York: W.W. Norton, 1966), 58; Gerald G. Eggert, "Richard Olney and the Income Tax Cases," *Mississippi Valley Historical Review* 48 (1961): 26.

89. Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863–1869* (Lawrence, KS: University Press of Kansas, 1990), 69. The judiciary was never given the opportunity to make civil rights policy because President Johnson vetoed the Civil Rights Act of 1866. Congressional proponents of civil rights, fortified by the election of 1866, responded by passing the Fourteenth Amendment.

90. House Report No. 1740, 58th Cong., 2d sess., 1904, p. 3.

91. *Cong. Rec.* (June 26, 1894): 6814.

on Civil War loyalty oaths and the income tax, many representatives agreed that Congress should not consider the constitutional merits of proposed measures because that was the responsibility of the federal judiciary. Those representatives who did offer constitutional commentaries limited their analyses to predictions of what the justices would, in fact, do.[92]

Public officials have frequently asserted that they were forced by circumstances either to vote for or to sign legislation containing clauses they believed were unwise or unconstitutional. Before the Supreme Court outlawed the practice in *INS v. Chadha,*[93] presidents repeatedly complained that they had been obliged to accept unconstitutional legislative vetoes as the price for obtaining the powers they believed necessary to administer the government.[94] Many leading Democrats publicly opposed the income tax of 1894 on policy and constitutional grounds but voted for the measure because the hated provision was attached to the Wilson-Gorman tariff.[95] Members of the early nineteenth-century New York legislature openly declared that they wished to repeal the steamship monopoly at issue in *Gibbons v. Ogden,*[96] but they feared that the Supreme Court would find that such legislation violated the contracts clause.[97]

Party moderates have solicited judicial policymaking by expanding federal jurisdiction. Lasser points out that the *Test Oath Cases*[98] and *Ex Parte Milligan*[99] were handed down shortly after the Reconstruction Congress passed legislation that facilitated judicial review of civil liberties issues. When the Court proceeded to make decisions legislators disapproved of, that jurisdictional grant was promptly repealed and the Court immediately adopted a more passive attitude toward congressional policies.[100] Statutory provisions expediting judicial review of controversial issues have also served as important legislative compromises. Congress in the 1970s and 1980s was under great pressure to pass laws reforming campaign finance and reducing the deficit, but representatives could not agree on any specific response to these public demands. Both the Federal Elections Campaign Act of 1974 and the Gramm-Rudman-Hollings Act were enacted after extended debate only when legislators opposed to several provisions in each bill were induced to support their passage by the addition of

92. Morgan, *Congress and the Constitution,* 122–39, 154, 156.

93. 462 U.S. 919 (1983).

94. Barbara Hinkson Craig, *Chadha: The Story of an Epic Constitutional Struggle* (New York: Oxford University Press, 1988); James L. Sundquist, *The Decline and Resurgence of Congress* (Washington, DC: The Brookings Institution, 1981), 345–354.

95. Cong. Rec., June 27, 1894, 6611, 6894; Edward Stanwood, *American Tariff Controversies in the Nineteenth Century,* vol. II (Boston: Houghton, Mifflin, 1903), 326, 338, 343, 354.

96. 22 U.S. 1 (1824).

97. Wallace Mendelson, "New Light on *Fletcher v. Peck* and *Gibbons v. Ogden,*" *Yale Law Journal,* 58 (1949).

98. *Ex Parte Garland,* 71 U.S. 333 (1866); *Cummings v. Missouri,* 71 U.S. 277 (1866).

99. 71 U.S. 2 (1866).

100. Lasser, *The Limits of Judicial Power,* 90–92.

clauses that ensured that the Court would immediately have the opportunity to delete the offending sections of both measures.[101]

