ABSTRACT

Title of Dissertation: PARTY WITH THE COURT: POLITICAL PARTIES AND THE NATIONAL JUDICIARY IN THE CREATION, MAINTENANCE, AND TRANSFORMATION OF POLITICAL ORDERS

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In the United States, the national judiciary plays a vital role in the creation, maintenance, and transformation of political orders. Political parties, the institutions primarily responsible for the operation of a political order, tend to be large and heterogeneous. This heterogeneity creates disjunction within the party and threatens to undermine partisan unity. In order to hold power over an extended period of time, parties-in-power must diffuse their intra-party tension. This dissertation explores the phenomena of parties using courts to diffuse intra-party tension by displacing highly divisive issues onto the national judiciary. This exploration reveals a pattern whereby the dominant wing of the party-in-power consistently secures its preferences through the courts to the detriment of minority wing preferences. To elucidate this pattern, three different political orders are examined. First, the Republican political order is examined to reveal how the dominant, conservative wing of the Party used the courts

to protect against invasive regulatory schemes favored by the progressive, minority wing of the Party. Second, an examination of the New Deal/Great Society Democratic political order reveals the role the courts played in enabling the liberal, dominant wing of the Party to circumvent conservative, minority wing obstruction of civil rights and how the courts helped liberal Democrats woo African American voters so as to transform and liberalize the Democratic Party. Third, the period of divided government is detailed to reveal how the dominant, economically conservative wing of the Republican Party uses the Supreme Court to manage issues highly salient to the socially conservative minority wing. Judicial administration of religion in education, homosexual rights, and abortion resulted in the Republican Party eschewing those issues from its legislative agenda and, simultaneously, resulted in center-left policy consistent with dominant wing preferences. By judicializing social issues, the Republican Party created greater Party unity than what would otherwise be possible, which enabled it to rise to power at the turn of the 21st Century. The party-court dynamic has implications for judicial power, party government, and constitutional theory and each are explored in the conclusion.

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by

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TABLE OF CONTENTS

Chapter 1

Introduction: The Party-Court Dynamic In American Politics

The ability to gain and hold power defines the relative success of political parties in American politics. When parties hold power over extended periods of time, they effectively reorder institutional commitments and the American political order.[1] However, a paradox marks American political history. National parties have been highly competitive throughout American political history, yet, much of that same history is defined by extended periods of one-party control of the national government. Moreover, the American party system begets strange bedfellows, which is to say that national parties in the United States frequently contain intra-party coalitions that have little in common with one another. So, how, in a system defined by competitive parity and disjointed coalitions, can a political party maintain and extend its hold on power so as to reorder American political commitments?

In order to answer that question, we must turn to an unusual source of partisan stability: the national judiciary. The tale of American party politics cannot be told without detailing how parties utilize the national judiciary, particularly the Supreme Court, as a force for stabilizing, maintaining, and transforming their national political coalitions. The development of the modern national judiciary, with its extensive jurisdiction, uncontested powers of review, and a highly regarded ultimate court of appeal, provides political parties the means of diffusing intra-party tension over political controversies by shifting such issues to the courts. The same institutional features that

[1] I borrow the term "political order" and "political regime" form the American political development literature. While scholars of American political development disagree on the exact terms of what constitutes a political regime, they largely agree that political orders are marked by the dominance of one party in national elections (Plotke 1996; Polsky 1997); the persistence of the party's ideological commitments in American political discourse (Polsky 1997); and the creation of political and institutional currents that layer on top of old state structures (Orren and Skowronek 1994; Skowronek 1993).

provide the courts with a democratic pedigree also provide judges with a sympathetic ear to certain intra-party demands, which make the courts particularly suitable institutions to rely upon during periods of intra-party crisis.

This dissertation is dedicated to exploring the ways in which political parties, and the coalitions that make up those parties, use the courts and the subsequent impact judicial decision-making has on political parties. Examining how political parties use courts to manage their national coalitions and, transversely, the impact court decisions have on the composition of power-holding coalitions facilitates a fuller understanding of how the national judiciary functions in American politics. Without the proper analytic framework, we fail to understand how political parties use courts as a necessary means of diffusing inherent intra-party tension, which, in turn, enables parties to govern over extended periods of time.

There have been numerous efforts to link judicial action with governing coalitions. In 1957, Robert Dahl argued that the Supreme Court will never serve as an effective check against existing national majorities due to the fact that Supreme Court justices are appointed by party leaders that have an interest in assuring that justices share many or most of their ideological preferences. Through some rudimentary but effective empirical testing, Dahl showed that the Supreme Court rarely struck down laws passed by the current national governing coalition. Instead, the Court upheld the acts of current legislative majorities and, on the rare occasions it exercised its powers of review, the Court struck down legislation that represented the interests of old legislative majorities.

Thus, the Court legitimated the current power-holding coalition by upholding its statutes while clearing away the commitments of old political regimes.

Dahl's article created a framework adopted and improved upon by a second generation of scholars. Mark Graber examined Marshall Court decision-making in light of the Jeffersonian political regime and found that Marshall Court decisions were not simply pro-Federalist rulings that ran counter to the preferences of Jeffersonian Republicans, but, rather, the Court tended to craft opinions based on the common preferences that the Federalists and Jeffersonian Republicans shared (1998). Scot Powe (2000) and Michael Klarman (1996) made similar observations regarding the Warren Court's pro-civil liberties rulings, arguing that these decisions fit within New Deal-Great Society liberalism and the political climate of the day, rather than as the Court acting independently. Cornell Clayton and J. Mitch Pickerill examined how Rehnquist Court federalism decisions map well onto the emerging views of the dominant, Republican Party (2004).

The recent work in regime politics takes seriously Dahl's idea that the Supreme Court operates as a coordinate partner with the dominant power-holding coalition in American politics and that Court decisions map well with the dominant political ideology of the day. However, the regime politics scholarship appreciates the relationship between national coalitions and courts without making courts mere agents of political coalitions. Courts remain independent and judicial independence manifests in ways unanticipated by political actors. For example, Ken Kersch argued that the march of civil liberties throughout the 20th Century was nothing of the kind. Rather, the Supreme Court

frequently expanded and contracted civil rights based on the demands of the regulatory state (2004). Thus, preferences of the dominant national coalition can result in expansion and/or contraction, sometimes simultaneously, of civil rights and liberties whenever the Court concretizes political settlements on the contours of rights regimes such that expansion on dimension of civil rights decreases protection on another dimension.

While Kersch showed how the preferences of the dominant national coalition can manifest on multiple dimensions, Mark A. Graber demonstrated how the courts function as a policymaking institution when elected officials are either unable or unwilling to act (1993). According to Graber, the courts rarely act in "countermajoritarian" ways since legislators regularly rely on the courts to make policy areas too controversial to risk legislating. George Lovell expanded on this idea and showed how courts regularly make policy when there is no clear legislative intent because legislators are unable to resolve conflicts regarding key statutory provisions (2003). The dominant national coalition benefits from deference to the national judiciary in at least two ways. First, by avoiding highly controversial issues that threaten their electoral security, courts essentially take the blame for making policy in areas that political actors have an electoral incentive to avoid. Second, creating vague statutory language enables the construction of broad legislative coalitions necessary to pass Congress. By avoiding high degrees of specificity, legislators with differing aspirations and goals for the legislation can agree on statutory language since unclear wording can encompass various interpretations.

Kevin McMahon's recent work on President Roosevelt's role in paving the way to *Brown v. Board of Education*[2] developed the idea of the Supreme Court advancing the aspirations of certain members of the dominant national coalition (2004). Specifically, McMahon addresses why the Court acted on civil rights when it did and the role the president played in facilitating judicial action. By placing judges sympathetic to liberal Democratic civil libertarian preferences and deferential to the exercise of federal power, Roosevelt created a Court that would "advance [Roosevelt's] intraparty and institutional interests… [and create] a legal order clearly in conflict with his legislative compromises on race" (2004, 13). McMahon's work touches on the dynamics between political parties and the courts but his main focus is on highlighting presidential power through judicial decision-making. The impact of these decisions on the party is largely absent.

Scholarship that places Supreme Court decision-making in the context of political regimes offers better explanations of judicial decision-making than looking at such decisions in isolation. Yet, the design of this scholarship was to cast judicial decision-making in light of national coalitions and not to examine the ways in which the judiciary impacts partisan politics. So, despite a vibrant literature on courts in regime politics, we still know little regarding how the existence of the judiciary impacts both intra- and inter-party politics, the impact of judicial decisions on the internal composition of political parties, and whether judicial decision-making can aid or harm partisan power-holding in American politics. In this dissertation, I address this gap by arguing that courts play a vital role in American intra-party politics by creating a means of stabilizing, maintaining, and transforming heterogeneous coalitions. While courts help extend the life of parties-

[2] 347 U.S. 483 (1954).

in-power, court rulings tend to favor the dominant wing of the party-in-power. Thus, courts play a role in managing power-holding coalitions *and* create outcomes preferred by privileged coalitions within the party-in-power. It is to this pattern that we now turn.

The American Party System

The politics of power-holding in the United States is tricky at best. The American constitutional system was designed specifically to preclude the existence of political parties, yet, the party-free constitutional order only lasted until need for an organized opposition arose (Hofstadter 1968) and ambitious politicians organized to form a viable alternative to the political status quo (Aldrich 1995). The emergence of coalitions, designed to mobilize political opposition and organize for electoral and political victory, ended the noble dream of a government managed through republican virtue. Yet, political parties quickly became the central conduit through which political interests held power in the United States, which gave rise to an odd phenomena. Political parties serve to mobilize political interests and collectivize political action, however, the American two-party system is not well suited to establishing stable, homogeneous political coalitions.

American political parties can best be described as large coalitions of smaller coalitions. Parties with homogeneous preference structures are rare. In large part, the heterogeneity of interests inherent in American parties stems from the need for large, national coalitions in order to secure electoral victories.[3] Heterogeneity of interests

[3] Duverger argued that countries with first-past-the-post voting systems almost always result in two-party systems like that in the United States (1963). These two-party systems are the most susceptible to national

always causes disjunction within a political party but the degree of the disjunction varies significantly. Minor disjunction arises from dedicating party energy to certain issues while relegating other issues to the party's backburner. When an issue is not particularly salient, ignoring an issue or dedicating limited energy to its resolution does little to impact partisan unity. However, when an issue on which the party is divided becomes salient and constituents of party members demand action, parties must find a way to deal with this heterogeneity of interests without dividing the party. This issue is particularly problematic for the party-in-power where small defections can result in a loss of power. So how does a party-in-power prevent defection while balancing the competing interests within its national coalition?

To answer this question, we must further dissect the nature of political parties in the United States and develop a useful analytical framework through which to understand the role of courts in partisan power-holding. As noted above, political parties contain numerous coalitions. The nebulous nature of political coalitions makes the study of intra-party coalitions difficult. Compounding the difficulty, intra-party coalitions can appear and disappear as quickly as political expediency warrants. Moreover, coalitions can form on multiple policy dimensions so that stable and cohesive coalitions often elude demanding empirical measure. However, when we look at political parties in a historical perspective, we can identify two major coalitions within the party-in-power pertaining to the highly divisive issue of the day. These coalitions are relatively stable and constant throughout each of the case studies. For the sake of consistency across case studies, these

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coalitions with heterogeneous interests due to the need for a coalition approximating 50% plus one of the electorate.

two coalitions will be referred to as the *dominant* intra-party coalition and the *minority* intra-party coalition.

The Dominant Intra-party Coalition

With a few notable exceptions,[4] the presidential wing of a party exercises the greatest power and influence within the party. The dominance of the presidential wing of the party-in-power is easily explained.[5] The presidential wing is defined by the drawing of the presidential nominee from the ranks of that wing. Simply put, in order to gain a party's nomination for the presidency, it is necessary to gain either the support of entrenched party machines and influential party bosses, as was the case prior to convention reforms in the mid-20th Century, or secure popular victories in state-by-state elections by taking policy positions that have the greatest appeal to the greatest number of primary voters.[6] Either way, the effect of the party nominating process is to align the presidential nominee with the largest and/or most powerful coalitions within the party.

The control of the presidency gives the dominant wing of the party significant influence in several ways. First, control of the presidency enables the dominant wing of the party to exercise both positive and negative policy-making authority. The president has certain coercive powers through which to bargain and cajole interests and institutions

[4] There have been a few exceptions to this rule. Andrew Johnson and Theodore Roosevelt both had notable differences with the dominant wing of the party. Of course, both Johnson and Roosevelt assumed the presidency due to historical contingency rather than electoral politics. In both cases, the predecessor's ideology matched the dominant wing of the party.

[5] Past scholarship use the terms presidential wing, the dominant wing, and the elite wing interchangeably. For the sake of consistency, I primarily use the label dominant wing throughout most of this work, although a few references to presidential wing occur when necessary.

[6] Such strategy has the effect of aligning the candidate with the largest and most active groups within the party, thereby, creating a majoritarian effect within the Party.

into law-making action (see Neustadt 1991). Following the expansion of executive power that occurred during the New Deal, the presidency increased both its capacity to directly make policy and the dependence of other institutions on presidential leadership (see Lowi 1985). Additionally, the president's *de facto* and *de jure* veto power prevents the ideological opposition from realizing (and perhaps even attempting) those policies the president adamantly opposes.

Second, dominant wing preferences enjoy a unique rhetorical position. Rather than bargain with political and institutional equals, the president can take preferred policies directly to constituents by "going public" (Kernell 1997). Not only does this power have a persuasive force but also presidential rhetoric can fundamentally alter the "conceptions of the political order" (Tulis 1987, 12). Such a powerful position enables the presidential wing, and hence the dominant wing, to exercise greater control over the party agenda and the structuring of party energy to realize that agenda.

Finally, the presidential wing of the party-in-power enjoys a privileged position within the party. Presidents, particularly during, although not limited to, the 20th Century, have been the symbolic and actual head of the party. As Woodrow Wilson observed, the president can "dominate his party by being spokesman for the real sentiment and purpose of the country by giving the country at once the information and the statements of policy which will enable it to form its judgments alike of parties and men" (as quoted in Milkis 1999, 49). Through the president, policies preferred by the dominant wing have unique voice in the party, which can push and pull the party toward certain positions and policies it would otherwise not seek with the same vigor.

Perhaps most importantly for this study, the dominant wing enjoys significant control over the judicial nomination and appointment process. Supreme Court justices appointed by the party-in-power are most apt to reflect the policy preferences of the dominant wing of the party (Funston 1975, 807; Segal and Spaeth 2002, 186).[7] This is far from an exact science, as multiple justices have shown,[8] however, there seems little doubt that the justices sitting on the Supreme Court overwhelmingly reflect the policy preferences of the appointing party (Segal and Spaeth 2002; Moraski and Shipan 1999). The significant influence of the dominant wing does not ensure that Supreme Court decisions will completely conform to their preferences. The judiciary is an independent institution with its own policy-making rules, forms, and proclivities. However, there is a high probability that the outcome will fall within certain ideological bounds preferable to the dominant wing than if some form of deference or delegation of authority did not occur. As such, legislative deference to the judiciary has a high probability of resulting in a policy that favors the preferences of the dominant wing.

The Minority Coalition

The advantages listed above result in greater control of the party agenda, party energy, and the means to achieve policy goals by the dominant wing of the party. However, the structural advantages enjoyed by the dominant wing fall well short of total

[7] During periods of divided control of government, it is less clear that any one political party is truly in power and, hence, becomes more difficult to determine the influence of particular coalitions within parties. The predominant influence of the president in the process is also less certain (see Moraski and Shipan 1999). The modern phenomenon of divided government and how it alters this scheme will be discussed in Chapter Four.

[8] Justices Story, McReynolds, Cardozo, and Souter are just three examples of appointees to the Supreme Court whose voting records are quite distinct from the preferences of the appointing president and his wing

domination of the party. Since two-party systems require large, national coalitions in order to compete for national power, failure to account for the demands of minority coalitions can result in defection from the party, which adversely impacts its electoral competitiveness. Historically, national elections in the United States have been sufficiently competitive to make group defection from one party enough to assure their inability to win or hold power. In order to maintain party unity, the dominant wing can not wholly ignore the demands of minority coalitions within the party. Thus, the minority wing in the party has power in the form of defection.

For example, in the late 1840s, the antislavery wings of both parties began to agitate for action on the issue of slavery in the territories. While the northern-dominated Whig Party was willing to accommodate certain free-soil demands, the Democratic Party in both the North and South was unwilling to make such concessions. A group of predominantly northern, free-soil Democrats defected from their party, formed the Free Soil Party in 1848, and enjoyed some initial electoral success. Free-soilers won thirteen congressional seats—mostly in New England and New York. More significantly, the Whigs exploited the split in the Democratic Party and won the presidency (Sundquist 1983, 63-68).

For reasons related to the political and electoral advantage of holding power, established party actors have significant interest in preventing defection from the party. In other words, to prevent defection, dominant wing party members must account for minority wing preferences. Capitulation to minority wing preferences on non-salient issues costs little more than the allocation of political resources or redistribution of

particularized benefits. For example, while the reclamation of arid lands in the southwest had little appeal to northern, economically conservative Republicans during the first part of the 20th Century, northern conservatives nonetheless supported public funding of irrigation and land cultivation programs, preferences of the minority western-progressive wing of the Republican Party.[9] However, when minority wing preferences on salient issues run counter to the policy preferences and ideological commitments of the dominant wing of the party, the costs of capitulation increase significantly.

The presence of competing preferences creates tension among the various intra-party coalitions. Making matters worse, party members in government face competing incentives that amplify the tension within the party. On the one hand, party members seek to realize, maintain, and protect either their policy preferences or those preferences that will maximize their chances of re-election. On the other, party members benefit by having a united party that can either place them in highly influential positions and/or enable them greater opportunity to send benefits back to their respective districts. The greater the variation of preferences regarding the salient issue, the greater the tension is likely to be between the two wings of the party. The tension is amplified given that realization or obstruction of a contested policy will threaten party unity. Thus, when there is significant disagreement within a party-in-power on a salient issue, the disjunction between the various intra-party coalitions threatens party solidarity.

In these situations, elected officials in the party-in-power face a peculiar problem. Ignoring the demands of one wing of the party can lead loss of solidarity within the party and declining support for the party in the electorate. However, yielding to one wing of

[9] See the Republican Party Platforms of 1900, 1904, and 1908 (Porter and Johnson 1956, 123; 138; 160).

the party means the other wing will have to support a policy that runs counter to their preferences and may have significant electoral consequences. Either of these scenarios can result in a loss of control over the national government. This damned-if-you-do, damned-if-you-don't scenario requires party elites to find a way to cut the Gordian Knot.