Politicians frequently use the judicial recruitment process to advance their policy goals. The Reagan administration sought to achieve its social agenda primarily by staffing the justice department and judiciary with movement conservatives.[102] William Howard Taft lobbied hard to ensure that the personnel of the Supreme Court would restrain legislatures imbued with socialistic doctrines.[103] The Truman administration deemphasized legislative efforts to eradicate segregation and instead sought to create a federal judiciary hostile to Jim Crow institutions. Southern Democrats who were unwilling to vote for civil rights proposals proved willing to confirm federal justices who were known to be strong proponents of racial equality.[104] When the Republicans captured the White House in 1952, they continued to seek judicial solutions for civil rights questions. Robert Burk notes that although "President Eisenhower [was] unenthusiastic about school desegregation legislation . . . , probably [his] greatest contribution to the long-term struggle against Jim Crow was the appointment of integration supporters to Southern federal courts." Eisenhower's Supreme Court nominees were all known proponents of black civil rights when they were nominated to the bench, and recent studies suggest that they were selected for that reason.[105]

Politicians in the executive branch also made significant use of the amicus brief in their successful efforts to have the judiciary promote racial equality. The Supreme Court began issuing broad rulings in civil rights cases only after the Truman Administration supported the NAACP Legal Defense Fund's contentions in *Shelley v. Kraemer,*[106] *Sweatt v. Painter,*[107] and *Brown v. Board of Education.*[108] "President Eisenhower's reported neutrality in *Brown* Steven Puro points out, "is belied by the amicus brief submitted

101. Louis Fisher, *Constitutional Dialogues: Interpretation as a Political Process* (Princeton: Princeton University Press, 1988), 36; Craig, *Chadha,* 70.

102. O'Brien, "The Reagan Judges"; Murphy, "Reagan's Judicial Strategy."

103. For example, Walter F. Murphy, "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," in Philip Kurland, ed., *1961: The Supreme Court Review* (Chicago: University of Chicago Press, 1961).

104. Sundquist, *Dynamics of the Party System,* 274–275; Lawrence H. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: New American Library, 1985), 83–84.

105. Robert Fredrick Burk, *The Eisenhower Administration and Black Civil Rights* (Knoxville: University of Tennessee Press, 1984), 199; Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court,* 2nd ed. (New York: Oxford University Press, 1985), 251–271; Michael A. Kahn, "Shattering the Myth About President Eisenhower's Supreme Court Appointments," *Presidential Studies Quarterly,* 22 (1992).

106. 334 U.S. 1 (1948).

107. 339 U.S. 629 (1950).

108. 349 U.S. 294 (1954). See Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1967); Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 1975), 251–253, 277, 558–561.

by his administration in support of the petitioners in that case."[109] Indeed, in light of assertions about Eisenhower's "hidden hand presidency," scholars might consider the significance of Senator Richard Russell's assertion, the day *Brown* was decided, that the Court had become "a pliant tool" in the hands of the "political arm of the Executive Branch of the Government."[110] More generally, Puro suggests that "the U.S. as *amicus* may be urging the Court . . . to espouse socially unpopular views it would be politically risky for the executive to adopt." "In this way," he concludes, "such 'unpopular' or 'progressive' views are transformed into public policy but the onus of having made the decisions rests on the Court and not upon the executive."[111]

Congress rarely becomes directly involved in litigation, but legislative input has directly influenced several important legal decisions. As Louis Fisher points out, representatives "encourage judicial policymaking" by "pass[ing] statutes that give standing to litigants, provid[ing] fees for attorneys, and establish[ing] separate agencies such as the Legal Services Corporation to bring suit on broad public issues."[112] The Voting Rights Act of 1965 did not ban the poll tax outright, but Congress declared that such practices were unconstitutional and ordered the attorney general to initiate the litigation that eventually culminated in the Supreme Court's decision to strike down such levies in *Harper v. Virginia Board of Elections.*[113] Lasser suggests that the Court in *Ex Parte Milligan* may have been swayed by the presence of prominent Republican lawmakers who served as counsel for the parties attacking the constitutionality of martial law declarations in the North during the Civil War.[114] The appeal in *Chadha* might have lacked the necessary adversarial parties had the House and Senate not submitted an amicus brief. Barbara Craig observes that "perhaps because [congressional] leadership had been unable to stem the tide of legislative vetoes, the hope was that by keeping the case alive, the court could and would do so."[115]

Although the issues raised by many of the cases cited above did not immediately threaten to disrupt existing political cleavages, with rare exception, legislative deference to the judiciary has taken place concerning those issues that the major parties are, by their nature, not well structured to debate. In particular, the Court has also played a major role when sectional disputes have arisen that crosscut national party alignments, as we have seen when slavery (and civil rights) pitted the North against the

109. Steven Puro, "The United States as *Amicus Curiae*," in S. Sidney Ulmer, ed., *Courts, Law, and Judicial Processes* (New York: Free Press, 1981), 222.

110. William S. White, "Ruling to Figure in '54 Campaign," *New York Times* 103 (May 18, 1954): 20. See Fred I. Greenstein, *The Hidden-Hand Presidency: Eisenhower as Leader* (New York: Basic Books, 1982).

111. Puro, "The United States as *Amicus Curiae*," 229.

112. Fisher, *Constitutional Dialogues*, 16–17.

113. 383 U.S. 667 (1966). See United States Statutes at Large 1966, 442–443.

114. Lasser, *The Limits of Judicial Power*, 69.

115. Craig, *Chadha*, 103.

South, antitrust pitted the East against the West, and now, when abortion pits the coasts against the hinterlands. Elected officials often attempt to facilitate judicial policymaking immediately before a realignment occurs, but *Chadha, Buckley v. Valeo*[116] (major parts of campaign finance law declared unconstitutional), and *Bowsher v. Synar*[117] (part of budget balancing act declared unconstitutional) were decided during a period of sustained dealignment. Indeed, at least one instance of legislative deference, the congressional decision to refer disputes over black suffrage to the courts, occurred shortly after a major realignment removed racial issues from national electoral politics.

This contrast in legal scrutiny of issues that are on and off the political agenda at any given time helps explain the contemporary judicial practice of affording more scrutiny to civil liberties claims than to claims of economic right. Many commentators point out that this two-tiered review has no logical justification, that "the right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right."[118] There is, however, a clear political difference between the freedom of contract and the right to privacy. Disputes over property rights lie at the heart of the New Deal party system. Many disputes over civil liberties, on the other hand, crosscut that partisan alignment. Thus, contemporary party moderates often advance economic proposals, but frequently sidestep social issues, hoping perhaps that these issues will be resolved by adjudication. The preferred position of civil liberties in the Supreme Court reflects nothing more than the preferred position of property issues in the New Deal party system.

LEGISLATIVE DEFERENCE AS A POLITICAL STRATEGY

Judicial policymaking more frequently intensifies than moderates the baneful effects that crosscutting issues have on existing partisan cleavages. Thus, mainstream politicians cannot expect that citizens will continue to vote on those issues that have traditionally divided the major parties *because* the judiciary has taken the responsibility for settling other political controversies. Rather, the available evidence indicates that legislative deference to the judiciary serves the interests of party moderates and political elites in obtaining favorable policies on crosscutting issues only when citizens continue to vote as they have in the past *in spite of* judicial efforts to settle other political controversies.

The judicial policymaking that takes place after legislative and executive invitations has consistently favored the interests of the presidential wing of the dominant national coalition or the elite wings of both major parties. The *Dred Scott* decision reflected the overrepresentation of Southerners in prominent national offices before the Civil War. During Reconstruction,

116. 424 U.S. 1 (1976).
117. 478 U.S. 714 (1986).
118. *Lynch v. Household Finance Corp.* 405 U.S. 538, 552 (1972).

the Court endorsed the milder policies promoted by the presidential wing of the Unionist/Republican party rather than the harsher policies preferred by radical Republicans. The series of activist decisions handed down by the Court at the turn of the twentieth century adopted the laissez-faire constitutional views of the Gilded Age's legal aristocracy. By the time *Brown* was decided, the political leaders and presidential wings of both national parties wanted to eradicate segregation practices. Finally, lawyers and opinion elites are far more supportive than the general public of contemporary Supreme Court decisions that protect such civil liberties as the right to burn the flag or the right to have an abortion.[119]