Resolving Intra-party Tension

In part, the answer to the riddle of salient, divisive issues depends on the nature of the issue (see Figure 1). Given that party membership—both in government and in the electorate—is divided on their preferred resolution, setting an appropriate course of action is no easy task. However, the issue itself may limit the options available to party elites. Certain issues, such as tariff revision, tax policy, and foreign affairs, are not easily delegated to electorally unaccountable policymaking institutions, like the courts or administrative agencies. Should such a nondelagable issue cleave a party and gain a high degree of salience, party members in government will have little choice but to make policy through the traditional legislative process. This represents a real danger for the party-in-power since any outcome favorable to one wing of the party will run counter to the preference of the other wing of the party and party members in the electorate sympathetic to the losing wing will likely respond unfavorably in the next election. Such was the case with the Republican Party when it attempted to revise the national tariff during the Taft Administration. Large numbers of progressive Republicans failed to continue supporting the Party following tariff revision that favored business interests in

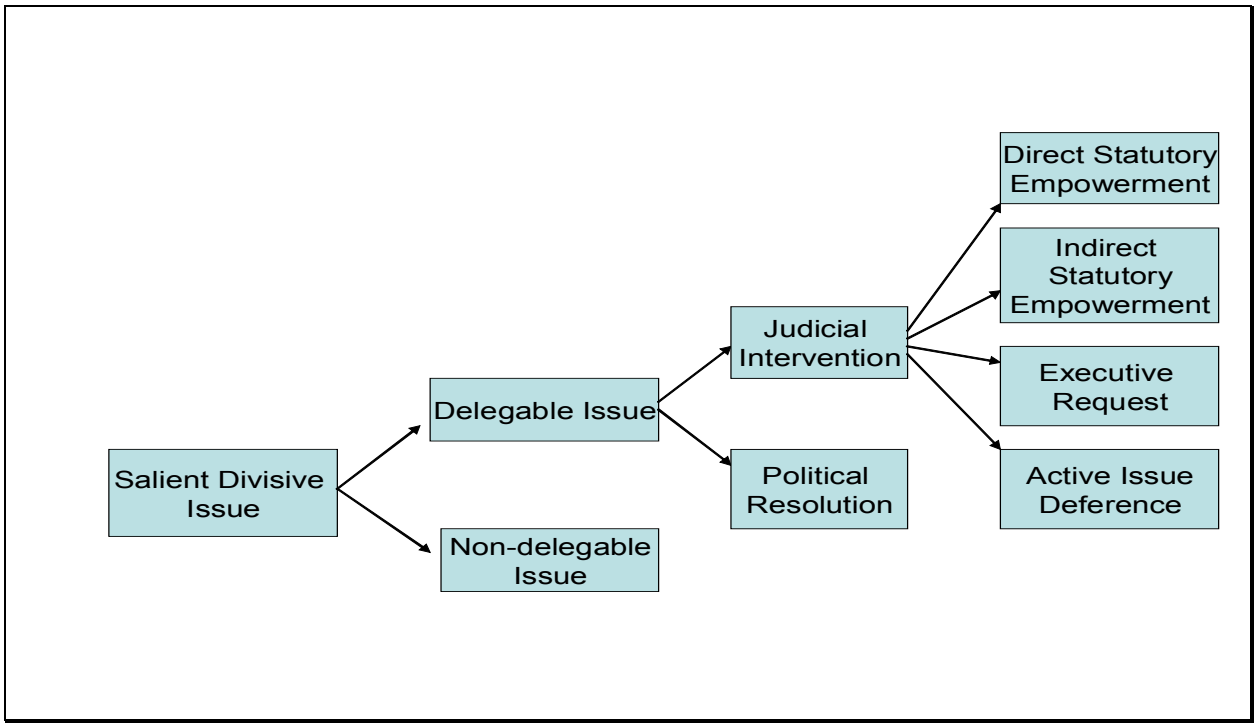
the East over Midwestern agriculture.

Salient issues that cannot be delegated must be dealt with by the party-in-power. However, most domestic issues contain features that enable elected officials to delegate certain policy-making authority to administrative agencies or courts. Most notably, any domestic policy that seeks to regulate private behavior touches upon the proper exercise of government power, the natural limitation of those powers, and the rights of individuals vis-à-vis governmental power. When domestic policy contains such an issue, political actors can easily draw courts into the policy-making arena. Given that a party-in-power faces the prospect of losing power if party officials fully address the issue through the legislative process, the best interests of party elites may be served by delegating the issue. Of course, simply because an issue is delegable and certain members of the party-in-power will benefit from judicial or administrative empowerment does not guarantee that the party will exercise this option. For example, the liberal wing of the Democratic Party largely abandoned its court-centered civil rights strategy in 1964 with the passage of the Civil Rights Act. Previous civil rights acts that garnered wide liberal Democratic support relied heavily on the courts for civil rights enforcement, which gave some measure of relief to southern conservatives in the Party who were content to allow southern judges to temper aggressive civil rights claims. However, by 1964, liberal Democrats felt either sufficiently comfortable with their hold on power or sufficiently compelled by the moral imperative of the civil rights issue that they willfully acted in a way that led southern conservatives in the electorate to abandon their Party in national elections.

Despite a few instances to the contrary, the case studies below show a pattern in

which the party-in-power repeatedly seeks out judicial intervention on delegable issues that cleave the party. The means through which a party-in-power seeks judicial intervention vary significantly based on various political and issue-based conditions. Table 1 lays out the various ways a party-in-power can draw courts into the policy-making arena and the respective benefits for the dominant and minority wings.

FIGURE 1: Options for Resolving Salient Divisive Issues



Direct statutory empowerment of the judiciary occurs when one wing of the party pushes for legislative action. If the minority wing of the party-in-power demands legislation and threatens defection, the dominant wing can acquiesce to the legislation but secure strong judicial review over the legislative action in question. This strategy gives the minority wing a legislative victory, thereby preventing potential defection, but assures

that a sympathetic judiciary will likely protect the core preferences of the dominant wing that are jeopardized by the legislation. Where the dominant wing is demanding legislative action that runs counter to minority wing preferences, judicial supervision can act as a compromise position. The dominant wing can secure its legislative victory without straining relations with the party's minority wing while the minority wing gains some minimal protection of its preferences in the lower courts where "local" judges are likely to be more sympathetic to minority wing concerns.

TABLE 1: Means of Judicial Intervention, Benefits, and Impact on Party

	Means of Court Involvement	*Benefit for a Dominant Wing that Desires Progressive Change*	*Benefit for a Dominant Wing that Desires Status Quo*	*Benefit for a Minority Wing that Desires Change*	*Benefit for a Minority Wing that Desires Status Quo*	*Impact on Party*
Direct Statutory Empowerment	• Statutory grant of power • Creation of new court	Creates opportunity for limited change through courts	Compromise position that still protects jeopardized preferences	Secure legislative victory	Chance to win at lower levels of federal courts	• Stabilizes party by appeasing major intra-party coalitions
Indirect Statutory Empowerment	• Ambiguous language in important statutory provision(s)	Creates opportunity for limited change through courts	Compromise position that still protects jeopardized preferences	Secure legislative victory	Chance to win at lower levels of federal courts	• Stabilizes party by appeasing major intra-party coalitions
Executive Request	• Solicitor General involvement in Supreme Court case. Request judicial action	Circumvent minority wing opposition while avoiding divisive legislative action	Symbolic appeasement of minority wing demands	Party unity	Party unity	• Stabilizes party by removing the need for legislative action • Can bring new constituency into party through judicial action

Active Issue Deference	• Dominant wing actively argues that an issue rightly belongs to the courts	Leaves divisive issue to sympathetic courts	Leaves divisive issue to sympathetic courts	Party unity	Party unity	• Stabilizes party

The effect of direct statutory empowerment then is similar in nature for both wings of the party-in-power but the degree of success for each wing varies significantly. Since the dominant wing of the party-in-power has a natural alliance with the national judiciary—particularly the Supreme Court—the dominant wing will likely gain greater protection or secure greater policy gains when the court acts on its behalf than on behalf of the minority wing. Yet, in terms of constituent politics the effect is the same. Elected officials aligned with the minority wing can assure their constituents that the courts will protect their interests when they demand judicial oversight the same way the dominant wing can when it make similar demands. The effect on the party is also the same. Empowering the judiciary to make policy on a highly divisive issue stabilizes the party in a way unlikely to occur without judicial intervention.

Indirect statutory empowerment has a similar effect as direct empowerment, however, the means are quite different. Direct statutory empowerment occurs when the bargaining power of the wing demanding judicial oversight is quite strong. However, when the bargaining position of the wing hoping to empower the courts is relatively weak, it may seek to insert vague statutory language which will likely result in the courts determining the statute's meaning. Again, once judicial policy-making is likely, the dominant wing, if it is the wing seeking judicial supervision, increases the chances that their core preferences will be protected by the Supreme Court. If it is the minority wing seeking judicial protection, it may gain some measure of protection from the lower levels of the federal judiciary. However, minority wings rarely win on highly divisive issues that come before the Supreme Court. The result for the national coalition, though, is,

again, creating greater stability than without the safety of the judiciary.

When a salient issue arises on which the party-in-power is divided and the dominant wing seeks change but faces minority wing obstruction in Congress, the dominant wing may seek to use its hold on the presidency to request judicial policy-making within this area. The dominant wing can use the Solicitor General's Office to circumvent minority wing obstruction by asking the courts to render policy from the bench. This avoids a direct legislative clash between the dominant and minority wings of the party-in-power, which would otherwise create great internal pressure and, likely, fracture the party's national coalition. Thus, if the executive branch requests judicial action, it creates the possibility that the dominant wing will secure a greater number of its preferences and continue to hold power. Direct attempts at overcoming minority wing obstruction in the legislature would likely not bear less legislative fruit and harm party solidarity.

Members of the minority wing are unlikely to gain many direct benefits from the executive requesting judicial intervention. The Supreme Court will likely favor dominant wing preferences to the detriment of the minority wing. Yet, the minority wing certainly benefits from avoiding a legislative confrontation with its brethren wing since elected officials aligned with the minority wing benefit from power-holding in the distribution of goods and securing its preferences on issues that garner greater consensus within the party.

Finally, there are times when party interests may be best served by deferring salient, divisive issues to the courts. When a party's hold on power is particularly

vulnerable or a party is attempting to consolidate power, the party may agree to allow the courts to play the primary role in defining policy in this area. Active issue deference is particularly likely when the dominant wing of the party is not looking to significantly alter existing policy as the Supreme Court is unlikely to deviate significantly from dominant wing preferences. Thus, the dominant wing benefits from judicial policy-making by securing its preferences and increasing its party's ability to secure and hold national power.

The minority wing, again, is unlikely to fair as well. Unless a sizable portion of the party is willing to support the appointment of jurists who favor changing policy on the issue(s) currently deferred to the judiciary, policy is unlikely to swing in such a way that would be consistent with minority wing preferences. Much as in the case of executive requests for judicial intervention, any benefit for the minority wing flows from the fact that elected officials from the minority wing benefit from membership in the party-in-power and those officials can easily shift blame for policy outcomes onto the courts. In such cases, issues deferred to the courts become "judicialized" and debate on the issue often center on judges and judicial philosophies. Minority wing voters tend to express high levels of frustration with the national judiciary while loyally supporting the party that appointed many of those same judges to the bench.

As the various strategies above suggest, the courts play an imperative role in partisan compromise. These compromises usually favor the dominant wing of the party-in-power but benefits accrue to all members of the party through the party's continued hold over national power. Given that the dominant wing of the party-in-power accrues

greater opportunity for policy victories and continued power-holding, the strategy of using the courts as a means of stabilizing the party will likely be initiated principally by the dominant wing.

The focus the judicial strategy of the party-in-power does not deny the existence of other judicial strategies. The party-out-of-power, interest groups, and individuals will likely have their own judicial strategies. These strategies may compliment or conflict with the strategy of the party-in-power. However, due to the likely ideological congruence of the court with the party-in-power, should the judicial strategy of other groups run counter to the preferences of the party-in-power, the chances of success are relatively low. Efforts by organized labor to secure and protect workers' rights during the first two decades of the Twentieth Century met with frequent frustration because the conservative Republican political order, which dominated American politics, had little sympathy for the highly progressive claims of organized labor. On the flip side, when the preferences of other groups overlap with the preferences of the party-in-power's dominant wing, these litigation campaigns can be highly successful. The NAACP's legal strategy became highly successful once the liberal wing of the Democratic Party ascended to power and African Americans became a vital member of the liberal wing of the Party. Yet, since the focus of this dissertation is the way the party-in-power uses the national coalition to manage its national coalition and the impact this strategy has on the party following judicial decisions, the existence of other strategies bears little on the analysis below.

Case Selection

The following three chapters provide case studies of parties-in-power using the courts to manage their national coalition by empowering courts to resolve highly divisive, salient issues and the resulting impact judicial decisions have on the party. All three cases occurred during the 20th Century. Each study varies in the composition of the party-in-power, the issues and amount of authority delegated to the courts, and the degree of success achieved through this strategy. However, the case studies are linked by a deliberative effort by members of the party-in-power attempting to maximize their ability to secure favorable policy outcomes and manage the national coalition that keeps them in power.

While the case studies examine a significant portion of the 20th Century, they are by no means comprehensive; nor are they meant to be. Rather, each case examines how the party-in-power utilizes the courts to manage salient issues that cut across their national coalition. The cases also demonstrate how the structure of the American party system has significant import on judicial policy-making authority and highlights the role the national judiciary—particularly the Supreme Court—plays in regime politics. These illustrations of judicial power in regime politics also underscores how the dynamic between parties and courts impacts the development of public policy and American institutions.

The periods examined are representative of the dynamic that occurs between parties and courts throughout American history. The chapters are presented in chronological order, however, one is not dependent on the other. Rather, each stems

from the nature of our political structure and the intercurrence that occurs among the institutions in that system. The existence of an institutional pattern does not preclude political actors learning from the triumphs and mistakes of preceding political regimes. However, the study is primarily focused on the examination of the party-court dynamic through an institutional perspective. Yet, even through an institutional perspective, the cases reveal significant variance within the dynamic. In each of the studies, different actors in different governmental branches play the central role in extending judicial authority to avoid intra-party conflict. In the same vein, the response of the Supreme Court varies significantly within and between each period of study. Judicial actors were frequently caught between the demands of political allies and the norms, practices, and institutional constraints inherent in legal institutions. Finally, the inability of the courts to successfully resolve the tensions inherent in heterogeneous national parties reveals that courts may be able to extend the life of a political order but they can not prevent the inevitable decay of all political regimes.

The following three chapters offer analysis on three discrete political orders, led by distinct political parties. Each chapter offers a unique insight into party-court relations and the complex inter-institutional dynamic that exists under our constitutional system. Chapter 2 examines the Republican political order that coalesced during the mid-1890s and continued into the early 1930s. This period reveals a heterogeneous Republican Party highly divided over issues of labor, national regulatory authority, and tariff reform. This case shows how a privileged coalition in the party-in-power can use the courts to protect their core policy commitments while giving the appearance of yielding to the

demands of other intra-party coalitions. The case also shows how a party can use the courts to stabilize its coalitions following a rift in the party and a subsequent loss of power. Finally, the Progressive Era was central to the development of the modern administrative state and this chapter displays how the relationship between the party-in-power and the Supreme Court limited the development of the Interstate Commerce Commission and the Federal Trade Commission.

Chapter 3 explores the New Deal/Great Society Democratic Party from approximately 1938-1968. The Democratic Party was marked by a significant divide between northern liberals and southern conservatives. While this divide occurred on several dimensions, the chapter focuses on the effort by the dominant, liberal wing of the Party to liberalize racial policy, particularly in the South. Entrenched southern conservatives made significant legislative action virtually impossible, therefore, the dominant wing used the courts to pursue a more egalitarian racial policy. The liberal wing's appeal to the courts during the mid-20th Century highlights an attempt to use the courts as an agent of progressive reform and, at the same time, as a means of liberalizing the Party by wooing African American voters who bolstered the liberal wing of the Party. Finally, this case also shows how the abandonment of a court-centered policy led to the fracture and eventual destruction of the Democratic political order.

Chapter 4 explores the contemporary Republican Party from 1980 through the present. Divided government marks most of this period and, thereby, shows how the relationship between parties and courts is not wholly dependent on unified government. Rather, the Republican Party was able to use a series of presidential victories to place

jurists sympathetic to dominant wing preferences on the national judiciary. The tension between the dominant economic conservative wing and the minority wing of social conservatives led to the channeling of social issues to the courts. By removing the divisive social issues from the legislative agenda, libertine economic conservatives could pursue their economic agenda while acting to realize the social right's agenda. In such areas as religion in school, gay rights, and abortion, the economic conservative Republicans have deferred significant policy-making authority to the national judiciary in order to appease the socially conservative wing of the Party and maintain party cohesion. The party-court dynamic created conditions ripe for the rise of a Republican political order.

Chapter 5 concludes the dissertation by drawing several implications from the dynamic between parties and courts. Specifically, it reconsiders party government in light of the courts as a means of stabilizing national coalitions. Additionally, the role of the courts in a democratic political order is analyzed in light of the pattern of party-court interaction. Finally, the relationship between the development of partisan and judicial power is explored.

These chapters will portray an underappreciated relationship between political parties and the judiciary. The relationship is systemic, dynamic, and crucial to understanding both party politics and judicial behavior. Moreover, the relationship is critical to understanding who gets what, when, and how under the American constitutional system.

Finally, this dissertation reveals a greater need to study the role of courts in regime politics. Frequently, courts and judges are treated as principle players in constitutional politics. However, to truly elucidate a "political jurisprudence", we must understand the political actors who benefit from judicial decision-making and how this can influence political outcomes over time. While separation of powers is a defining feature of the American political system, diffusing power provides well-positioned political coalitions multiple means of achieving or stymieing change.

Political contests that end in the High Court tend to be matters of great political significance. Winning politically does not guarantee winning legally; nor does winning in the courts assure that political victories outside the courts will immediately follow. However, the transfer of issues from the political arena to a legal one is significant for American politics and not just because of the policy outcomes. Rather, judicial decisions significantly impact the American party system and the coalitions that make up those parties. Those who hoped to tie nationally elected office to a collective political machine not only succeeded in linking national politics to local politics and the political branches with one another, but they also created a system that would link the vitality of party rule to the courts.

Chapter 2

The Republican Party in the Progressive Era: Coalition Maintenance and Judicial Retrenchment

Formation of the Republican Party Coalition: The Election of 1896

American partisan politics experienced a dramatic shift during the 1890s. National elections from 1872 through 1896 were highly competitive. The parties swapped control of the House five times, the Senate four times, and the presidency three times. Yet, the national elections of 1894 and 1896 were critical realigning elections (Key 1955; Burnham 1970; Sundquist 1983; but see Pomper 1968). Key coalitions within the Democratic Party abandoned their partisan moorings for the Republican Party. Moreover, the voters that began voting for the Republican Party in 1894 and 1896 sustained their pattern of voting for a significant period of time. The change in voting behavior brought a shift in the balance of power between the two major American parties and solidified a new Republican political order.

The realignment of the party system was not readily foreseen by political observers of the day. The national government had been through a period of divided government and national elections had been exceedingly close. The competitiveness of national elections led both parties to devote significant political resources to turning out partisan supporters on election day and securing their votes through patronage (Silbey 1991, 151). Commensurate with the distribution of patronage was the fight over expanding the pool of government benefits to distribute. Many of the most significant fights in Congress in the 1880s and 1890s were over measures designed to broaden patronage, including maintaining and expanding tariff protection and the revenue it raised. Such measures overwhelmingly favored the Republican Party as tariff surpluses

were largely allocated to Civil War pension programs—a key source of Republican patronage (see Bensel 1984, 72-73; Skocpol 1992).