Although the substance of judicial policymaking has secretly pleased many party moderates, their use of the judiciary to buttress the existing party system has had more ambiguous consequences. Judicial policymaking typically aggravates political fissures because judges are less likely than elected officials to find acceptable compromises. Indeed, judges are less likely than elected officials to be interested in accommodating all parties to a controversy. Legislation typically reflects a variety of interests, but cases that cannot be settled out of court are normally decided in favor of one party or the other.[120] Moreover, a good deal of theory imbibed by justices insists that "the basic ingredient of decision is principle, and it should not be compromised and parceled out a little in one case, a little more in another, until eventually someone receives the full benefit."[121] For this reason, the judicial process is more prone than the legislative process to yield fairly well-defined winners and losers. Judicial rulings on the constitutionality of slavery, antitrust, and abortion policies, for example, have supported without much reservation the positions taken by proslavery, pro–laissez-faire, and prochoice activists. This judicial willingness to make more extreme policy decisions than elected officials leaves successful litigants less willing to accept political compromises and creates opposition to the new status quo among citizens who were willing to tolerate some compromises but cannot stomach the relatively immoderate position announced by the Court.

The success or failure of legislative efforts to encourage judicial policymaking thus depends on the extent to which citizens maintain their previous political attachments in the face of what they may perceive as disagreeable judicial decisions. History suggests that party moderates can obtain favorable Supreme Court rulings that do not significantly damage the dominant national coalition or existing party system only if at least one of three conditions is met. First, mainstream politicians will not suffer substantial harm if the Court makes policies that have broad popular support, even though political circumstances make their legislative enactment difficult. Such decisions as *Gideon v. Wainwright*[122] and *Griswold v. Connecticut*

119. See Brest, "Who Decides?"
120. See Murphy and Tannenhaus, "Publicity, Public Opinion and the Court," 993.
121. Fisher, *Constitutional Dialogues*, 10 (quoting Chief Justice Earl Warren).
122. 372 U.S. 335 (1963).

have proven to be fairly uncontroversial politically because few citizens in the late twentieth century vote for candidates who openly promise to deny lawyers or birth control prescriptions to indigents. Second, mainstream politicians will not suffer substantial harm if the Court makes policies that most people do not regard as important enough to consider when making electoral decisions. *INS v. Chadha* and *Buckley v. Valeo* have had little direct effect on the structure of partisan competition because the voting public is either unaware of precisely what was decided in these cases or does not vote for candidates on the basis of their specific positions on campaign finance reform or the legislative veto.[123] Third, mainstream politicians will not suffer substantial harm if most elites in both major coalitions support the policies that the courts are making. From 1936 to 1960, the public could not hold politicians accountable for judicial decisions condemning segregated institutions because neither the national Democratic party nor the national Republican party had any interest in overruling *Brown* and its progeny.[124]

Nevertheless, a circumstance in which the leading political elites of both major parties are refusing to challenge controversial Supreme Court decisions is likely to be unstable. Insurgents in the minority party are likely to "go hunting where the ducks are" in order to win control of their coalition and realign the party system in their image. In recent years, the emerging southern wing of the Republican party has used judicial rulings on such social issues as race and abortion both to bludgeon liberal, eastern Republicanism into oblivion and to detach important partisans of the New Deal coalition from the Democratic party. Moreover, at least until *Webster,* judicial policymaking facilitated these conservative Republican efforts by mobilizing prolife voters while demobilizing prochoice elites. The latter could continue supporting GOP candidates on economic issues, confident that courts would make the policies on social issues that they preferred.

The injuries suffered by the Democratic party as a result of such judicial decisions as *Roe,* however, can be overestimated. To begin with, the damage has taken place almost exclusively at the presidential level. In virtually all other electoral offices, Democrats, many of whom campaign on prochoice and pro–civil rights platforms, seem as strong as they have been throughout the post–World War II era. Moreover, studies repeatedly show that American voters and political contributors continue to be primarily concerned with pocketbook rather than social issues. Thus, much if not all of the conservative dominance of recent American presidential policies may stem from public dissatisfaction with Democratic economic (and foreign) policies, matters that the Warren and early Burger courts did not

123. Of course, the *Buckley* decision has had major indirect effects on voting choices by significantly affecting the campaign finance options open to different political entrepreneurs.

124. Taylor Branch's description of Republican and Democratic party efforts during the 1960 national election to woo black voters without antagonizing Southern whites offers an excellent illustration of the relatively similar civil rights programs of both major parties at the time. Taylor Branch, *Parting the Waters: America in the King Years 1954–63* (New York: Simon and Schuster, 1988), 312–313.

concern themselves with to any significant degree. Had President Carter successfully rescued the hostages in Iran and engineered an economic boom before the 1980 election, he might have won a landslide over Ronald Reagan of sufficient magnitude to convince a generation of Republican party moderates that their coalition could never capture the executive branch by campaigning on so socially conservative a platform.

Clearly, much more research is needed to determine whether legislative deference to the judiciary mitigates or exacerbates the influence that cross-cutting issues have on existing political cleavages. Nevertheless, one reason exists for thinking that strategy is of some utility, at least in the short run. When faced with social controversies that threaten to destroy their political base, party moderates, who presumably have a vested interest in adopting those tactics that will best preserve their political power, have repeatedly encouraged judicial policymaking. Diverting issues to the courtroom may prove to be only a temporary balm in most cases, but to desperate politicians transitory measures are better than no relief at all. In a manner reminiscent of democracy, legislative deference to the judiciary may be the worst strategic approach to disruptive partisan disputes except for all the others.

JUDICIAL REVIEW IN AN ACTUAL DEMOCRACY

No simple formula explains or describes every judicial declaration that some policy is unconstitutional. Legislative deference to the judiciary is only one of many historical causes of independent judicial policymaking. When the Court is temporarily dominated by "holdover[s] from the old coalition," justices "perform the counter-majoritarian functions ascribed to it by traditional theory."[125] The Hughes Court struck down federal economic regulations in such cases as *Carter v. Carter Coal Co.*[126] despite the best efforts of Democratic party leaders to discourage judicial interference with the New Deal. Justices have also proved willing to resolve hotly disputed partisan controversies when they perceive that the elected branches of government are not responding to them. Justice Lewis Powell defended his willingness to continue Warren Court policymaking by pointing to "the sluggishness of the legislative branch in addressing urgent needs for reform."[127] Moreover, courts clearly respond to the activities of persons outside the legislature. Institutional and individual litigants influence the Supreme Court by the manner in which they frame constitutional issues and time their presentations. In her study of the Legal Services Organization, Susan Lawrence demonstrates how staff attorneys successfully placed the constitutional rights of poorer Americans on the judicial agenda dur-

125. Funston, "The Supreme Court," 796.

126. 298 U.S. 234 (1936).

127. Lewis F. Powell, Jr., "What the Justices Are Saying . . ." *American Bar Association Journal* 82 (1976): 1455.

ing the late 1960s and obtained favorable outcomes in most cases.[128] Finally, the values of individual justices and the internal dynamics of particular courts obviously have a substantial impact on judicial decision-making. Justices Felix Frankfurter and Hugo Black differed considerably in their willingness to declare laws unconstitutional, even though both jurists were subject to the same external stimuli from politicians and lawyers while on the bench. Thus, phenomenon of legislative deference to the judiciary is best understood as providing an important supplement to these conventional explanations of why justices declare policies unconstitutional.

If persistent judicial policymaking is a consequence of certain relatively permanent features of political competition in the United States, then the Court's willingness to exercise its power to declare laws unconstitutional should not be considered an exceptional event. As long as two-party systems remain susceptible to crosscutting issues and the judiciary presents a viable alternative forum for decision-making, politicians can be expected to continue placing responsibility for unwanted political conflicts in the hands of the justices. Although there may be periods in American history when courts are relatively inactive, the forces underlying political efforts to invite judicial policymaking ensure that the federal judiciary will frequently play a prominent role in American politics.

The underlying political structures that give rise to legislative deference to the judiciary suggest that Warren/Burger/Rehnquist Court activism is particularly likely to be a political fixture in the near future. Nearly every political controversy has been nationalized in contemporary American politics.[129] Because national parties can reflect partisan cleavage on only a few of those issues, party moderates must regularly attempt to organize many conflicts out of electoral politics. When faced with this issue-overload, the modern "Congress has increasingly found the judicial system a convenient dumping ground for a number of difficult problems."[130] Future politicians will, no doubt, continue to encourage judicial policymaking on those issues that crosscut the dealigning New Deal party system, and on those issues that crosscut any future party system. In this political environment, justices willing to make public policy will have no shortage of policies to make.