As a counter to the Republican-dominated, pension-driven patronage system, the Democratic Party increasingly relied on its urban machines to secure electoral victories. The era is famous for "boss" dominated politics like that of Tammany Hall in New York. These urban party machines (usually Democratic) dolled out large amounts of patronage in return for electoral support. The machines were so efficient and the patronage so desirable that the era boasted the highest levels of voter turnout in American history (Silby 1991, 144-147).

The influence of patronage, sectional disparities, and the competing ideological visions of the government's role in society elevated the level of party identification among voters. Joel Silbey noted that throughout the mid-1800s, voters rarely abandoned their party. In fact, he goes so far as to assert that "[m]ost [voters] would as soon have changed their religion as their politics" (1991, 171). Throughout the latter half of the 1800s, party identification was durable and sustained.

However, starting in 1892 and culminating in the election of 1896, Democrats in the Atlantic seaboard states began to leave the Democratic Party for the Republican Party. Throughout the 1890s, the rising tide of populism led to a split in the Democratic Party in several border states and resulted in Kentucky, Maryland, and West Virginia swinging to the Republican Party. Most importantly, the 2,000,000 individuals who voted for the first time in 1896 adopted the Republican Party and, arguably, sustained this voting pattern throughout the Progressive Era (Mayer 1967, 257).

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In 1896, the Democratic Party firmly embraced the populist wing of their party and nominated William Jennings Bryan as their presidential candidate. The national convention was an astonishing and complete victory for populist, free-silver Democrats. The convention, dominated by western populists, defeated a resolution commending the Cleveland administration, which backed the gold standard, (Sundquist 1983, 151) and crafted a platform that included demands for "free and unlimited coinage of both silver and gold" at current rates; an attempt to reenact the income tax and/or reconstitute the Supreme Court so that the income tax would pass constitutional scrutiny; greater "powers to the Interstate Commerce Commission and such restriction and guarantees in the control of railroads as will protect the people from robbery and oppression" (Porter and Johnson 1956, 98-99). The convention was highlighted by Bryan's famed "Cross of Gold" speech, which reportedly concretized populist sentiment.

In response, the Republican Party committed itself to an economic policy of international protectionism and domestic free enterprise. Along with nominating William McKinley, a noted economic conservative with the self-titled McKinley Tariff to his credit, the convention adopted a platform with a series of planks dedicated to the Party's "allegiance to the policy of protection, as the bulwark of American industrial independence, and the foundation of American development and prosperity" (Porter and Johnson 1956, 107). The platform also included a commitment to the gold standard and greater tariff protection for certain agricultural and manufacturing interests. In fact,

protection of American industry and commitment to the gold standard became staples of Republican politics throughout the Progressive Era.

Yet, the Republicans owed their 1896 victory as much to what the Democrats advocated as to any plank in their own platform. The Democratic Party overestimated the size and strength of the Populist movement, which they embraced by making free silver coinage the foundation plank of their platform. A significant portion of the American population still lived in the Northeastern and Midwestern portions of the country. The areas actively agitating for silver (and other populist policies) were sparsely populated, rural sections of the country that, while politically mobilized, did not have the number of voters as the areas back east.

Additionally, the Democratic Party misjudged the middle class response to its embrace of populist monetary policy. While it was clear that banks and business opposed increasing the monetary supply through silver as raising the monetary supply favored debtors over creditors, the middle class did not stand to lose as much as banking and other creditor interests. However, as Richard Hofstadter noted, "The middle classes, which often took seriously the hysterical literature describing the Populists as anarchists or socialists, either ridiculed or feared them" (1968, 99). Such fears were fed by the likes of Mark Hanna and the Republican national committee, which spent twice as much during the presidential campaign of 1896 than it had in 1892 (Mayer 1967, 252), much of it on campaign pamphlets designed to elevate concerns over the monetary issue. Eastern and midwestern middle class voters became increasingly uncomfortable with Bryan at the

head of the Democratic Party and his use of populist rhetoric that placed the free silver issue above all others.

Further, the Populist-Democrats overestimated class identity as a unifying force throughout the country. Populists did not distinguish between farmers and industrial labor as they were both members of the same socio-economic strata. However, class failed to unify voting interests (as it has always failed in the United States) even to the point where farmers did not vote as a block. "Eastern farmers who had acute problems and discontents of their own, looked upon Western farmers as competitors and enemies" (Hofstadter 1968, 99). The absence of working class unity and sectional cohesion within the agricultural vote ensured a poor showing by the Democratic Party in the national elections.

The failure of the Democratic Party to unify working class farmers and labor, western and eastern agricultural interests, and maintain their dominance of the urban vote resulted in a realignment that brought a new Republican regime to power which dominated national politics for more than three decades. The coalition of big business, manufacturing interests, labor, eastern agriculture, and the Protestant middle class formed the pillars of the Republican Party. However, as might be deduced from the list, the Republican Party was not uniform in their interests. Western expansionists in the 1870s suffered significantly due to over-expansion, land speculation, drought, low agricultural prices, and depressed conditions in the silver-mining industry. These conditions gave rise to a politics of progressive reformism among Republican leaders in western states. The element of western progressive reform was frequently at odds with the conservative

northeastern Republican agenda. With the realignment of 1894-1896 bringing western progressives into the Republican Party, Party leaders had to figure out a way of dealing with divisive issues while holding a firm grip on power.

The Dividing Lines

The division in the Republican Party comes into sharp focus by looking at regulation of railroads, trusts, and the tariff. In each of these issues, the Republican Party was internally divided between the conservative hardliners and progressive insurgents. Conservatives favored minimal regulation of the railroads except where it favored the interests of railroad carriers, regulation of monopolies only where significant harm resulted from restraints on trade, and high tariffs to protect American industry and support the pension system. On the flip side, progressives believed all three issues were interrelated in that tariffs enabled and protected certain trusts and large railroad companies had near monopolistic control over certain areas of the country. The only remedy to these perceived ills was ample regulation of the railroad carrier lines to protect Midwestern shipper interests, destruction of trusts wherever they existed, and downward reform of the national tariff.

As the dominant wing of the party, controlling the presidency and wielding considerable influence in the House and Senate, conservative Republicans did little to address the issue of trusts and even less to enforce the laws on the books. President McKinley was highly complacent toward trusts and benefited greatly from generous campaign contributions by big business in both 1896 and 1900. In McKinley's 1900

presidential acceptance letter, he dedicated two paragraphs out of ten pages to the trust issue. In those two paragraphs, he managed to weakly proclaim that the combination of capital "should be made the subject of prohibitory or penal legislation" (as quoted in Geering 1998, 67) but he offered no suggestions or recommendations. McKinley's position no doubt pleased both business interests and eastern Republicans who consistently aligned with their corporate constituents. However, western members of the Grand Old Party (GOP) did not share in the same benefits and viewed the trust issue quite differently.

To members of the minority, progressive wing within the Republican Party, trusts were responsible "for practically every important inequity in contemporary American life" (Holt 1967, 11). Perhaps most importantly in the West, the rising cost of living, which caused great hardship during the period of declining agricultural prices, was attributed to the so-called "money interests." Progressives believed that the solution to the rise of private, corporate power was the assertion of public power. However, beyond knowing that government was part of the solution, progressives were much less certain as to how to remedy the ills of the trusts. A few radicals proposed state ownership of certain industries, such as coal mining and the railroads, however, progressives were not socialists and were sufficiently uncomfortable with state ownership of property to virtually eliminate this option. The most favored and most realized proposals tended to be regulatory legislation designed to oversee the monopolistic practice in question.

Nowhere is this trend more evident than in the regulation of the railroads. As early as 1884, the *New York Times* declared "railroads were grinding monopolies" that

"could be regulated in the minutest particulars by Congress."[10] The persistence and growth of consolidating railroad lines under the control of a few powerful companies heightened concerns of a monopolistic hold over the nation's primary source of transportation. Fears were particularly strong in the West, a region that depended on the railroads to ship agricultural products to population centers in the East and overseas. As Robert M. LaFollette declared in 1905, "The railway business of this country has become a monopoly in fact."[11] LaFollette later summarized the driving force of western progressive fears, "Fares made by the railway company are made by a party prejudiced in its own interests, and therefore, certain to be unjust to the public."[12]

Progressive interest in curtailing the monopolistic practices of railroad companies was both a revolt from status quo corporate practice and an affirmation of American commercialism. Regulatory schemes were revolutionary insofar as they were able to change the beliefs of railroad men that national regulation was superior to the "cutthroat competition" of unregulated, free market competition (Kolko 1965, 207). Yet, the revolution of national regulation advocated by progressive Republicans was tempered by the fact that most of the initiatives affirmed the American belief in private ownership and capitalistic competition. Even "radical" legislative proffers tended to propose setting definite (not just maximum) shipping rates and fines for every day of noncompliance with an Interstate Commerce Commission order.[13] These proposals are a far cry from the

[10] *New York Times* December 20, 1884, 4.
[11] LaFollette, Robert M. "Fair Railroad Regulation." *Saturday Evening Post* March 4, 1905.
[12] LaFollette, Robert M. "Fair Railroad Regulation." *Saturday Evening Post* April 15, 1905.
[13] Both of these measures were proposed in the Quarles Bill (S. 2439) in 1903. The measure passed the House but failed in the Senate.

public ownership of the railroads demanded by certain leftist political groups.[14]

While most elected officials during the early part of the 20th Century agreed that monopolies could be regulated, they did not agree on much else including whether they always should be regulated. Whereas progressives were willing to regulate monopolies wherever they occurred, the conservative wing of the Republican Party was much more tempered. Naturally occurring monopolies were a product of the market and, therefore, acceptable (Broderick 1989, 20). "[T]he Republican Party's general position was that firms could grow horizontally or vertically to whatever extent they were capable as long as trade was not illegally restrained" (Geering 1998, 68). Moreover, government intrusion on natural outcomes of the market was an egregious use of government authority over legal activities.

In placing the trust issue in the context of the railroads, the issue became even more complex due to the ideological, political, and personal ties between the railroads and conservative Republicans. Old Guard Republicans believed the economic health of the nation was intrinsically linked to the health of the railroads. This belief was well justified as "[r]ailroad capital represented one-seventh of national wealth" (Ely 2001, 225). The hardliners' economic philosophy made for a natural alignment of railroad interests with eastern Republicans, which gave the Party an important financial and electoral advantage over the Democratic opposition. Many leading Republican elected officials also had strong financial ties to the railroads, although the effect of such ties is unclear.

[14] The Socialist Party called for public ownership of the railroads in all of its party platforms from 1900 through 1920 (see Porter and Johnson 1956, 128; 142; 165; 189; 211; and 240)

When it came to regulating monopolistic combinations and practices by the railroads, the conservative wing of the Republican Party only supported regulatory measures when one of three factors was involved. First, the railroads actively supported the proposed governmental regulation and, thereby, secured the support of the conservative wing of the Party. As noted above, during the late 19th Century and early 20th Century, railroad companies began to see governmental regulation as the cure for certain commercial ills and not just as an obstacle to profit maximization. Governmental regulation could alleviate some of the burdens of unregulated competition and the "constant drive toward consolidation" (Ely 2001, 225). Regulation helped protect smaller railroad operations from larger corporate predators. Moreover, larger railroad lines could engage in practices others could not. For example, rebating[15] was used most effectively by the largest and most wealthy lines. Small carriers also used rebating but these lines were more vulnerable to bankruptcy as they did not have the financial resources to survive sustained losses. Rebating provided incentives for the largest shippers to use certain carrier lines. However, the practice significantly cut into carrier profit margins to the ire of railroad executives. The market alone was unable to arrest rebating for as soon as one line provided a rebate, the others had to match their competitors' prices in order to compete. The result was an economic race to the bottom that saw many lines fold as a result. Prohibitory governmental regulation on rebating was the only remedy that offered hope to curtail or eliminate the process.

[15] Rebates are departures from published rate schedules used as incentives by railroad companies to entice large shipping companies to use their lines. Two rebating practices were common: public and private. Public rebates were a common feature of rate wars designed to openly drive competing railroad lines out of business. Private rebates were given as a "special, particular, and secret" benefit to the same ends of

Second, conservatives supported federal regulation as "[s]tate regulation [began] to grow more cumbersome, and was less controllable and more unpredictable than federal regulation" (Kolko 1965, 89). Not only did the sheer number of states and the diversity of regulatory laws make business practices exceedingly complex but, perhaps more disconcerting to the railroad industry, progressive politics dominated several middle and western states. These states began to pass increasingly intrusive measures that carriers deemed harmful to business practices. Conservative Republicans hoped that the promotion of limited federal regulation would eliminate more intrusive state regulatory schemes. Federal regulation was a way to retrench policies less hostile to the interests of the railroads.

The final factor in securing the support of the conservative wing of the Republican Party was to include strong judicial oversight of the regulatory practice or, in some other way, ensure that the courts would be involved in administrative supervision and policy formation. Throughout the first thirty years of the 20th Century, the Supreme Court was predominantly a conservative institution. Economically conservative presidents nominated like-minded jurists who were confirmed by a free enterprise-dominated Senate. It should come as no surprise that the Republican political order resulted in conservative judicial outcomes. Adding to the conservative tendency was the dominant jurisprudential thought that distinguished between valid economic regulation and invalid class legislation (Gillman 1993, 10). The rapid expansion of the state and novel employment of state power (both proposed and actuated) often struck the courts as paternalistic intrusions on economic freedom designed to favor one group over another.

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market domination (Ripley 1927, 188).

Judicial resistance to rapid regulatory change was not unique to the federal judiciary. During this same period, state courts struck down a significant number of state regulations and issued thousands of injunctions to protect the interests of corporate America (Foner 1998, 123). In the early 20th Century, the rule of law seemingly contradicted progressive preferences and was generally resistance to rapid change. Given the inhospitable nature of American jurisprudence, the courts made an ideal ally for the conservative wing of the Republican Party when its economic preferences were threatened.

To show how the conflict between conservative and progressives played out within the Republican Party, we must turn to specific examples of railroad regulation. First, the Elkins Act of 1903 provides an illustration of railroad legislation proposed and supported by conservatives at the bequest of railroad companies. Following 1903, spurred by Teddy Roosevelt's shift toward progressivism, conservatives faced an increasing drive by progressives to provide greater regulatory authority to the Interstate Commerce Commission. This increase in progressive agitation led to greater instability within the Republican Party and a growing number of threats to defect from the Party if it did not act to regulate perceived monopolistic ills. The Hepburn Act of 1906 and the Mann-Elkins Act of 1910 represented regulatory legislation that sat uncomfortably with the conservative wing of the Party. However, faced with the possibility of splintering the Party if they ardently resisted the measures, conservatives were willing to capitulate to progressive demands once judicial oversight was assured. Finally, after progressives defected from the Republican Party following the battle over tariff reform, conservatives

again turned to the courts to protect their economic policy preferences while seemingly capitulating to progressive demands in order to minimize the difference between the two coalitions and heal the rift in the Republican Party.

Elkins Act of 1903

At the turn of the 20th Century, the nation's larger railroad companies and banks controlled approximately two-thirds of the national railway lines (Kolko 1965, 88). The threat of monopoly caused great concern among shippers and agricultural interests. However, despite seemingly oligopolistic operations, the industry remained fiercely competitive to the point where businesses were willing to limit profits to drive competitors out of business. The principle means of achieving such ends was the rebate. When carrier lines provided rebates, they were able to provide an incentive to large shippers to exclusively use their lines and, conversely, not use competitor lines. Rebates were both the principle means of achieving near monopolistic control over a particular railway line and a significant contributor to declining profit margins that frequently pushed certain, usually smaller, railways to the point of bankruptcy.

In 1900, Stephen B. Elkins became the chairman of the Senate Committee on Interstate Commerce. Senator Elkins was the co-owner of the West Virginia Central and Pittsburgh Railroad[16] and a long time advocate for railroad interests. Shortly after taking the chairmanship, Elkins was met by "urgent appeals" to curtail the "evil use of rebates and discriminations" (Lambert 1955, 261). Dealing with the rebate issue was unique as

[16] Elkins co-owned the West Virginia Central and Pittsburgh Railroad until 1902 when he and his father-in-law, Henry G. Davis, sold it to B & O Railroad.

there was virtually no opposition. Large railroads supported the abolition of rebating as it was the only mechanism smaller lines could use to lure large shippers away from them. Small railroads frequently got into bidding wars with on another, which was sufficiently harmful to their profitability that it drove many lines out of business. Shipping and agricultural interests were sufficiently agitated about the threat of monopoly that they saw any attempt to regulate trusts as a step in the right direction.

In 1902, Senator Elkins introduced the Anti-Rebating bill (also known as the Elkins bill), which was largely written by the Pennsylvania Railroad (Kolko 1965, 95). The measure tightened the prohibition of rebates by making companies and individuals liable for rebating activity up to $20,000. Both railroads and shippers could be prosecuted for giving or receiving rebates. However, the Elkins bill failed to include three progressive provisions and these omissions reveal the bill's conservative nature. First, the bill did not give the Interstate Commerce Commission (ICC) the authority to set shipping rates. The power to set rates was left in the hands of the railroads, which were only required to publish their rates in advance of sale. Second, Elkins had excluded from the bill the possibility of imprisonment for violating ICC rebating decisions, which had been favored by progressive members of the Party and garnered criticism shortly following its passage (Lambert 1955, 261). Third, the measure did not provide the ICC with the power to fine railroads directly. Instead, upon "reasonable grounds" the ICC could go to a federal circuit court to try the case and enforce the appropriate rates. Judicial review had always been a requisite for the support of railroad companies (Kolko 1965, 89) and the Elkins bill did not fail to include this provision.

Despite what amounted to a conservative regulatory bill, progressives eventually supported the bill when they recognized that progressive alternatives would not pass the Senate.[17] With the support of both conservatives and progressives, the Elkins Anti-Rebating Act passed the House with only six votes in opposition and the Senate entirely without dissent. President Roosevelt quickly signed the bill into law in February of 1903. While the Elkins Act enjoyed significant support among railroad men, shippers, conservatives, and progressives, there were a few dissenting voices. The dissent stemmed, not from what the Act did, but from the motivations that drove regulatory activity. As the *Commercial and Financial Chronicle* wrote, "The whole movement against the railroads is predicated . . . on the idea that they are extremely prosperous and that some of their profits might as well be taken from them and appropriated for the benefit of shippers and the general public."

For its part, the Supreme Court quickly rendered a decision in favor of large railroad lines. In a labored opinion, Justice White ordered an action against Missouri Pacific Railroad Company back to the circuit court for further proceedings rather than uphold the circuit court's injunction against Missouri Pacific's rate charges between St. Louis and Wichita, which far exceeded other freight charges for similar distances.[18] Oddly, the Court rendered their decision despite the fact that Missouri Pacific admitted unreasonable rate discrimination in its demurrer. Yet, despite upholding the circuit court's dismissal of the demurrer, the Court still ordered a new trial. As Justice Brewer noted in dissent, the Court essentially crafted a ruling that rendered the government

[17] "Friction over Trust Bill." *New York Times* February 7, 1903, 3.
[18] *Missouri Pacific Railroad Company v. United States*, 189 U.S. 274 (1903).

"powerless to compel the carriers to discharge their statutory duty[.]"[19] The New York Times unequivocally declared the railroads the victors under the Elkins Act.[20]

With the courts actively protecting the interests of carrier lines, the real danger of the Elkins Act was not its anti-rebating scheme. Rather, as conservatives would realize later, the revitalization of the ineffective Interstate Commerce Commission led progressives to argue that the Elkins Act was precedent for more regulatory legislation. Progressive Republicans soon began to agitate for new legislation that would further empower the Interstate Commerce Commission.

The Growing Divide

In the years following the passage of the Elkins Act, there was wide recognition that the Act failed to address fundamental inadequacies of the Interstate Commerce Commission. Yet, despite growing agitation among progressives to rein in corporate power, they still had to overcome conservative control over the Party and legislative agendas in order to secure passage of legislation designed to increase governmental oversight. The frustration felt by insurgent Republicans grew as the Democratic Party increasingly claimed the progressive agenda for themselves and produced tangible evidence for such claims. The 1904 platforms of both Parties provide an important illustration. The Democratic platform included a plank calling for "an enlargement of the powers of the Interstate Commerce Commission, to the end that the traveling public and shippers of this country may have prompt and adequate relief from the abuses to which

[19] Ibid. at 291.
[20] "Decision Favors Railroad." *New York Times* March 10, 1903, 5.

they are subjected in the matter of transportation" (Porter and Johnson 1956, 132). In contrast, despite a progressive push for greater reform and regulation, the Republican Party's platform contained only a weak affirmation of the Elkins Act and omitted any course for future regulatory activity (Porter and Johnson 1956, 138).

The Old Guard was able to thwart progressive efforts to modify the platform, but they miscalculated the extent of Roosevelt's desire and drive to reel in "bad" trusts. In the first 3 ½ years of his presidency, Roosevelt proved more progressive on the trust issue than his predecessor; a fact that had troubled members of the conservative bloc since Roosevelt's nomination as vice president.[21] In 1902, Roosevelt officially signaled his departure from lax governmental oversight of trusts and corporate power, both consistent with McKinley's hard-line conservativism, by instructing his Attorney General, Philander C. Knox, to launch a suit to dissolve the Northern Securities Company under the long neglected Sherman Antitrust Act.

While Roosevelt was certainly much more progressive than any of his Republican predecessors to hold the White House, he was hardly a radical progressive. Instead, Roosevelt embodied much of the ideological strain within the Party. On the issue of trusts and their regulation, Roosevelt held a position that was quite similar to the one espoused by arch-conservative Mark Hanna, which was, in reality, a moderate position in that he rejected a monolithic understanding of monopolies. Government intrusion on natural outcomes of the market would be an egregious use of government authority over legal activities, even if those natural outcomes produced a monopoly. However,

[21] Shortly after McKinley's assassination, Mark Hanna, a hardline conservative, exploded, "I told William McKinley it was a mistake to nominate that wild man at Philadelphia . . . Now look, that damned cowboy is

consistent with the progressive understanding of monopolies, certain trusts resulted from illegitimate interference (including governmental interference) with the market equilibrium. Monopolies achieved through manipulation of the market were ripe for "busting" as the government needed to undo that which it achieved through illegitimate means.[22] Thus, Roosevelt's support for "good" monopolies and hostility toward "bad" monopolies made him more progressive than conservatives would have liked but more conservative than progressives would have liked.

Of course, Roosevelt's moderation in the executive branch created a difficulty for the Republican Party when it came to setting the Party agenda. Under McKinley, progressive reform was highly unlikely as conservatives occupied veto points in the White House and in the Senate. However, under Roosevelt, progressives believed fate improved their standing within the Party and Roosevelt's "bully pulpit" leadership style could lead to a more progressive agenda despite their minority status within the Party. On the flip side, conservatives realized their once unquestioned control over the Party

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President of the United States" (as quoted in Mayer 1967, 272).

[22] Evidence of Roosevelt's philosophy on monopolies and government regulation can be seen in his famous "Square Deal" speech:

"In his turn, the capitalist who is really a conservative, the man who has forethought as well as patriotism, should heartily welcome every effort, legislative or otherwise, which has for its object to secure fair dealing by capital, corporate or individual, toward the public and toward the employee . . .

There must be ever present in our minds the fundamental truth that in a republic such as ours the only safety is to stand neither for nor against any man because he is rich or because he is poor, because he is engaged in one occupation or another, because he works with his brains or because he works with his hands. We must treat each man on his worth and merits as a man. We must see that each is given a square deal, because he is entitled to no more and should receive no less . . . .

Finally, we must keep ever in mind that a republic such as ours can exist only by virtue of the orderly liberty which comes through the equal domination of the law over all men alike, and through its administration in such resolute and fearless fashion as shall teach all that no man is above it and no man below it."

"A Square Deal," at the N.Y. State Agriculture Association, Sep. 7, 1903.
Available at http://www.pbs.org/greatspeeches/timeline/#1900. (Visited on June 3, 2004)

slipped with McKinley's assassination but, especially during Roosevelt's first few years in office, believed that the leadership of the conservative bloc could temper the President's more progressive impulses. The reality was that Roosevelt straddled the conservative-progressive divide for most of his presidency leaving both wings of the Party without presidential control.[23] Roosevelt's presidency represented one of the few enigmatic periods in American political history when the dominant wing of the party-in-power did not count the president as a definitive member of its ranks.

Following the 1904 election, Roosevelt became decidedly more concerned with growing national discontent over shipping rates on railroad carrier lines. In his annual message to Congress, Roosevelt requested the passage of legislation that vested the Interstate Commerce Commission with the power "to decide, subject to judicial review, what shall be a reasonable rate."[24] Progressive Republicans in the House met Roosevelt's proposals with applause.[25] However, the dominant, conservative wing of the Party initially proved quite resistant to the idea, as demonstrated by the inability of progressives to add a plank to the 1904 Republican platform calling for increased railroad regulation. Conservative resistance to extensive railway regulation effectively allied Roosevelt with western progressives on the rate regulation issue, for the first time, forcing conservatives to resist significant regulatory reform with executive pressure working against their interests.

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[23] Roosevelt is too often remembered as a highly progressive president, a fact the historical record does not support. While he was the most progressive Republican president to date and oversaw several important reform measures, his shift to the left following his departure from the White House has left a progressive cast to his legacy that his presidential record does not support.
[24] "President Roosevelt's Message." *Wall Street Journal* December 7, 1904, 5.
[25] "Read in Both Houses: Reception of the President's Message at Capitol." *Washington Post* December 7,

Hepburn Act of 1906

The House, where the progressive wing of the Republican Party was strongest, was quick to respond to Roosevelt's call for regulatory action. In 1905, the Esch-Townsend bill passed the House by an overwhelming vote of 326 to 17. The measure had several provisions designed to curtail the power of the railways and limit the extent to which large railway lines could expand their control. Most significantly, the bill gave the Interstate Commerce Commission authority to set "reasonable" railroad rates that remained effective until set aside by court review. The bill also created a transportation court "to hear all railroad cases on review" (Cushman 1941, 69). One might question why the Esch-Townsend bill managed to pass with so few dissenting votes given that conservatives were so resistant to empower the ICC to regulate shipping rates. The answer is in strong judicial review. Throughout the debates over regulatory reform, conservatives in the House accepted some measure of administrative regulation so long as the legislation contained an explicit provision requiring judicial oversight of regulatory action. The Esch-Townsend bill contained both provisions to empower the ICC, favored by progressives, and to have robust judicial review, favored by conservatives.

Despite the bill's warm reception in the House, the Senate was not so accommodating. As historian George E. Mowry wrote, the Esch-Townsend bill "[met] with the determined opposition of the conservative phalanx [and] it was smothered in the dark recesses of the Committee on Interstate Commerce" (1946, 24). The Committee, chaired by the Old Guard's own Stephen Elkins, viewed the bill unfavorably and Senator

Aldrich, who led the conservative wing in the Senate, managed to bury the bill. The legislative session expired without the bill making it out of Committee.

Such may have been the fate of all regulatory bills if public pressure had not been increasingly stoked by the conjunction of four factors first identified by economist William Ripley (1927, 487-492). First, railroad carrier lines rapidly consolidated. Second, coinciding with the growing consolidation, freight rates sharply and rapidly increased. Third, a few men increasingly exercised financial control over the bulk of the railroad system. Fourth, a series of public disclosures revealed the extent to which railroad rate discrimination spawned from the rise of industrial monopoly. Public agitation over these issues led to "an irresistible outpouring of public opinion" (Harbaugh 1973, 2084), which created conditions wherein the Republican Party had to prevent against party members in the electorate either demobilizing or defecting to an increasingly progressive Democratic Party.

In 1906, William Peters Hepburn, chairman of the House Committee on Interstate Commerce, introduced a bill, supported by the White House, that empowered the ICC to set future maximum carrier rates following a complaint, alleging price rebating or gorging, filed with the Commission. The measure was unanimously voted out of committee and passed by a staggering margin of 346 to 7 in the full House. Even with the significant external pressures noted above, the margin of passage is surprising because the House was sufficiently malapportioned to "perpetuate conservative domination of the House" (Harbaugh 1973, 2088). What makes the vote in the House all the more curious was the intense battle that occurred in the Senate. Several scholars have

conjectured explanations for this oddity. First, Kolko argued that House members had to concern themselves "with the interests of the 'shippers' and the 'people'" due to constituent politics (1965, 132). The electoral incentive undoubtedly played a role, particularly in the South and West, but it is unclear why eastern congressmen, perennially aligned with railroad interests would suddenly benefit more by siding with the interests of shippers unless we account for the demands of continued partisan unity. Second, Stephenson noted conservatives in the House looked to the Senate, the bulwark of conservativism, to kill the measure – a fate that befell much progressive legislation in the past (1971, 286). While the logic of this explanation is sound, no direct evidence supports this hypothesis. Finally, Speaker Joseph Canon likely secured party unity through the Republican machine in the House by including a provision for strong judicial review over ICC regulation—a measure that took much longer to secure in the Senate.

Whatever the case, the Hepburn bill met with significant resistance in the Senate. Yet, the fight over the bill's passage should not be confused with uncertainty of its passage. The confluence of events and pressures noted above formed the impetus for a cross-party coalition of progressive Republicans and Democrats that guaranteed legislative victory so long as the bill came to a final vote. The real issue was the form of that victory. In the Senate, this meant that much of the debate centered on conservative demands that the bill contain a strong grant of judicial review and enable the courts to define the extent of their own powers of review.

Immediately after the bill was sent to the Senate Committee on Interstate Commerce, Senator Dolliver, a progressive from Iowa, offered a resolution that the bill

be accepted unmodified as it came from the House. Several conservative committee members objected to this maneuver as they had planned to amend the bill and strengthen judicial oversight of regulatory activity. Two conservative members of the Committee, Stephen Elkins and Joseph Foraker, even had bills of their own which they hoped to substitute for the Hepburn bill. However, the Old Guard simply did not have enough votes to prevent the bill from leaving the committee unamended. All five conservatives on the Committee voted against reporting the bill to the entire Senate but were squarely in the minority.[26]

Perhaps more revealing than the conservative votes against reporting the bill was their reasoning. All dissenting members of the Committee signed a statement explaining their votes. In the words of Senator Aldrich, "A majority of the Republican members of the Committee did not join in the favorable report . . . for the reason . . . that clear and adequate provision should have been made for subjecting the orders of the commission affecting rates to judicial review."[27] But knowing that recalcitrance would only widen a growing divide between conservative and progressive Republicans, Aldrich concluded that if the bill was properly amended to provide for review, four of the five dissenting senators "were ready to give their support to the House bill."[28]

The majority of the ensuing debate on the Senate floor was over whether the Hepburn bill should include "broad" or "narrow" judicial review. However, this debate over how extensive judicial oversight does not mask the real divide. Progressives desired extensive administrative management of the railway system. The Old Guard sought to

[26] Senators Aldrich, Crane, Elkins, Foraker, and Kean all voted against the measure in Committee.
[27] *Congressional Record*, vol. 40, 2969.

limit such control to those areas that benefited railroad companies or ensured fairness in the marketplace. Unable to limit legislation to the latter, the conservative wing of the Republican Party was forced to seek an institutional ally that could place restraints on the former. Broad judicial review would likely bring limitations on administrative decisions and provide a sympathetic forum outside of the bureaucracy to challenge ICC decisions. The fundamental end game facing elected officials was determining the scope of the administrative state and the degree to which certain dimensions of the regulatory state would be privileged over others (see Skowronek 1982). Conservatives wanted to ensure that strong judicial review would be privileged over bureaucratic regulatory schemes that would give reformists the final word.

Upon reaching the Senate floor, progressive senators attempted to amend the Hepburn bill to limit judicial oversight while conservative senators proposed increasing judicial supervision and review. Senator Joseph Bailey (D-TX), a progressive from the other side of the aisle, proposed an amendment that limited judicial review to only questions of legality and procedure so that substantive issues would be beyond judicial inquiry. He also attempted to secure an amendment that prohibited judicial injunction of ICC rates prior to and during the review period. Both proposals adversely impacted railroads, particularly the latter as it "let the railroads suffer by having to lose charges while a case on appeal was being argued" (Stephenson 1971, 297).

These amendments met with conservative derision. As Senator Aldrich stated, "the proposition to make the decision of the commission final, without any possible chance to have the rights of the parties litigated or maintained by the courts was an

[28] Ibid.

infamous proposition" (as quoted in Stephenson 1971, 299). Yet, the infamous proposition had significant support outside of the Old Guard. Twenty-six Democratic senators supported the Bailey amendment and leading Democrats believed as many as 20 Republican senators would support the bill.[29] However, the Democrats underestimated the Party's ability to work out a compromise that protected the interests of both conservatives and progressives.[30] Ultimately, the lack of conservative support, questions about the constitutionality of the amendment, and Roosevelt's untimely waffling on the amendment undid support for the progressive amendments and the measure failed by a vote of 23 to 54.[31]

By the time the Bailey amendment was defeated, the Hepburn bill had been under consideration for two months with little progress toward passage. As noted above, the Senate successfully killed many regulatory bills by deliberating them to death. While still confident of the bill's passage, supporters of the bill were increasingly aware that the legislative session ended in two months and they needed to bridge the divide over judicial review. Roosevelt, more concerned with passing some measure of reform than being doctrinaire (Mowry 1960, 26), hosted several of the moderate progressives on March 31.[32] By the end of the meeting, Roosevelt had laid the groundwork for a compromise on

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[29] *Atlantic Constitution* April 17, 1906, 1; April 19, 1906, 1.

[30] Compromise came from both the conservative and progressive wings. On April 16th, Senator Hayburn (R-ID)—widely considered a western moderate with progressive tendencies—proposed an amendment "providing for the broadest review that has yet been proposed." Newspapers marveled at the conservative strategy of using western senators to secure Old Guard politics. See "Wants Broad Review." *The Washington Post* April 17, 1906, 4.

[31] *Congressional Record*, vol. 40, 6672.

[32] Senators in attendance included Dolliver, Allison, Cullom, Clap, and Long. The inclusion of Senator Allison is somewhat surprising given he was a member of the arch-conservative bloc of Aldrich, Platt, Spooner, and Allison, sometimes referred to as The Four (see Stephenson 1971, 134). However, Allison's home state of Iowa had great interest in regulatory action and may have been thought to be more willing to

judicial review by embracing conservative demands for broad powers of judicial review over ICC decisions (Kolko 1965, 139).

Roosevelt's compromise became more important to party unity as, from the March meeting until early May, frustrations mounted within the Republican Party. The recalcitrant conservative wing increasingly agitated progressives by refusing to stipulate to anything but broad judicial review. Conservatives were equally unhappy that reform was being pushed from within their own ranks. Noting the games conservatives were playing, Senator Dolliver cuttingly remarked:

> Senators have begun speeches by denouncing the measure as unconstitutional and ended by declaring their purpose to vote for it, as if the proverb read, "Be sure you are wrong, and then go ahead." A Senator who is against the bill made a speech for it, while another who is for it made a speech against it. A Senator who has gone over the measure three times in elaborate arguments finds no soundness in it, sees in every section the mangled remains of the Constitution, seriously proposes to take a little bill of his own and tuck it in tenderly by the side of these wicked and repugnant offenses against constitutional government as an alternative remedy.[33]

In an attempt "to heal the widening breach in the party," Roosevelt withdrew his support for anything short of broad judicial review (Mowry 1960, 26).[34] With the President's refusal to support the progressive's desire for minimal judicial oversight, conservatives moved to secure strong judicial oversight through an amendment proposed by Senator Allison.

The Allison amendment, described as "quite verbose and a little confusing" (Fowler 1961, 347), was essentially the House version of judicial review except that it

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compromise than many other conservatives.

[33] *Congressional Record*, vol. 40, 6778.

[34] Roosevelt to Knute Nelson, April 11, 1906, *The Letters of Theodore Roosevelt*, 209.

explicitly enabled the courts to define their own powers of review over ICC regulation. As Senator Long noted

> In my opinion, this bill as it came to us from the House without which I proposed, or with the amendment proposed by the Senator from Iowa [Mr. Allison] does not differ in any particular. The extent of judicial interference with rates made by the Commission under the House bill unamended . . . under the amendment of the Senator from Iowa would be the same.[35]

By this point, progressives were happy to get as much as they could and, LaFollette aside, were willing to support the Allison amendment. Once the amendment was formally attached to the Hepburn bill, conservative resistance dissipated and the bill passed the Senate 71 to 3. Roosevelt signed the bill into law on June 29, 1906.

Without a close examination of the legislative history of the Hepburn Act, it appears as if there was wide-sweeping support for such regulatory reform.[36] However, as noted above, public pressure created conditions wherein some form of regulatory legislation needed to be passed in order for the Republicans to maintain their hold on power. Therefore, conservatives who opposed such regulatory action were forced to find a way to protect their preferences and mitigate against the growing divide within the Party that threatened the very fabric of the Republican political order that had existed for nearly a decade. The Hepburn Act did just this but left much of the ICC's new powers

[35] *Congressional Record*, vol. 40, 6687.

[36] Kolko makes this argument, stating, "The votes in the Hepburn Bill in both the House and Senate were nearly unanimous. Unless one maintains that the railroads were totally powerless politically, which was hardly the case, the votes for the Hepburn Bill can only be understood as an indication that enough important railroads essentially backed the measure, or were neutral toward it, to make such an overwhelming vote possible" (1965, 148). However, Ely counters citing, "Railroad companies, in fact, were adamantly opposed to giving the ICC rate-making authority" (2001, 226). Kolko only considered one dimension of the political debate: Support or opposition to rate regulation. As we have seen, there are multiple political considerations within the debates over the Hepburn bill including policy and partisan cohesion. Incorporating these multiple considerations helps frame the debate with greater accuracy.

subject to judicial oversight through the Act's grant of broad judicial review. As we will now show, the Supreme Court largely endorsed and secured conservative preferences in a series of rulings.

The Hepburn Act Before the Court

Conservative wing reliance on the judiciary proved a successful venture. In a series of rulings, the Supreme Court held true to conservative policy with only slight deviation. While a few conservatives would have been happier if the Court had struck down the Hepburn Act, something the Court never embraced, most believed that Congress acted within established constitutional bounds when it delegated regulatory authority to the ICC. With constitutional nullification out of the picture, conservatives hoped that the court would carefully monitor ICC rulings and protect free enterprise wherever possible. The Court seemed happy to comply.