The necessarily limited nature of partisan politics in two-party systems has important implications for political movements intent on retrieving some issue from judicial control. Liberals eager to make abortion a central issue in upcoming political campaigns, for example, might be less enthusiastic if they realized the probable consequences of their electoral success. Recent gubernatorial elections in Virginia, New Jersey, and Texas suggest

128. Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton: Princeton University Press, 1990).

129. Schattschneider, *The Semisovereign People,* 76–94; William M. Lunch, *The Nationalization of American Politics* (Berkeley: University of California Press, 1987).

130. Lunch, *The Nationalization of American Politics,* 133.

that some candidates will profit by highlighting their commitment to abortion rights.[131] This emphasis on abortion, however, has typically come at the expense of more traditional Democratic party issues. In order to appeal to prochoice voters, most of whom are fairly affluent, such politicians as Douglas Wilder, Bill Clinton, and Paul Tsongas either muted or abandoned concerns for the poor or labor. This change in political emphasis suggests that a judicial decision overruling *Roe* would not necessarily add to the number of issues at stake in future elections. Rather, candidates, political coalitions and voters will be forced to choose more openly among competing economic and social controversies. Abortion and other social issues may enter partisan politics only to the extent that certain economic issues get pushed out.

THE COUNTERMAJORITARIAN DIFFICULTY REVISITED

Constitutional commentators assume that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."[132] Although scholars find the character of judicial review troubling, few would have the justices wholly abandon the practice. Much legal theorizing consists of different attempts to describe the conditions under which the "countermajoritarian difficulty" may legitimately be overcome. Some academics, recognizing that democracy is not the only value constitutional societies prize, maintain that judicial review is justified when courts protect certain basic individual rights from governmental infringement. Others support judicial review whenever democratic majorities have consented to be ruled undemocratically. Members of yet another influential school of thought suggest that the judicial power is exercised appropriately when the justices declare unconstitutional those laws that interfere with democratic processes, be they broadly or narrowly construed. Bruce Ackerman proclaims that justices should adhere to the principles endorsed by previous democratic majorities at special constitutional moments.[133] The resulting, often vituperative, normative debates over the proper judicial function, however, proceed from a shared conception of the political context in which judicial review normally takes place. Proponents of judicial activism and judicial self-restraint, originalists and noninterpretivists, think it axiomatic that when justices declare laws unconstitutional, they overturn the policies preferred by lawmaking majorities.

131. For New Jersey and Virginia, see Dodson and Burnbauer, *Election 1989.*

132. Bickel, *The Least Dangerous Branch,* 16.

133. Bruce Ackerman, *We The People: Foundations* (Cambridge: Harvard University Press, 1991). The canonical works in the substantive rights, originalist, and democratic process schools of constitutional thought are, respectively, Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon & Schuster, 1990), and John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

This empirical presupposition cannot withstand any serious examination of American political and legal history. With the important exception of the New Deal, whenever a prevailing national majority clearly supported a policy, the Supreme Court declared that policy constitutional.[134] Whenever the Supreme Court declared a policy unconstitutional, no prevailing national majority clearly supported that policy. Moreover, key actors in the dominant national coalition typically either facilitated or otherwise blessed judicial rulings striking down federal and state laws. In many instances of judicial policymaking, the members of the "prevailing majority" who enacted the measure declared unconstitutional clearly encouraged the judiciary to second-guess their handiwork. The legislative invitation to make social policy in *Dred Scott* and other cases was expressed in the very text of the statute passed by Congress. Sometimes, the prevailing majority in one governmental institution has made a policy decision that the prevailing majority in another institution with at least as much right to speak on behalf of the American people maintained was unconstitutional. *Brown v. Board of Education,* for example, might be aptly subtitled *The Truman and Eisenhower Administrations v. Southern States.*

Theories of judicial review in a democracy will be of only limited interest until they correctly describe the circumstances in which judicial policymaking normally takes place. Conventional wisdom properly appreciates that in a well-ordered democratic republic, law should consist of the deliberate policy decisions made by a majority of the people's representatives who are electorally accountable to the public. Thus, the Supreme Court's power to declare laws unconstitutional seems problematic if in the typical case of judicial policymaking unelected justices strike down laws that represent the deliberate policy decisions of legislative majorities that are electorally accountable to the public. When the actual political histories of the most important instances of judicial policymaking are examined closely, however, the relationship between judicial review and the democratic requirements of deliberate decision-making, majoritarianism, and political accountability are far more complex than the simplistic models presupposed by much constitutional commentary.[135]

134. The Marshall Court's efforts in the early 1830s to protect the rights of Native Americans may be another example of a truly countermajoritarian ruling. See *Cherokee Nation v. Georgia,* 5 Peters 1 (1831).