In 1910, the Court affirmed the constitutionality of the ICC's newly established powers. In *ICC v. Illinois Central Railroad Co.,*[37] the Court gave a nod to progressive reform by upholding the ICC's power to regulate the distribution of freight cars. The Court signaled limited deference to the Commission by declaring that it would not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."[38] However, the Court rejected the ICC's assertion that the courts "must treat the railroad company as being at fault for the

[37] 215 U.S. 452 (1910).
[38] Ibid. at 470.

failure to daily deliver all the cars called for in times of car shortage."[39]

On the whole, *Illinois Central Railroad* was a mixed bag. The Court announced that it would not oversee every last administrative ruling crafted by the ICC, recognizing a political and administrative need for the ICC in regulating the flow of commerce. However, by rejecting the ICC's rule that privileged shippers over carriers, the Court signaled that it would not allow the ICC to use its new powers over rate regulation to create new legal presumptions regarding the culpability of railroad companies. In an important test of ICC regulatory authority, the Court affirmed the power of the ICC to regulate shipping rates but also signaled its unwillingness to allow the ICC to craft policy wholly at odds with conservative economic preferences. The *New York Times* reported the matter as a victory for the ICC but noted that it was a very limited victory.[40]

In years following, the Supreme Court used the Hepburn Act in ways that more obviously favored conservative policy. Specifically, the Court used the Act's expansion of federal power to exclude state regulation—the level at which the most progressive regulation occurred. In *Chicago, Rock Island and Pacific Railroad Co. v. Harwick Farmers Elevator Co*,[41] the Court stripped the states of regulatory authority. Chief Justice White asserted:

> It must follow in consequence of [the Hepburn Act] that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme.[42]

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[39] Ibid. at 471.
[40] "Coal Roads Lose Suit." *New York Times* January 11, 1910, 2.
[41] 226 U.S. 426 (1913).
[42] Ibid. at 435.

The Court affirmed the limitations on the state in *Charleston & Western Carolina Railway Co. v. Varnville*,[43] holding "[t]hat [the absence of conflict] is immaterial. When Congress has taken the particular subject-matter in hand[,] coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[44] In both cases, progressive state measures were nullified for more business-friendly ICC regulations.

As can be seen in the few cases cited above, the Supreme Court effectively facilitated the Republican Party's compromise. By refusing to strike down the Hepburn Act on constitutional grounds, the Court upheld the progressive legislative victory. However, by limiting the degree of regulatory authority of the ICC and striking down progressive regulatory measures at the state level, the Court breathed new life into conservative economic and regulatory preferences. It was not a perfect victory for either side but, given the constraints of the governing Republican Party coalition, it was the greatest success possible.

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The Hepburn Act did not quell the progressive impulse for greater regulation of the railways. The success of progressives in the West only heightened the strength of progressives in the Republican Party. Reform governors such as Robert M. LaFollette (Wisconsin), Albert Cummins (Iowa), Coe Crawford (South Dakota), and Hiram Johnson (California) rose to political power based on vigorous attacks on the railroads. In his gubernatorial inaugural address, Governor Johnson called for greater regulatory control

[43] 237 U.S. 597 (1915).

over the railway systems in California by empowering the state's Railroad Commission and dismissing the "bogie man of unconstitutionality" that conservative opponents used as their primary reason for opposing such measures (Lower 1993, 29).[45]

The growing strength, size, and momentum of the Republican Party's progressive wing gave them greater influence over intra-party policies. Recall in 1904 that the Party's platform made no mention of support for increased railroad regulation. In 1908, progressives were able to secure a plank endorsing the passage of the Hepburn Act and hinting at support for more regulation. While the three-sentence plank was trivial compared to the Democratic plank that was greater in size and substance, the mere addition of the plank in the Republican platform revealed the growing strength and confidence of the progressive wing of the Party, which led to even greater internal tension. Yet, 1908 hardly brought victory to progressive Republicans. The presidency was once again returned to a conservative-minded easterner in William Howard Taft.[46] While the Republican platform contained compromise positions, on the whole, it was a ringing endorsement of conservativism. Perhaps most noteworthy was a plank "upholding . . . the authority and integrity of the courts, State and Federal" (Porter and Johnson 1956, 160). During a period when state and federal courts were increasingly under attack as a "judicial oligarchy" that "had usurped the powers of Congress and thwarted the will of the people by . . . nullifying legislation designed to ameliorate the

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[44] Ibid. at 604.

[45] Governor Johnson successfully passed a reform measure that empowered the state commerce agency to regulate rates within state boundaries. However, as noted above, the Supreme Court in *Chicago, Rock Island* and *Charleston & Western Carolina Railway* overturned such measures.

[46] Taft was from Ohio, which is arguably in the Midwest. However, Ohio's economy and politics were aligned with the east and quite at odds with western progressive states like Iowa, Wisconsin, and, even, California.

more baneful effects of the Industrial Revolution" (Ross 1994, 1), the dominant wing of the Party still embraced its role as the protector of judicial power.[47] Since progressive Republicans were the primary advocates of judicial reforms designed to make the courts more accountable, the pro-judiciary plank shows the degree of control conservatives retained over the national party system.

The Tariff and the Republican Divide

In 1908, one issue loomed larger than all others: tariff reform. The last time the tariff had been revised was in 1897 and was a source of significant sectional agitation. The Dingley tariff of 1897 overwhelmingly benefited "eastern manufacturers and their bankers and, to a lesser extent, to vulnerable wool, fruit, timber, and sugar-beet producers in the West" (Sanders 1999, 219). Midwestern farmers received virtually no benefit from the tariff while the tariff was downright hostile to southern interests. As Richard Bensel noted, "The developmental engine [the tariff] left the southern periphery to shoulder almost the entire cost of industrialization . . . The [nonindustrial] periphery was drained while the [manufacturing] core prospered" (1984, 63). The resulting sectional alliances pitted Midwestern and southern agricultural interests against far western and eastern manufacturing; a slight variation from the railroad rate alignment discussed above.

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[47] In his inaugural address, Taft acknowledged the need to protect both judicial power and corporate interests when he addressed demands to curtail the power of the courts to issue injunctions. "Another labor question has arisen which has awakened the most excited discussion. That is in respect to the power of the federal courts to issue injunctions in industrial disputes. *As to that, my convictions are fixed. Take away from the courts, if it could be taken away, the power to issue injunctions in labor disputes, and it would create a privileged class among the laborers and save the lawless among their number from a most needful remedy available to all men for the protection of their business against lawless invasion.*"

Taft, William Howard. *Inaugural Address*. Available at http://www.bartleby.com/124/pres43.html.

Upon being sworn into office, President Taft promised, above all, to adhere to the Party's platform and revise the Dingley tariff despite conservative preferences to leave the tariff unrevised (Pringle 1939, 395). Under a combination of presidential and progressive pressure, eastern conservatives agreed to revise the tariff but they did not share the assumption of midwestern progressives that revision would be downward. Unfortunately for progressives, President Taft's idea of revision was also different than their own, even if he support limited tariff reduction. Progressives quickly realized that the gains made with the help of Roosevelt did not come so readily under a new administration.

The tariff issue reveals the importance of courts to the maintenance of the Republican political order. As will be discussed below, the Payne-Aldrich tariff divided the Party much the way railroad rate regulation did. However, the tariff has never been an issue upon which the courts played a significant role in oversight or policy-making. In other words, the issue could not be delegated to the courts in any substantial way.[48] Without the assistance of the courts, the Republican Party had no way to alleviate the internal tensions that threatened to tear it apart. Either conservatives or progressives needed to yield to the demands of the other. Both proved unwilling to yield and unwilling to share power with those they saw as their opposition.

A good deal of noise had been made about revising the tariff during Roosevelt's administration, however, the issue received little attention. *The Washington Post* noted that Speaker Cannon and Roosevelt struck a deal to keep the tariff off the national agenda

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(Visited on February 15, 2005)

[48] See "Nondelegable Issue" on Figure 1. Page 15, supra.

in return for smoothing the way for the passage of the Hepburn Act.[49] Others argued Roosevelt neglected tariff reform because he believed it unworthy of his attention (Pringle 1939, 420). The lack of attention to tariff revision also may have stemmed from a sincere belief in the operational success of the Dingley tariff, since Roosevelt stated as much in his personal correspondence.[50] Whatever the reason, the protracted neglect of tariff revision increased agitation over the high tariff schedule. Midwestern agricultural and production interests complained bitterly over a tariff designed to protect eastern-based industry, which resulted in higher prices for goods only a downward revision would ease. When Taft took up the tariff issue in the first year of his administration, the cleavage between progressive and conservative Republicans began to look like an unbridgeable divide.

Throughout the debates over the Payne-Aldrich Tariff, Taft attempted to maintain party unity. However, several factors compelled Taft to take action that destroyed any hope of maintaining the Republican coalition. First, a cornerstone of Republican Party ideology was economic nationalism and a facilitative, rather than regulatory, role for the state in governing domestic competition in the marketplace (Geering 1998, 67-71). The tariff, however, required government privileging certain industries for protection, while leaving other industries to the whimsy of the invisible hand. The Party that argued the national government should err on the side of modest regulation of trusts made protection its cornerstone. As one Massachusetts congressmen proclaimed, "The policy of

[49] "President Has House: He and Cannon Agree on Railroad-rate Legislation." *The Washington Post* November 29, 1905, 2.
[50] Shortly after his departure from office, Roosevelt wrote, " . . . there is no real ground for dissatisfaction . . . with the present tariff; so that what we have to meet is not an actual need, but a mental condition among

protection may be wrong but it is the policy of the Republican party and when protection ceases to exist the party will cease to exist" (as quoted in Harbaugh 1973, 2088).

Second, the tariff divided the Republican Party along sectional lines. Eastern and far western industry benefited from the protection provided by the tariff. Midwestern agrarian interests suffered as the tariff resulted in higher prices for goods. Since sectionalism largely determined support for tariff reform, national Party leaders were forced to balance competing interests when setting the Party agenda regarding tariffs. Compounding the problem, most Republican senators and congressmen did not have to concern themselves with these competing interests when satisfying constituency demands since one's position on the tariff was largely determined by geography, and local politics drove national policy-making. However, the absence of competing demands at home did not determine the policy of the president or the national Party platform, as these were an amalgam of constituent and partisan pressures. As a result, the tariff remained a major division throughout Taft's administration.

Third, several leading progressive Republicans formed a coalition with the Democratic opposition to propose an amendment that would write into the bill an income tax. The measure was designed to overturn the Supreme Court's decision in *Pollack v. Farmers' Loan & Trust, Co*.[51] While the income tax enjoyed a sizable amount of support in both parties, hardline Republican conservatives in the Senate opposed it for two reasons. The primary reason was that an income tax would "render the protective tariff superfluous from a fiscal point of view" (Bickel and Schmidt 1984, 22). Powerful

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our people" (as quoted in Pringle 1939, 430).
[51] 157 U.S. 439 (1895).

conservative senators like Aldrich and George Sutherland ardently embraced the wisdom of protective policy (Paschal 1951, 58-59). A secondary reason stemmed from the conservative argument that such blatant attacks on Supreme Court rulings undercut the independence of the national judiciary. Given the reliance on the courts by conservative Republicans, the latter point was where most of the legislative debate was focused.

Senator Sutherland set forth the conservative position that any legislative endeavor to force the Court to reconsider its decision in *Pollack* would set public opinion against

> . . . the independence, the dignity, the respect, the sacredness of that great tribunal whose function in our system of government has made us unlike any republic that ever existed in the world, whose part in our government is the greatest contribution that America has made to political science.[52]

Yet, the opposition to the amendment was outnumbered and seemingly destined to fail if not for an innovative legislative strategy crafted by Senator Aldrich. In order to remove the income tax provision from the tariff proposal, Senator Aldrich and President Taft brokered a deal to eliminate the income tax provision from the bill and craft a constitutional amendment, for which Aldrich agreed to rally conservative support. The goal of the maneuver was clearly to protect the integrity of the Supreme Court since the Court would have been forced to either duplicate an unpopular ruling or overturn a recently established precedent. Much as the Supreme Court frequently acted to protect conservative preferences, conservatives acted to protect the integrity of the Court.

The maneuver did several things damaging to the Republican coalition. First, it eliminated the possibility of the Supreme Court, once again, resolving an issue divisive to

[52] *Congressional Record*, vol. 44, 4022.

the Republican Party. Second, it drew to light the difference in which the conservatives and progressives valued the courts and their role in American policy-making. Third, and perhaps most importantly, Taft's negotiations with Aldrich gave the appearance that he had allied himself with the Old Guard in House and Senate. This notion was furthered by his hardline stands against western insurgent demands to revise the tariff schedules on wool, cotton, and industrial products (Gould 1986, 127). While the Payne-Aldrich Tariff was clearly borne of compromise, leading to lower tariff schedules in most major categories, the final tariff angered midwestern Republicans who desired greater downward revisions. Taft and his conservative Republican allies bore their ire.

The split in the Party was clear following the passage of the tariff. Taft publicly declared in Winona, Minnesota that the revision was "the best tariff bill that the Republican party ever passed." Taft may have been trying to put the best face possible on the tariff, yet, the statement bolstered western progressives' belief that Taft "seems to have surrendered absolutely to Aldrich" (Senator Joseph Bristow as quoted in Gould 1986, 128). While insurgent Republicans had been critical of administration priorities, prior to Taft's remarks in Winona, they had rarely attacked Taft personally (Holt 1967, 38). Following Taft's gaffe, western progressives began criticizing Taft openly and vigorously. Taft attempted to undercut dissent in the Party ranks by "cutting off the insurgents' patronage and throwing the influence of the administration against them in the primary election of 1910" (1967, 37-38). The fight between the conservative wing and the progressive wing split the Republican Party and led to Roosevelt's re-entry into

"the ring" of national politics, the eventual progressive split in the Republican Party, and the formation of the short-lived Progressive Party.

As briefly noted above, unlike rate regulation, the tariff was not an issue easily deferred to the judiciary—and the one policy that could have been left to the judiciary was resolved through negotiated compromise, which aggravated progressives. Only one provision of the Payne-Aldrich tariff was tested before the Supreme Court and that was a weak constitutional challenge to congressional authority to raise revenue through the tariff in which the Court unanimously upheld the Act.[53]

The history of the United States tariff is devoid of a judicial ruling with significant implications for tariff policy (see generally Taussig 1967). The inability of the courts to oversee tariff policy left the conservative wing of the Republican Party without an institution that could stabilize the Republican coalition by enabling the passage of progressive reform while safeguarding conservative policies, as the courts did with railroad rate regulation. The result was a conservative-progressive split in the Republican Party that eventually led to a sweeping loss of power.

Mann-Elkins Act of 1910

If the Republican Party was to retain its control over the national government, it would need to heal the divide between progressives and conservatives, or, at least, prevent the gap from widening further. In the legislative session following the passage of the Payne-Aldrich tariff, conservatives gave in to progressive demands for further regulatory legislation by supporting additional revision of the ICC's regulatory powers

with, of course, ample judicial oversight. This no doubt stemmed from mixed motivations. First, throughout his administration, President Taft viewed the Party's platform as a mandatory course of action and the 1908 platform supported additional, albeit limited, railroad regulation. Second, the fallout from the Payne-Aldrich tariff undoubtedly created the realization that failure to heal the conservative-progressive rift within the Party would significantly reduce the Party's ability to hold power in the 1910 and 1912 elections.

President Taft and his Attorney General George Wickersham drafted the bill Stephen Elkins introduced to the Senate. Wickersham relied heavily on advice from the railroads when he crafted the bill. Drafts of the bill had been sent out to several railroad companies prior to its submission to Congress (Hechler 1940, 165)—a fact not lost on the progressives the bill was supposed to appease.[54] One such progressive, Joseph Bristow, wrote about the bill, "I will not vote for a bill regulating the railroads which was drawn by the railroad attorneys in New York, any more than I voted for a tariff bill that was written by the manufacturers of New England" (as quoted in Hechler 1940, 174).

Progressive reservation aside, the bill was not devoid of regulatory substance. The central aim of the bill was to fulfill the promises made in the Republican Party platform by prohibiting railroads from owning stock in competing lines and to grant the ICC the power to regulate the issuance of railroad securities. Had the bill contained only these progressive measures and, perhaps, a few choice additions, progressives would surely have embraced the measure from the start. However, conservatives, backed by the

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[53] *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911).

[54] On January 7, 1909, the *New York Sun* reported that the railroad executives were behind the removal of

railroads, insisted on the creation of a Commerce Court, which would oversee all ICC regulations and resolve disputes between carriers and the ICC. The combination of the recent tariff fight, the continued ties between the Old Guard and railroad companies, and the creation of yet more judicial oversight led to the odd situation of conservatives supporting a regulatory bill and progressives opposing it.

Several provisions evoked the displeasure of progressive Republicans, but none more so than the proposed creation of the Commerce Court. The measure was actually quite similar to a proposal in the bill Representative Hepburn originally proposed in 1906 but was eliminated in the House Committee on Interstate Commerce due to concerns that such a court would "increase the judicial throttling of the [C]ommission" (Cushman 1941, 81). Senator Cummins, who led the progressives throughout the fight over the proposed bill, claimed that placing all authority over ICC regulation in one court would subject all subsequent judicial proceedings to immense pressure from a united railway industry. Moreover, the political influence of the railroads would ensure the appointment of judges highly sympathetic to carriers, thereby, undercutting ICC authority.[55] Representative Rufus Hardy (D-TX) made a similar argument in the House:

> . . . Environments affect us all. Our opinions, gradually take a tinge from our association. I do not know that this amounts to very much but when you get your court set aside for the trial of one class of cases only, with the representatives of the United States, far removed from the people, upon one side, and the representatives of the great railroads and other corporations immediately and vitally interested on the other, after a while your impartial judge begins to see things in a little different light from what he did before.[56]

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several regulatory measures originally proposed in a draft of the bill.

[55] Cummins' speech ranged over four days, but see generally *Congressional Record*, vol. 61, 2, 3341-3385.

[56] *Congressional Record,* vol. 45, 4939.

Finally, in the bill, the Commerce Court was authorized to resolve disputes over fact and law, which greatly concerned progressives since this would "transfer from the Commission to the Court all powers to determine rates and classifications" (Mowry 1960, 95).

These attacks proved successful on the one hand and a failure on the other. Taft had Attorney General Wickersham meet with the Senate leadership and develop a compromise plan on the proposed Commerce Court. The result was a series of technical concessions, which insurgents believed to be important modifications. However, in reality, the compromise position only provided the right of interlocutory appeal to the Supreme Court if the Commerce Court ordered an injunction restraining the operation of an ICC order. Clearly, the railroads and conservative Republicans were quite comfortable with a compromise position that provided for greater judicial oversight, as Wickersham acknowledged in his correspondence to Taft.[57] Additionally, progressives were later able to amend the bill so that judges to the Commerce Court were to be appointed by the Chief Justice of the Supreme Court and not the president. Again, conservatives had little objection to a measure that placed the power of appointment into the hands of Chief Justice Edward White, who had proved himself a solidly conservative jurist.[58]

Even when progressive Republicans secured legislative victories over conservatives' objections by piecing together an inter-party coalition with progressive

[57] George W. Wickersham to William Howard Taft, March 19, 1910.
[58] White had been quite conservative both as a member of the House of Representatives and as a member of the Supreme Court. One of White's biographers dubbed him the "defender of the conservative faith" (Highsaw 1981).

Democrats, the victories were short-lived. An amendment was introduced and passed over conservative dissent that enabled the ICC to suspend new rates for 120 days beyond their effective date and up to six months if the Commission hearings on the new rate were not finished by the time the 120 days expired. A similar coalition was able to reword the long and short haul provision. However, conservatives successfully support the addition of a subsequent provision, which partially diffused conservative objections by enabling railroads to apply to "be relieved from the operation of this section." Gabriel Kolko noted that over the next eight months, the ICC received over 5,000 such requests from the railroads, all of which were granted until an investigation of each one could take place (1965, 193-4).

Thus, the Mann-Elkins Act, which passed with overwhelming support by conservative and progressive Republicans in both the House and Senate, did little to advance progressive regulatory action. The Act provided the ICC with a new power to suspend and investigate rate hikes but it created a court designed to oversee the Commission's actions. It further failed to provide a workable standard for "just and reasonable" rates, which, again, empowered the courts to define the extent of ICC regulatory action. Finally, it failed to amend the commodity clause, which the Court had subsequently gutted and rendered virtually impotent in *United States v. Delaware and Hudson Railroad*.[59] The Act was sufficiently innocuous that the *Railway Age Gazette* claimed, "It does not necessarily follow that [the Mann-Elkins Act] will either hurt or help anyone."[60]

[59] 213 U.S. 257 (1909).
[60] *Railway Age Gazette*, XLIX (July 8, 1910), 63.

While Taft and other party elites hoped that enacting some type of regulatory measure would help heal the rift in the Republican Party, the Act was insufficient to bridge the divide wrought by the tariff. Moreover, the fight over the creation of the Commerce Court helped remind progressives and conservatives of the severity of their ideological differences even while they strove toward compromise. The result was a Party divided; the actions of the Commerce Court did little to assuage wary progressives.

As it turned out, progressives reservations regarding the Commerce Court proved accurate. Within a year of its creation, the court undercut the independence and authority of the ICC and overwhelmingly favored the railroads. In its first year, 57 cases were filed with the Commerce Court; although only 38 of these cases involved the court as an appellate tribunal "standing between the Interstate Commerce Commission and the Supreme Court of the United States" (Ripley 1927, 581). The Commerce Court successfully disposed thirty of these cases. In 27 out of 30, it issued restraining orders or final rulings in favor of carriers and against shippers (1927, 581). The Commerce Court became so reviled by progressives in both parties that proposals for its abolition were introduced as early as 1911. In 1912, legislation abolishing the Commerce Court passed both the House, now controlled by the Democrats, and the Senate on two separate occasions. However, Taft vetoed both measures, which did not play well in his re-election bid.[61] The court was abolished in 1913 following Wilson's ascent to the White House and the corresponding Democratic control of the House and capture of the Senate.

[61] The Progressive Party, which garnished most of its support from progressive Republican defectors, included an anti-Commerce Court plank in their platform, " . . . in order that the power of the Interstate Commerce Commission to protect the people may not be impaired or destroyed, we demand the abolition of the Commerce Court" (Porter and Johnson 1956, 179).

With the Commerce Court proving a particularly bitter pill for progressives and the degree of difficulty of securing even minimal regulatory legislation through the Party apparatus, progressive Republicans grew increasingly separatist in their political strategies. Making matters worse for Republican solidarity, a popular former president firmly embraced the progressive wing of the Party and led them in what would be a failed attempt to establish a Progressive Party.

Progressives in the Republican Party had threatened defection for years and conservatives had grown increasingly wary of the possibility. Once Roosevelt began to embrace certain progressive measures, the rift in the Party became increasingly obvious. Senator Jacob H. Gallinger (R-NH) noted this problem in a letter to one of his congressional colleagues: "Unless some restraint can be placed on the White House the Republican party will be divided into hostile camps before 1906" (as quoted in Gould 1986, 78). Conservatives were able to appease progressives for another five years but the divide proved too great to overcome. The relative ideological closeness of progressive Republicans and Democrats on the trust issue made a cross-party coalition inevitable. Yet, despite this progressive alliance, conservatives were able to secure outcomes suitable to their constituents during the first two decades of the 20th Century. Perhaps more interesting, progressive defection from the Republican Party in 1912 proved to be temporary as the Republican political order was able to re-establish its hold on power throughout the 1920s. But given the degree of division between conservatives and progressives, how were conservatives able to rehabilitate the Party, particularly when the

Democratic Party in the first two years of the Wilson administration engaged in a serious effort to recast the American administrative state akin to progressive Republican desires?

The answer, again, points to a reliance on the national judiciary. Throughout the first few years of the Wilson administration, conservative Republicans attempted to minimize their differences with progressives in order to bring them back into the Party fold. This presented some difficulty considering the number of regulatory measures, generally favored by progressives and opposed by conservatives, in the first two years of the Wilson administration. Conservative Republicans again turned to the courts to protect their preferences in the face of a progressive assault. However, in contrast to the preceding years, conservatives made little opposition to progressive legislation, opting instead to only wage significant legislative battles when matters of judicial oversight were involved. By avoiding the political thicket and not objecting to progressive reforms, the conservative wing of the Republican Party was able to lure those progressives who had defected from the Party back into the Republican fold.

Democratic Control and the Move to Regulate Trusts

With the progressive impulse at its apex, the regulatory movement expanded from the regulation of railroads to the oversight of all industrial practice in interstate commerce. Of course, the railroads played a major role in commerce among the states but progressive interests went beyond rate regulation. The Democratically-led progressive drive focused on rehabilitating and strengthening the Sherman Antitrust Act,

which the Supreme Court previously gave a conservative construction and rendered it impotent to address the ills of corporate power.

In 1911, the Supreme Court issued its ruling in the *Standard Oil Co. v. United States*[62] and *United States v. American Tobacco Co.* cases.[63] The rulings in these cases had been highly anticipated by both the left and the right. E.G. Lowry wrote that no cases before the Supreme Court

> caused the markets and the whole industrial and commercial world to pause more perceptibly than have the cases of the government against the Standard Oil Company and the American Tobacco Company. . . For months the financial markets have virtually stood still awaiting their settlement.[64]

The day following the Supreme Court's decision, Wall Street broke out of a prolonged slump as the market jumped upward.[65]

Wall Street reacted with great joy at the Court's rulings and, no doubt, President Taft and many of his conservative colleagues were equally pleased. In principle, the Supreme Court embraced the conservative vision and understanding of the Sherman Antitrust Act.[66] Several years prior to the Court's rulings, Mark Hanna had articulated the difference between "good" and "bad" trusts. Subsequent Republicans had adopted such an understanding of monopolies, including then-President Taft. In a letter to Congress, Taft explained that "mere bigness" of corporations and the "mere incidental

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[62] 221 U.S. 1 (1911).
[63] 221 U.S. 106 (1911).
[64] Lowry, E.G. 1911. "The Supreme Court Speaks." *Harper's Weekly*, 55:8.
[65] *New York Tribune* May 17, 1911, 1.
[66] In a letter to his wife, Taft wrote that the Court's opinion was a "good opinion" and, although, the Court's reasoning "did not take exactly the line of distinction I have drawn,[ ] it certainly approximates it" (as quoted in Pringle 1939, 665). Taft's greatest concern regarding *Standard Oil* was whether the Court was well suited to distinguish between "good" and "bad" trusts (1939, 666). The *New York Tribune* also noted the consistency between Taft's articulation and the Court's ruling (May 16, 1911, 8).

restraint of trade and competition" were not the problems. The problem lay in "the aggregation of capital and plants with the express or implied intent to restrain [competition]." Thus, there were "good" trusts and "bad" trusts, and only the latter should be punished.

In *Standard Oil*, the Supreme Court abandoned its fourteen-year-old precedent set in *United States v. Trans-Missouri Freight Association*[67] that held any restraint of trade was impermissible under the Sherman Act. The Court substituted its holding in *Trans-Missouri* for a "rule of reason", which made illegal those combinations of trade that harmed the public good by "restraining the free flow of commerce and tend[ing] to bring about. . . the enhancement of prices."[68] While the Court did not overtly draw the distinction between "good" and "bad" trusts, the effect of the rule of reason was to construct such categories (Hofstadter 1968, 249). The Court further reserved for the judiciary, and not the executive, the authority to determine whether business conduct was an unreasonable restraint on trade.

Progressives on both sides of the aisle were as unhappy as conservatives and businessmen were thrilled. William Jennings Bryan claimed that *Standard Oil* left the Sherman Act exactly as trusts would have written it.[69] Four Democratic Congressmen, two Democratic senators, and one Republican senator immediately introduced legislation to overturn the rule of reason (Sanders 1999, 278). On the flip side, Andrew Carnegie declared that he was "satisfied almost beyond measure" and "a happy man today" (as

[67] 166 U.S. 318 (1897).
[68] 221 U.S. 1, 58. The Court embraced the standard of an undue restraint on trade, which the courts would ultimately determine on an *ad hoc* basis.
[69] *Detroit News* May 17, 1911, 11.

quoted in Bickel and Schmidt 1984, 112). Even the stock market responded following news of the decision; total transactions on the day the Court released its opinion neared 1,000,000.[70]

Both the Democratic and Progressive Parties used the Court's opinion as an impetus for greater regulatory action in their respective platforms. The Democratic Party's antitrust plank included a rebuke of the Supreme Court's rule of reason:

> We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficiency and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation" (Porter and Johnson 1956, 169).

Similarly, the Progressive Party platform demanded "a strong National regulation of inter-State corporations" and the "establishment of a strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations engaged in inter-State commerce" (178).

These two platforms held the key to the creation of a new Democratic political order. Since the Democratic Party's control over Congress and the presidency stemmed primarily from the progressive-conservative split in the Republican Party, the Democratic leadership knew that they would need to engage in the "politics of coalition building" (James 2000, 136). Those building such a coalition needed to look no further than to progressives who defected from the Republican Party since, as the two platforms suggest, they shared the desire to regulate the rapid expansion of corporate power.

So the Wilson years posed a dilemma for progressives who either chose to stay within the Republican Party or left the Party for Roosevelt's Progressive Party.

[70] "Business Likes Oil Decision." *New York Times* May 17, 1911, 1.

Woodrow Wilson won the presidency on a platform more progressive than its Republican counterpart. The insurgent Republicans, therefore, faced the prospect of either joining the Democratic majority on progressive measures, resulting in de facto abandonment of their party, or joining with the Old Guard and attempting to refashion party unity. Almost all of the progressives chose the latter, if for reasons other than a sudden change of heart regarding Old Guard policies.

The Democratic governing strategy was not well designed to expand their coalition. Democrats in the House and Senate governed through party-driven caucus. The exclusive nature of the caucus system reaffirmed the pre-existing divisions between the parties. Moreover, the centralized nature of Democratic legislative organization was anathema to progressive Republican ideology. The exclusive and secretive caucus decision-making process was too similar to Cannonism and the city machines that progressives equated with corrupt politics. Summing up the opinion of many of his progressive colleagues, Senator Clapp wrote that the destruction of the caucus would bring "the dawning of a better day" (as quoted in Holt 1967, 85). The Democratic Party in Congress attempted to reach across the aisle from time to time, however, the exclusivity of the Democratic power structure rankled progressive Republicans.

Adding to the caucus problem, Wilson viewed himself as the head of the Democratic Party, not as independent from the Party or its collective agenda. Wilson's governing style reflected that commitment and he carried out his legislative agenda through the caucus system crafted by the Democratic majority in Congress. Moreover, Wilson failed to appoint a Republican to his cabinet—the first Democratic president to

fail to appoint an opposition party member since Buchanan. Historian John Blum argued that had Wilson been more active in his pursuit of progressives, he would have lost more Democratic votes than he would have gained from progressives (1956, 66). However, certain factors cast doubt on this assertion and lend credence to the fact that Wilson and the Democratic Party had both the agenda and the ability to lure progressives into the Democratic fold.

First, as mentioned above, Wilson's agenda was quite progressive and had the support of several leading progressives from outside the Democratic Party. The ideological proximity made for a strong lure for those who had begun to doubt Republican commitment to progressivism. Second, in contrast to the exclusive Democratic caucus system, Wilson frequently relied on progressive Republican advice and input when drafting regulatory measures. Senator Cummins played a central role in Wilson's antitrust legislation, discussed below. Finally, Wilson used patronage to keep Democrats firmly behind his bills.[71] Wilson's mastery of the patronage system as a means of garnering support provided Wilson greater leeway in building a larger, progressive governing coalition. Thus, Wilson not only had the agenda to attract progressive Republicans but also had the means of establishing sufficient discipline among Democratic regulars to prevent internal revolt.

Wilson's commitment to progressivism and his attempt to build a larger Democratic coalition came most readily in his attempt to curb the power of trusts through administrative regulation. While most legislative energy was devoted to tariff reform

[71] Wilson became so proficient at distributing patronage to his Democratic colleagues that Senator Weeks (R-CA) declared it a "menace to free institutions" (as quoted in Holt 1967, 86).

during the first year of Democratic control, the second year brought a concentrated effort to rehabilitate antitrust law and overturn the Court's newly imposed "rule of reason" standard. Specifically, Wilson attempted to secure a series of bills similar to the "seven sisters" acts that he successfully enacted toward the end of his tenure as governor of New Jersey. The keystone of the acts was the New Jersey Trust Definitions law that prohibited any monopoly from entering into

> any agreement by which they directly or indirectly precluded a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any article or commodity, either by pooling, withholding from the market, or selling at a fixed price, or in any other manner by which the price might be affected (Updyke 1913, 650).

Agrarian Democrats, in particular, embraced Wilson's efforts to create "free and unrestricted competition," which would have reinstated prohibitions against all restriction on competition similar to the Court's *Trans-Missouri* doctrine.

What followed in 1913 and 1914 was the legislative effort to pass the so-called "five brothers", five individual bills crafted as a hybrid version of Wilson's "seven sisters" and a bill introduced by Senator LaFollette (R-WI) and Representative Lenroot (R-WI) in 1911 (James 2000, 170). The "five brothers" had five central aims. First, the legislation contained clarifying language regarding the Sherman Antitrust Act's prohibition on restraint of trade by defining those practices that constituted monopolizing behavior. Second, certain types of price discrimination, exclusive contracts, and the ability of mine owners to sell their resources to certain parties would be banned. Third, the "brothers" would prohibit a "director, officer, or employee" from holding a post at another national financial institution, thereby, eliminating the interlocking directorships.

Fourth, it proposed creation of a federal administrative agency with significant powers to facilitate the gathering of information, including subpoena power of both documents and witnesses and unlimited access to all corporate records and relevant papers. Finally, it permitted the agency to regulate new securities issued by the railroads.[72] Together the bills were comprehensive, authoritative, and unmistakably aimed at killing the rule of reason. As the *New York Times* editorialized, the rule of reason would be "swept away by the bill's provisions."[73]

Representative Hepburn and Senator Newland introduced the bills in the House and Senate respectively and received words of support from progressives and notable silence by conservatives. Senator Cummins, who played a role in drafting the bill, signaled his overwhelming support by declaring the necessity of such a commission:

> The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the anti-trust law and under the decisions of the court in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of fair commerce between the states. It is these considerations which, in my judgment, have made it wise, if not necessary to supplement the anti-trust law by additional legislation, not in antagonism to the anti-trust law, but in harmony with the anti-trust law, to more effectively put into the industrial life of America the principle of the anti-trust law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations.[74]

[72] For greater detail, see Sklar's *The Corporate Reconstruction of American Capitalism* (1992) and James's *Presidents, Parties, and the State* (2000, 170-72).
[73] *New York Times* January 23, 1914, 3.
[74] *Congressional Record*, vol. 51, 11455.

Most progressives shared Cummins' sentiments about the need to control the evils associated with trusts and many more initially seemed willing to support Wilson's agenda.

Conservatives, on the other hand, were less agreeable. But given their remote odds of defeating the legislation in Congress and the potential to drive a permanent wedge between them and progressive Republicans, conservatives were not in a position to successfully oppose such reform. Instead, the conservative wing of the Party chose to engage in a politics of selective opposition. On many of the proposals, conservatives voiced little objection unless progressive Republicans first objected. Only on the issue of whether the commission should have quasi-judicial authority did conservatives mount sustained opposition.

Conservative opposition to an administrative agency with quasi-judicial powers centered on two questions. First, did the courts have the power to review the commission's findings of fact or were they bound by the commission's findings? Second, who would interpret the phrase "unfair methods of competition in commerce," which the bill forbade? Progressives argued that the proposed commission would have final determination over factual findings and bear primary responsibility for constructing "unfair methods of competition" through its application to real cases. Senator Sterling's (R-SD) interpretation bore out this belief:

> Under the plain language of this act the court is the auxiliary to the commission, and the court has as much judicial power as the sheriff or the clerk of a court would have, its business being simply to enforce the order of the commission, and that is all. Its powers here are ministerial, not judicial.[75]

[75] Ibid. at 12215.

Thus, the courts were to serve a ministerial role quite distinct from the oversight role the judiciary had carved for itself in other regulatory arenas.

However, conservative Republicans, led by Senator George Sutherland, rebutted the idea of a ministerial court and argued that the commission's factual findings must be subject to judicial review. Senator Frank Brandegee, a conservative senator from Connecticut, argued, "It is for Congress to set up [the Commission] and leave the power [to determine unfair methods of competition] with the courts—and I do not believe we can take it away."[76] Brandegee also warned that without due process of law guaranteed by judicial review of the commission's factual findings, the commission would issue arbitrary orders.[77] Senator Sutherland also expressed his belief that the courts retained their authority to review the commission's factual findings since such power stemmed from the essence of "judicial power as the right to determine what the law is."[78] As will be shown below, the Supreme Court subsequently adopted Sutherland's interpretation and "convert[ed] practically every question of fact involved in a trade commission hearing into a question of law" (Cushman 1941, 201).

On the second question of whether the courts or the commission should have the power to define the phrase "unfair methods of competition," proponents of the bill wanted to create a standard sufficiently flexible to enable the commission to apply it to evolving business practices, various industries, and changing economic conditions. They did not believe that using such a phrase would tie the commission to the common law

[76] *Congressional Record,* vol. 51, 12216.
[77] Ibid.
[78] Ibid. at 12031.

definition; the commission would be free to define the phrase as it investigated alleged corporate malfeasance.

Conservatives were entirely uncomfortable with the prospect of a regulatory body free from the moorings of judicial oversight. Senator Sutherland again took to the floor of the Senate and criticized the notion that the commission could depart from the common law construction of "unfair methods of competition."[79] Even Senator Borah, a progressive from the Midwest, and a few Democrats suggested that such authority should not be placed in the hands of an independent and unresponsive regulatory commission, but should instead reside with the courts.[80]

Congress never fully remedied these two discrepancies. While the Federal Trade Commission Act passed by a wide margin, the failure to fully enumerate the power and authority of the trade commission gave the courts final policy-making authority over the Federal Trade Commission and its investigatory authority. The most notable trend throughout the 63rd session of Congress was that conservatives remained in the background and muted their opposition to most of the bill's provisions. Only in a few instances did conservatives feel compelled to advocate for greater judicial oversight than the bill permitted. By minimizing the differences in the Party, conservatives attempted to heal the calamitous rift that drove them out of power in 1912. The strategy worked so well that Senator Bristow, a progressive Republican, noted that conservative Republicans who had fought the progressives for the past 15 years were now "rather eager to vote with us" (as quoted in Holt 1967, 111). As the rift in the Party closed, issues that did not cut

[79] Ibid. at 11178.
[80] Ibid. at 11600.

across traditional lines of cleavage became salient[81] and re-established the pre-1912 partisan alignment. With the recurrence of the old alignment, the Republican Party reclaimed its dominance of national politics.