Many Supreme Court decisions can be described as countermajoritarian in the sense that they declare policies unconstitutional that are favored by most Americans. The Supreme Court's school-prayer and flag-burning decisions come to mind. For reasons that need further elaboration, however, these rulings did not strike down policies preferred by clear majorities of the people's elected representatives, the democratic standard normally used by persons concerned with the countermajoritarian problem. See Bickel, *The Least Dangerous Branch,* 16 (quoted above). Of course, decisions inconsistent with populist conceptions of democracy also present significant theoretical problems that will be explored in future work.

135. Of course, judicial review may be legitimate even when inconsistent with basic features of democratic governance. Walter Murphy and others have consistently reminded scholars that the United States is not a pure, but a *constitutional* democracy committed to protecting certain values against democratic majorities. See, e.g., Murphy, Fleming, and

For example, judicial review has not proven in practice to be as antithetical to political accountability as much theory suggests. The Supreme Court tends to engage in independent judicial policymaking only on those cross-cutting issues that voters have not chosen or have been unable to hold elected officials accountable for. Surveys suggest that few contemporary voters wish to hold politicians accountable for their stands on abortion, particularly when doing so would prevent them from voting their economic preferences. Many citizens in antebellum America wished to hold presidential candidates accountable for their position on slavery, but could not do so because neither party essayed very clear positions on that issue. Significantly, when a party arose in the late 1850s that offered voters a clear choice on slavery, candidates of that party refused to offer voters well-defined positions on economic issues.

A more accurate measure of the relationship between judicial review and political accountability would examine what happens when most citizens begin making electoral decisions on the basis of those issues on which the Court has been engaging in independent judicial policymaking. Here, too, the record indicates that the justices are fairly responsive to public demands that the Court retreat from earlier decisions. Both the New Deal and the Civil War suggest that whenever popular majorities elect an entire government opposed to the direction of recent judicial policymaking, the justices quickly abandon their effort to make those policies. Neither *Dred Scott* nor *Carter Coal* survived the clear installation of a hostile political regime. The Supreme Court is simply not structured to impede a determined majority for any length of time. For this reason, judicial decisions have proven fairly durable only when no such determined majority or executive exists.

These observations, I should emphasize, are not designed to celebrate independent judicial policymaking. The central point is simply that all exercises of the judicial power do not have the same relationship to democratic values. Realistic theories of the judicial function, thus, must examine the extent to which particular instances of judicial review actually promote or retard deliberate policymaking, majoritarianism, and political accountability. In some instances, judicial review is clearly inconsistent with ordinary understandings of democratic majoritarianism. The Court's attempt to strike down the New Deal, for example, does present the classic example of the "countermajoritarian difficulty." But if American political parties are not and cannot be structured to resolve every partisan issue that excites the general public, then judicial review, or some other form of policymaking by unelected officials, will consistently be an integral feature of politics in the United States.

Scholars may still conclude that judicial policymaking is always undemo-

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Harris, 1986, 23–33. Whether judicial review in practice actually advances the values of constitutional democracy, however, is a question with empirical components that members of this school of thought do not fully address.

cratic. If two-party systems cannot serve as adequate vehicles for crosscutting issues, then the democratic solution may be to adopt some other basis of political competition. When some issues must be removed from electoral debate, democracies should have them resolved by institutions whose members are not appointed for life and whose decisions can be reversed by ordinary legislative majorities. Other scholars, however, may insist that no other form of political competition will better insure deliberate decision-making, majoritarianism, and political accountability. They may further claim that, in the United States, the judiciary is frequently the only viable institution elected officials can turn to when they are unwilling or unable to resolve heated political controversies. In this view, democratic values are better promoted by having some conflicts resolved by justices appointed and confirmed by elected officials when the practical alternative is not having those conflicts resolved at all.