The Federal Trade Commission Act of 1914 before the Court

Once again conservatives had placed great faith in the courts. Recognizing their weak bargaining position, conservatives relied on intentionally vague statutory language with disputed meaning to enable judicial oversight of the newly empowered FTC. Of course, the past two decades showed that the courts, particularly the Supreme Court, were more than willing to assert judicial policy-making authority over regulatory legislation. The case of the Federal Trade Commission Act proved to be no exception.

Much as with the Court's rulings on the ICC, the Supreme Court was willing to sustain a significant portion of the legislature's delegation of authority to an administrative agency. However, the Court was unwilling to yield to the Federal Trade Commission (FTC) in several ways that mirror conservative objections regarding the Commission's authority to define "unfair methods of competition" and the finality of the Commission's findings of fact. Recall that conservatives objected to the FTC defining "unfair methods of competition" because they feared that the Commission would deviate from the judicially prescribed common law definition and create a much stricter

[81] The most notable issue was foreign affairs. Those who left the Republican Party for the Progressive Party in 1912 tended to be nationalists who were genuinely committed "to the aggressive assertion of American rights in the Western Hemisphere and the Far East" (Mayer 1967, 338). Wilson bungled several international efforts, including an attempt to oust the president of Mexico and a proposal to award Colombia $25,000,000 in damages for the United States's role in fostering the revolution in Panama during Roosevelt's administration. Wilson's international policy so angered progressive Republicans that Senator "Bristow candidly conceded that his dislike of the President's foreign policy blinded him to other virtues of

definition that prohibited corporate activity that was then legal. In *Federal Trade Commission v. Gratz*,[82] the Supreme Court expressed similar concerns and foreclosed the authority of the FTC to craft such a definition.

Gratz was an overwhelming victory for conservative interests. Not only did the Court signal a continued oversight role for the national judiciary but also it did so with a sizable majority. Writing for a seven-member majority—five of which were Republican appointees—Justice McReynolds undercut the policy-making authority of the FTC when he declared:

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include . . . The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.[83]

This would have been sufficient to please conservatives and their constituents but the Court moved even further to mark its claim on defining what would constitute American anti-trust policy.

In analyzing the findings of the FTC regarding Gratz's corporate practices, McReynolds noted, "Nothing is alleged which would justify the conclusion that the *public suffered injury* or that competitors had reasonable ground for complaint."[84] By inserting a requirement of offending the public welfare, the Court asserts an antitrust doctrine strikingly similar to the doctrine of Mark Hanna. While President Wilson identified trusts by their "organizational efficiency," conservatives had distinguished

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the Administration" (338).
[82] 253 U.S. 421 (1920).
[83] Ibid. at 427-428.
[84] Ibid. at 428. Emphasis added.

between "good" and "bad" trusts by determining whether "the public interest had been violated" (James 2000, 161). The Court clearly was more concerned with an injury to the public than its organizational size or strength.

A few years after *Gratz*, the Supreme Court shifted its attention to the other major conservative reservation regarding the Commission: the finality of FTC factual findings. In *Federal Trade Commission v. Curtis Publishing Co.*,[85] Justice McReynolds, once again writing for seven justices, readily dispatched with the idea that the Commission's factual findings bound the courts. In a terse opinion revealing a shade of contempt for the FTC, McReynolds wrote:

> Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission -- the primary fact-finding body -- with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do.[86]

Not only did the Court declare that it had the power to review the FTC's factual findings as it reported them, but it also had the authority to review those facts the Commission omitted from its reports.

In claiming review authority over factual findings, the Court also declared the power to define the phrase "substantially lessen competition or tend to create a

[85] 260 U.S. 568 (1923).
[86] Ibid. at 580.

monopoly." In the words of the Court, "We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for the court, not the Commission; and the same rule must apply when the charge is that leases, sales, agreements or understandings substantially lessen competition or tend to create monopoly."[87] The Court's opinion in *Curtis Publishing*, radically altered the distribution of power in regulating the trusts. As Gerald Henderson observed shortly after the opinions in *Gratz* and *Curtis Publishing*:

> The question is of great importance, for if the Commission is, by these decisions, shorn of all power to exercise administrative discretion in matters of unfair competition or of restraint of trade or monopoly, it has become little more than a subordinate adjunct of the judicial system (1924, 102).

To say that the Court relegated the FTC to no more than an "adjunct" would underestimate the breadth of the FTC's investigatory powers. However, the Court did reduce the influence and authority of the Commission by curtailing its ability to define what constituted a monopoly and monopolistic practices. The Court largely stripped the FTC of the powers condemned and resisted by conservative Republicans. By the time the Supreme Court made its rulings in the major FTC cases, the Republican coalition had reunited and was a cohesive bloc that shared one central goal: defeating Wilson's foreign policy agenda, most notably the League of Nations.

In 1918, a reunited Republican Party took back the House and Senate. Two years later, the electorate signaled its collective desire to return to "normalcy" by placing Harding in the White House by an overwhelming margin. Interestingly, normalcy did not include much progressivism. Harding was the most conservative president since

[87] Ibid. at 579-80.

McKinley and most of his domestic agenda was crafted with the Party's corporate constituency in mind. As John D. Hicks observed, " . . . the policy of the Harding administration was to do with alacrity whatever business wanted to have done," which included "a return to free enterprise" (1960, 50).

Of course, the Republican political order came to an end in 1932. The ideological commitments of the conservative, dominant wing of the Party precluded a vigorous administrative response to the economic crisis of 1930. Herbert Hoover was either unable or unwilling to break with Old Guard conservatives and continued to grasp at the ethos of rugged individualism while the country dreamed of a government that would "do something." In 1930 and 1932, the Republican regime decayed and a new one rose in its stead. However, the failure to perpetuate the Republican order ad infinitum should not obscure the degree to which the Republican Party was able to alleviate internal party tension to keep its coalition intact. Moreover, even when the party disintegrated in 1912, they were able to coalesce and reclaim power for over a decade. The Republican Party remained intact due to the dominant, conservative wing's reliance on the courts to safeguard those policies that the minority, progressive wing agitated against. Without an institutional ally in the courts, it is difficult to see how the Republican Party would have maintained control over Congress and the presidency as long as it did.

Conclusion

Examining the historical record, the Republican Party clearly relied heavily on the courts as a means of facilitating compromise. Conservative

Republicans benefited by the courts consistently protecting policy commitments favored by the Old Guard. Progressive Republicans benefited by securing legislative victories that curtailed the power of railroads and trusts. By relying on the courts, Party members in government worked to reduce the ideological tension within the Party. Judicial policy-making regarding regulatory action also shifted much of the blame for conservative economic policy onto the courts. Given the conservative wing of the Republican Party relied on the courts to retrench its core economic preferences throughout the Progressive Era, it should come as no surprise that this period saw an unprecedented number of legislative proposals designed to limit the review authority of the courts (see Ross 1994). As the courts protected conservative commitments, conservative lawmakers protected the integrity of judicial power and even managed to increase the Supreme Court's policy-making authority by providing it with greater discretion over its caseload once conservative "normalcy" had been restored.[88]

In addition to playing an important role in shaping the American political landscape, the courts played a significant role in the development of the administrative state. Progressives believed that they had crafted legislation that would remedy the ills of railroad shipping practices. They succeeded when conservative interests aligned with their own, as was the case in curtailing rebating through the Elkins Act. Yet, when it came to extending more significant administrative authority, both the conservative wing and the Supreme Court

[88] The so-called Judges' Bill of 1925 eliminated direct appeals to the Supreme Court from the circuit courts of appeal except in a few notable exceptions, like interstate commerce and antitrust rulings, as well as

proved unwilling to wholly embrace the progressive agenda. The Court used the Hepburn Act as a means of eliminating state-based railroad rate regulation. By undermining a dualist regulatory regime, the Supreme Court undercut local regulatory schemes, which forestalled stringent rate controls enacted by progressive state legislatures. The Supreme Court also curtailed the powers of the Federal Trade Commission and refused to yield areas associated with customarily judicial policy-making, such as the power to define monopolistic practices.

The result was a bureaucratic system that underwent judicial revision to its structure and authority. The disjunction between the original legislative construction and the subsequent judicial modification led to institutional confusion as to which institution would ultimately be responsible for curtailing corporate power. Of course, the Old Guard of the Republican Party was unconcerned with such problems since their corporate constituency favored minimal administrative regulation and robust judicial oversight. Thus, the alliance between conservative Republicans and a conservative national judiciary dramatically altered the development of the national administrative state.

Eventually, the same conservative coalition that relied on the courts to protect its core commitments was dethroned by an inability to formulate a response to the economic depression that plagued the nation. Conservative support for careful judicial scrutiny of administrative rulings and strong judicial oversight of administrative power tied conservatives to private power that was seemingly unable to pull itself out of the economic disaster. Free enterprise had

been the policy on which conservatives had risen to power and held power but it was also that which caused them to fall.

Stephen Skowronek has argued that "[t]he courts were gradually swamped by Congress's expansion of bureaucratic authority into economic regulation, and ultimately they decided to focus their attention elsewhere" (1982, 287). This is, in part, accurate but it misses the importance of the judiciary as part of the political order. The courts, particularly the Supreme Court, fought the expansion of bureaucratic authority for years following the fall of the Republican Party as it acted to protect the same policy and jurisprudential commitments it protected for several decades leading up to the New Deal. However, changes in Court personnel and the slow shift in jurisprudence wrought by these new justices is a more accurate explanation of the decline of judicial oversight of administrative power (see Cushman 1998). Once the Republican Party was unable to place sympathetic jurists on the bench, the judicial conservativism gave way to a deferential national judiciary that endorsed national regulatory authority. The liberalism of the New Deal Court was born and a new regime controlled all three branches of the national government.

Chapter 3

The "New Deal" Democratic Party: Civil Rights and Party Transformation

Introduction

Throughout the Progressive Era, conservative Republicans used the courts as a means of retrenching their policy preferences while stabilizing their national party coalition. To appease their business and corporate constituents, conservative Republicans needed to maintain status quo regulatory policy and prevent the build-up of a social administrative state. The dominant wing of the party-in-power sought to have the courts abate progressive proclivities toward economic regulation. In short, during the Progressive Era, the Republican Party asked the courts to hamper change. Yet, the courts can do more than simply limit change. If the dominant wing of the party-in-power desires progressive change, then courts may be asked to facilitate change. In other words, what happens when the dominant wing of a party-in-power hopes to enact progressive policies but faces resistance from a conservative minority within the party?

The answer to these questions lies in an examination of the Democratic political order, which occurred during the 1930s through the 1960s. As the political agenda shifted away from economic recovery and winning World War II, the liberal wing of the Democratic Party increasingly shifted their progressive focus away from economic regulation to social egalitarianism. In realizing their egalitarian vision, the liberal wing of the Democratic Party also sought to draw African Americans into the Party by attacking the institution of segregation in the South. Of course, the southern, conservative wing of the Democratic Party viewed such action as "a monumental insult to the Democratic South and the southern way of life. . ."[89] and used every means

[89] Congressan L. Mendel Rivers (D-SC) as quoted in Frederickson, *The Dixiecrat Revolt & the End of the Solid South: 1932-1968*.

possible to oppose changing economic and social conditions for African Americans in the South.

During the period of 1938-1968, the Democratic Party faced the prospect of governing through a highly divided partisan system. As with the Republican Party in the Progressive Era, the Democratic Party was sectionally and ideologically divided. Throughout the Solid South, the Democratic Party was the only viable political organization (Key 1984). Southern Democrats were politically and socially conservative, especially when government regulation of the economy shifted to what the white southern establishment considered social issues. In 1938, President Franklin Delano Roosevelt attempted to purge southern conservatives from the Democratic Party but failed utterly. Following the failed purge, it was clear that Democrats either had to work with the conservative wing or find a way around them. When it came to egalitarian racial policy, southern conservatives would not abide by social initiatives so the liberal wing need to look for alternatives. In this chapter, I argue that the dominant, liberal wing of the Democratic Party found such an alternative by using the federal judiciary as one of its principle means of eliminating racial segregation in the South and wooing African American voters into the Democratic Party.

Scholars have focused a significant amount of attention on both the legal and political effort to eliminate segregation in the South (see Tushnet 1987; Branch 1999; 1989; Williams 1988; Dudziak 2002). Historians, legal academics, and political scientists alike have been fascinated by the period that saw the end of Jim Crow and the dawning of a new period of racial equality in the country. Yet, much of this literature

examines the civil rights movement in terms of social movements, pioneering civil rights cases, or international pressures rather than in a manner that highlights how minority gains during this period can be explained through the interaction of institutions in the American political system. This analysis will reexamine the sincerity of Democratic efforts to work toward dismantling the segregated South as both civil rights leaders and scholars articulated their skepticism regarding Democratic earnestness (Hastie and Marshall 1942; Brinkley 1995; Irons 1984). This chapter is not the first work to reevaluate the contributions and commitment of the New Deal regime to equalizing conditions among the races. Kevin J. McMahon recently argued that Roosevelt appointed reform-minded jurists to the High Bench and actively promoted activism on racial issues (2004). By examining *Brown* through the lens of presidential leadership, McMahon is able to link political constraints on the New Deal coalition, legal reform movements, and Supreme Court decision-making. Moreover, McMahon identifies the institutional constraints on the presidency, giving *Brown* greater conceptual clarity than merely attributing it to the preferences of the dominant national coalition. This is especially true since southern conservatives, a vital part of the Democratic coalition, adamantly opposed desegregation.

Yet, these studies do not examine the Democratic Party's efforts to both realize liberal social policy and manage the Party's national coalition to continue holding power. Examining judicial strategies and outcomes in light of the New Deal/Great Society coalition reveal several important insights. First, throughout the Democratic political order, the courts facilitated the maintenance of the regime by providing an indirect means

of attacking segregation and, thereby, diffusing blame and enabling the coalition to survive increasingly divisive issues. Second, the Democratic political order changed significantly during its hold on power. During the Truman administration, the Supreme Court played a central role in liberal Democratic efforts to woo African American voters, particularly in northern states, into the Party. The addition of a sizable African American voting bloc enabled the Party to continue to hold power and bolstered liberal wing strength within the Party enabling it to maintain its dominance of the national Party. Third, examining judicial decisions in light of the intra-party conflict sets the Supreme Court's revolutionary civil rights decisions within their political context and reveals how the Court served the interests of the dominant wing of the party-in-power much the way the Court did during the Progressive Era. Fourth, the concluding section reveals the degree to which the Democratic political order relied on the national judiciary in order to strike balance and compromise on disputed policy objectives. Once the Democratic Party firmly embraced and acted upon its desire for racial egalitarianism, the Democratic political coalition disintegrated and lost its unified control of the federal government.

In order to reveal these insights, this chapter will first examine the formation of the Democratic Party during the realigning period of 1928-1936. Attention then shifts to President Roosevelt's failed attempt to purge southern conservatives from the Party in 1938 and its implication for the pursuit of progressive racial policy. Next, I examine the inability of the liberal, majority wing of the Democratic Party realize progressive racial policy through the traditional political process because of conservative, minority wing obstruction. As a result, Truman used the courts as a way of securing its racial agenda

and a means of wooing African American voters, which effectively liberalized the Democratic Party. The examination then shifts to the Eisenhower Administration, its inheritance of Truman's court-centered strategy and the Civil Rights acts that use the courts as a means of creating legislative compromise. Finally, the last eight years of the Democratic political order are examined in order to reveal how the shift away from a court-centered strategy to desegregate the South sped the decay and eventual demise of the national Democratic coalition.

The Democratic Political Order Forms

As one political order ended, another was born out of its destruction. In the autumn of 1929, the United States stock market began a sharp descent that marked the onset of economic depression. On October 28, 1929, known as Black Monday, the frenzied sale of more than 9,250,000 shares drove stock prices down to unprecedented lows. Worse, unlike past crashes on Wall Street, the stocks did not recover. Most stocks continued to decline for months thereafter and the market did not fully recover until 1954. While the price of stock fell, unemployment rates took a sharp upward turn. Economic chaos beset America and neither political party was well-positioned to fashion a remedy.

The Republican Party that dominated national politics for the previous decade had once again become solidly conservative. Progressive Republicans still acted as the gadfly within the Party but their numbers and influence waned significantly in the 1920s. Moreover, Republican policy and ideology strongly reflected a pro-business and non-

interventionist approach. President Hoover's strategy for combating the economic malady that plagued the country was to regulate small discrete areas of the economy, such as agricultural regulation through the Federal Farm Board, or to provide loans to corporations and banks through the Reconstruction Finance Corporation (see Nash 1959). The Republican Party held to their belief that the majority of relief should come either from the states, something Hoover's Organization of Unemployment Relief was designed to promote, or from charitable organizations. Despite the scale of national need, the Republican Party was unable to abandon its ideological commitments to free enterprise, non-intervention, and rugged individualism. This failure gave the Democrats an opportunity to reclaim unified control over the federal government for the first time since 1916.

Despite the opportunity, the Democratic Party did not respond to the economic crisis with decisive action. During the Wilson administration, the Democratic Party had proved itself to be more willing and able to enact progressive regulatory measures than the Republican opposition. But, Democrats also had strong ties to business and were moored to conservative economic policy by their southern wing. For example, the Democratic Leader in the Senate, Joseph T. Robinson of Arkansas, opposed a bill that provided "$375 million in federal grants to states for relief of the unemployed," arguing that if all emergency relief were conceptualized as national then the "draft on the Federal Treasury will threaten to become immeasurable and unlimited" (Sundquist 1983, 206). However, the floundering of the Republican leadership to respond decisively to the

economic crisis led the Democratic Party to seek out an agenda that provided the greatest appeal to the "forgotten man."

No one seemed to appeal to the forgotten man like the man who named them.[90] Franklin Delano Roosevelt quickly emerged as the Democratic Party's best chance to recapture the White House. Roosevelt won the governorship of New York in 1928 and secured re-election in 1930 by a staggering 725,000 votes. During his tenure as the chief executive of New York, Roosevelt pushed a progressive agenda through the state legislature, which included direct relief aid, pro-labor policy, and a series of public works projects (Black 2003, 216-217, 191). The degree to which the Democratic Party embraced the progressive agenda can be seen in both the adoption of the Party's 1932 platform and the relative ease with which Roosevelt secured the Party's nomination.

The Democratic Party's 1932 platform mixed progressivism with some fiscally conservative proposals. The most notable conservative plank proposed "an immediate and drastic reduction of governmental expenditures by abolishing useless commissions and offices, consolidating departments and bureaus, and eliminating extravagance to accomplish a saving[s] of not less than twenty-five per cent in the cost of the Federal Government."[91] The plank clearly runs counter to the Keynesian economic practice of governmental regulatory control and deficit spending, which marked much of the New Deal. Moreover, the proposal to reduce governmental expenditures was the first in the platform, signaling its rhetorical importance to the Party.

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[90] Roosevelt, Franklin D. *The Forgotten Man Speech*, April 7, 1932. Available at http://newdeal.feri.org/speeches/1932c.htm. (Visited on October 22, 2004)

[91] *Democratic Party Platform of 1932*. Available at www.presidency.ucsb.edu/showplatforms.php?platindex=D1932. (Visited on October 19, 2004)

However, much of the rest of the domestic economic agenda consisted of progressive policies designed to alleviate the suffering of the most afflicted. The platform advocated "the extension of federal credit to the states to provide unemployment relief wherever the diminishing resources of the states makes it impossible for them to provide for the needy."[92] It also recommended the expansion of public works projects that would benefit the "public interest," including "adequate flood control and waterways."[93] In perhaps the most progressive, if vaguely phrased, measure, the Democrats proposed "a substantial reduction in the hours of labor." Unlike many of the other progressive planks, the Democratic Party platform from the previous election in 1928 contained no such proposal.

Adding to the progressive slant of the Party's platform, Franklin Delano Roosevelt was selected to be the Democratic nominee on just four ballots. During his acceptance speech, the first of its kind, Roosevelt articulated his plan to lead the Democratic Party on an activist campaign to remedy social and economic depression.

> Ours must be a party of liberal thought, of planned action, of enlightened international outlook, and of the greatest good to the greatest number of our citizens. . . [W]hen--not if--when we get the chance, the Federal Government will assume bold leadership in distress relief. For years Washington has alternated between putting its head in the sand and saying there is no large number of destitute people in our midst who need food and clothing, and then saying the States should take care of them, if there are. Instead of planning two and a half years ago to do what [the Republican leadership] are now trying to do, they kept putting it off from day to day, week to week, and month to month, until the conscience of America demanded action.
>
> I say that while primary responsibility for relief rests with localities now, as ever, yet the Federal Government has always had and still has a

[92] Ibid.
[93] Ibid.

> continuing responsibility for the broader public welfare. It will soon fulfill that responsibility.[94]

Roosevelt's words and call to arms resounded among millions of voters who either joined the electorate for the first time or permanently left the Republican Party.

The realignment that occurred between 1928 and 1936[95] stemmed largely from changed voting patterns in the North. The South had been solidly Democratic for nearly a century and would remain so for another decade and a half. However, the Republican Party dominated northern elections since 1896, losing their monopoly in presidential elections only during the conservative-progressive split in the Republican Party in 1912. Yet, starting in 1928 with Al Smith's advocacy for the repeal of Prohibition, northern ethnic and religious minorities began to swing to the Democratic Party (Allswang 1971, 42-6).

During this same period, racial minorities, particularly African Americans, began to dealign from their traditional Republican allegiance. Republican apathy to the plight of African Americans following the abandonment of Reconstruction continued throughout the Progressive Era. Southern dominance of the Democratic Party left African Americans with little hope of change emanating from the one-party that dominated the South (Myrdal 1962, 452-455; Key 1984). The only political party to take seriously the plight of repressed blacks during this period was the Communist Party (Kirby 1982, 10). However, New Deal economic reform proposals were sufficiently

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[94] Roosevelt, Franklin D. *Acceptance Speech as the Democratic Presidential Nominee,* July 2, 1937. Available at http://www.cfinst.org/eguide/PartyConventions/speeches/1932d.html. (Visited on Oct. 22, 2004)

[95] Realignment scholars have long disputed when the realignment formally occurred. In part, the dispute stems from different definitions of "realignment" (see Key 1955; Burnham 1970; Clubb Flanigan, and

radical that African Americans began to seriously consider the Democratic Party as a potential vehicle for significant social reform.

In the cases of ethnic, religious, and racial minorities, each group contributed significantly to the working class. As such, these groups were hit particularly hard by the Depression and desperately needed assistance. By embracing progressive reform measures designed to provide assistance to the lower and working classes, the Democratic Party concretized its support among ethnic and religious minorities in the North and began to see a rise in northern African American support. Nowhere was this clearer than with the support of labor unions.

Throughout the Progressive era, union support was not wedded to one party. Rather, organized labor attempted to forge alliances with progressives on both sides of the legislative aisle. In fact, much of New Deal labor policy that favored protecting workers, not unions, resulted from the Republican generated union policy (O'Brien 1998). Throughout the 1920s, the American Federation of Labor (AFL) and other union organizations worked with progressive Republicans over Democrats to secure protection for workers' rights (1998, 150). However, following the economic collapse in 1929, the formation of "tight bonds [] formed between organized labor and the Democratic Party" (Sunquist 1983, 217).

If the merging of northern minorities, organized labor, and agriculture with the Solid South did not formally concretize in 1932, the ratification of the New Deal in the 1936 national elections certainly did (Clubb, Flanigan, and Zingale 1980, 257). However, the new alignment of a large, progressive wing, largely based in the North and

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Zingale 1980; Sundquist 1983).

Midwest, and a smaller, conservative wing based in the South created intra-party tension, particularly when the progressive agenda shifted from the immediate concern of economic regulation toward social issues. The intra-party tension over the scope and degree of government activism needed to be either overcome or minimized if the Democratic Party was to maintain its hold on power. Roosevelt attempted to overcome the conservative bloc by purging them from the Party but failed. Following Roosevelt's failure, succeeding presidents and other members of the liberal wing of the Party used the courts to carry out their progressive agenda, maintain their hold on power, and transform the nature of the Democratic coalition by luring large numbers of northern African American voters into the Democratic Party.

In order to understand the role the courts played in maintaining the Democratic political order, we must first focus on southern conservative recalcitrance to the increasingly progressive Democratic agenda and Franklin Delano Roosevelt's attempt to purge conservatives from the Party.

Judicial Reorganization and the Failed Purge of 1938

Southern conservatives were willing to pursue a moderately progressive path that would stimulate the national economy through public works projects and give the national executive a much greater role in regulating the marketplace. The Seventy-third Congress passed legislation at an astonishing rate with little to no significant opposition. However, beneath the surface of congressional cooperation with New Deal programs lay a resistance born out of the Jeffersonian Democratic tradition that abhorred large national

government and encroachment on states' rights. While southern lawmakers were willing to cooperate with efforts to address the approximately 14 million unemployed Americans in 1932, as New Deal programs continued to slide toward progressive activism, southern resistance began to mount.

Conservative resistance to activist legislation grew sizably during the shift from the "first" to the "second" New Deal. In 1935, legislative skirmishes occurred in both the House and Senate over a public utility holding company bill that would have enabled the Security and Exchange Commission to dissolve holding companies that could not financially justify their existence. Liberal Democrats, with the active backing of Roosevelt, were eventually able to secure passage of a watered down bill but the fight sparked the first sustained effort to resist progressive reform and helped lay the foundation for future conservative resistance (Patterson 1967, 38-58)

Concurrent with the fight over the utility bill, Roosevelt proposed a tax plan that would "produce ample revenues without discouraging enterprise; and . . . distribute the burden of taxes equitably."[96] Roosevelt first proposed to tax inheritances and gifts as "[t]he transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and sentiments of the American people."[97] Roosevelt then proposed two progressive tax revisions that would create a surtax on "great individual net incomes;" and a "corporation income tax graduated according to the size of corporation income in place of the present uniform corporation income tax."[98]

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[96] Franklin D. Roosevelt. *Message to Congress on Tax Revision*. June 19, 1935. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=15088&st=&st1=. (Visited on October 25, 2004)
[97] Ibid.
[98] Ibid.

The redistributive program met with a chorus of conservative dissent in the House and Senate. Two central substantial concerns drove the dissent. First, conservatives in both parties favored lower taxes over a tax hike. According to conservative economic thought, creating larger revenue streams to both consumers and producers would lead to greater spending and investment that would spur economic recovery. A tax hike ran counter to this formula and could hamper economic recovery. Second, Roosevelt's tax proposal did not seem to create additional revenue with which to balance the budget (Patterson, 1967, 60). Both liberals and conservatives in the Democratic Party pledged to balance the budget in 1932 but liberals, led by Roosevelt, had seemingly abandoned this commitment, to the annoyance of conservatives.

With significant assistance from liberal leaders in the House and, particularly, the Senate, a slightly weakened tax proposal passed both chambers. On the strength of partisan loyalty and deference to a highly popular president, the measure overcame conservative dissent. Despite the victory for liberal Democrats, the two episodes fanned the flames that forged a conservative bloc within the Party. Nowhere was this intra-party opposition more stark and vociferous than in Roosevelt's court packing proposal introduced less than two years later.

Still riding the overwhelming electoral victory in November of 1936, wherein the Democrats picked up seven Senate seats and 22 House seats, Roosevelt announced on February 5, 1937 his "desire . . . to strengthen the administration of justice and to make it a more effective servant of public need."[99] Roosevelt articulated a plan to improve

[99] Roosevelt, Franklin D. *Message to Congress on the Reorganization of the Judicial Branch of the Government*, February 5, 1937. Available at

efficiency and justice in the courts by adding additional judges to the bench to compensate for "aged or infirm judges" who can attend to "the modern tasks of judg[ing that] call[s] for the use of full energies."[100] While the stated intent of the reorganization plan was to improve the judicial system, Roosevelt clearly intended to pack the courts—particularly the Supreme Court—with jurists sympathetic to New Deal policies and an accommodating jurisprudence.[101] For the past five years, the Supreme Court handed the New Deal a series of defeats by striking down cornerstone legislation such as the National Recovery Act,[102] the Agricultural Adjustment Act,[103] and the Guffey Coal Act,[104] among others. Infusing the courts with younger judges more deferential to the political branches and more sympathetic to having current economic and sociological factors inform their statutory and constitutional interpretation would create a new and distinctly liberal jurisprudence.

A chorus of protest met Roosevelt's proposal. Interestingly, the most ardent resistance came from the conservative membership within the Democratic Party. One general complaint accompanied a more substantial concern. First, conservatives and liberals alike, condemned the plan as dishonest. Conservatives saw the reorganization bill for the packing scheme for what it was and publicly called Roosevelt's spade a spade. Second, Democratic conservatives objected to the danger of corrupting the structural autonomy of the Supreme Court and its implications for certain areas of constitutional

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http://www.presidency.ucsb.edu/ws/index.php?pid=15360&st=&st1=. (Visited on October 26, 2004)
[100] Ibid.
[101] Roosevelt even hinted at this in his message to Congress. "A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world." Ibid.
[102] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[103] *United States v. Butler*, 297 U.S. 1 (1936).

thought. Ironically, southern conservatives couched a good degree of their criticism in the language of civil libertarianism. Yet, it was clear that the extension of civil liberties to African American was their primary concern, not the protection of existing liberties to white Americans.

When Roosevelt won the Democratic nomination in 1932, few considered him to be a racial egalitarian; certainly African Americans did not. In the 1932 general election, even in Democratic strongholds, Roosevelt did not fair well among African American voters. Nationwide, fewer than 25 percent of African American voters cast their ballot in favor of Roosevelt. However, Roosevelt and other liberal Democrats refused to exclude African Americans in New Deal programs bringing some much needed relief to a community hardest hit by the Depression. Gunnar Myrdal noted that inclusion in federal programs helped African Americans "reorganize themselves" and break with their longstanding tradition of voting Republican (Mydral 1962, 754-5). The liberal wing's growing sympathy toward African Americans led to increased concern among southern conservatives that liberals, particularly Roosevelt, would attempt "to cement this growing Negro allegiance by appointing judges who would upset southern racial patterns" (Patterson 1967, 98). After all, southern politicians knew that "social reform measures would have to include [African Americans]" due to the Constitution "and resented [it]" (Myrdal 1962, 456). If southern conservatives gave Roosevelt six appointments to the Supreme Court, liberal jurists could undercut white supremacy from the High Bench and, thereby, give African Americans a more prominent place within the Democratic Party.

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[104] *Carter v. Carter Coal*, 298 U.S. 238 (1936).

While conservative fears sounded a bit conspiratorial, the evidence supports the idea that Roosevelt intended to use the courts as a means of reconstituting the Democratic Party as southern conservatives believed. Yet, as is often the case with American parties, the Democratic Party could not continue to hold power without its minority wing. This left Roosevelt and the liberal wing with two options. First, Roosevelt could use his political power and resources to run New Dealers in the mold of Hugo Black (D-AL) in the South and, hopefully, defeat conservatives in Democratic primary elections. If Roosevelt could succeed along these lines, the South would not be abandoned, rather, it would be transformed much as Roosevelt reconstructed the Party in the first several years of the New Deal (Skowronek 1997, 288-305). Second, if the Democratic Party could appeal to a large pool of voters who sympathized with the liberal agenda but that did not yet vote Democratic, the southern, conservative wing of the Democratic Party could be overcome by shear numbers or cast out of the Party altogether.

Southern conservatives realized that liberals, led by Roosevelt, intended to use the courts as a means of wooing African Americans and forwarding the progressive agenda and made the issue the proverbial line in the sand. In response to Roosevelt's court packing plan, Senator Josiah W. Bailey of North Carolina privately wrote, "[Roosevelt] is determined to get the Negro vote and I do not have to tell you what *this* means" (as quoted in Patterson 1969, 98-9). One of Senator Bailey's colleagues, Carter Glass (D-VA), declared

> Should men of [Roosevelt's] mind have part in picking the six proposed judicial sycophants, very likely they would be glad to see reversed those decisions of the Court that saved the civilization of the South . . . It was the Supreme Court of the United States that validated the suffrage laws of

> the South which saved the section from anarchy and ruin in a period the unspeakable outrages of which nearly all the Nation recalls with shame (as quoted in McMahon 2004, 81).

Representative Hatton Sumners (D-TX) declared, "Boys, here's where I cash in my chips" when he heard Roosevelt's plans. He later declared that he would use his position as the Chair of the House Judiciary Committee to prevent the bill from reaching a vote in committee (Black 2003, 408). Vice President Garner discussed his displeasure with Roosevelt's proposal with southern colleagues and tacitly worked against the passage of the bill by rallying opposition (Alsop and Catledge 1938, 69). In fact, the Roosevelt Administration knew well that Garner was "off the reservation" on the court packing plan and attempted to "bore from the inside" (Ickes 1954, 140). Yet, liberals could do little to stop Garner from playing one of the leading rolls in defeating the measure.[105]

While Roosevelt and his liberal allies protested against southern claims that the judicial reorganization plan would woo African American voters, these objections had little effect. As Harold Ickes recounted, "The other night . . . Senator Bailey, who is against the Court plan, made a speech in which he said that I was trying to break down the segregation laws of the South . . . I wrote to Bailey today telling him that that had never been my position." Ickes continued, "[W]hile I have always been interested in seeing that the Negro has a square deal, I have never dissipated my strength against the particular stone wall of segregation" (1954, 115). Such efforts to placate southern conservatives made little headway.

[105] Harold Ickes recalls a conversation he had with Senator Tom Corcoran in which Corcoran "confirmed . . . that it was the Vice President who had betrayed the President" (1954, 171).

The Senate Judiciary Committee sat on the bill for several months before adversely reporting the bill out of committee. Seven Democrats and three Republicans signed a report roundly criticizing the bill. The Committee's adverse report was multifaceted but perhaps the most telling criticism was the Committee's dissatisfaction with the portion of Roosevelt's plan that would have centralized the federal district and circuit court systems and enabled judges to be assigned to districts outside of the district in which they live. The bill "thus creates a flying squadron of itinerant judges appointed for districts and circuits where they are not needed to be transferred to other parts of the country for judicial service."[106] The report concluded that Roosevelt's proposal was "a violation of the salutary American custom that all public officials should be citizens of the jurisdiction in which they serve or which they represent."

Southern conservatives realized that they needed local control over the federal judiciary in order to continue protecting segregation and conservative political philosophy in the South. Senator Tom Connally (D-TX), one of the signatories to the Judiciary Committee's adverse report, claimed that he opposed the reorganization plan as it was "an opening gambit in an effort to transform Democratic philosophy" (as quoted in Patterson 1969, 112). Local control of district and circuit courts kept the political and legal façade of segregation intact. Placing southern social conditions in the hands of jurists not from the South was anathema to maintaining strong control over segregationist policy. Maintaining sectionalism on the courts also kept the potential to use the courts as a means of striking compromise.

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[106] "Abstract of Senate Committee's Adverse Report on Roosevelt's Bill to Revamp Federal Courts," *New York Herald Tribune* June 15, 1937, 10.

By the time the court-packing bill came up for a vote, Justice Van Devanter announced his retirement, the Supreme Court announced its famous "switch-in-time" decisions in *West Coast Hotel v. Parrish*[107] and *NLRB v. Jones & Laughlin Steel*,[108] and the driving force behind the bill in the Senate—Majority Leader Robinson—died. The motion to recommit Roosevelt's bill, which effectively sounded its death knell, passed 70-20. With New Deal programs no longer in jeopardy, liberal and conservative Democrats in the Senate compromised and refused to move aggressively against the courts.

Liberals and conservatives continued their compromise by severely amending and paring down a new judicial reform bill. By removing the provisions for adding additional justices to the Supreme Court and allowing judges to sit in districts in which they did not reside, the bill passed and became the Judicial Procedure Reform Act of 1937. However, as part of the compromise, liberals secure a crucial provision for future civil rights cases that empowered the federal government to appear in cases with constitutional implications. The importance of the federal government's ability to appear before the Court on issues in which the government was not a party became vital to Democratic political and electoral strategy a decade later.

Following the failure of Roosevelt's court packing plan, the split in the Democratic Party became increasingly obvious. A string of Administration defeats in Congress over labor, economic relief, and anti-lynching only added to the liberal-conservative rift. Both liberals and conservatives in the Democratic Party began

[107] 300 U.S. 379 (1937).
[108] 301 U.S. 1 (1937).

consideration of forming new political coalitions. Senators Glass, Byrd, Gore, Bailey, and Clark all considered creating a conservative party as early as 1934 (Patterson 1967, 252). Leading conservative newspapers and magazines increased their calls for a new political order. Roger W. Babson of the *Review of Reviews* proposed that Carter Glass and Lewis Douglas (D-AZ) run for president and vice-president under the label of the Jeffersonian Democratic Party.[109] Mark Sullivan, a columnist with the New York *Herald Tribune*, proposed Republicans nominate a conservative Democrat as either their presidential or vice presidential nominee. Senators Byrd and Glass featured prominently in the names suggested.[110]

When not considering new political coalitions, southern conservatives voiced suspicion of their current political allegiance, warning against liberal attempts to woo African American voters and, thereby, transform the Party into a vehicle for the liberal-activist state. Senator Glass wrote, "The South would better begin thinking whether it will continue to cast its 152 electoral votes according to the memories of the Reconstruction era of 1865 and thereafter, or will have spirit and courage enough to face the new Reconstruction era that northern so-called Democrats are menacing us with" (as quoted in Patterson 1967, 257). Of course, the root of southern discontent sprouted from race. Senator Glass demonstrated this point:

> "The catering by our National Party to the Negro vote . . . is not only extremely distasteful to me, but very alarming to me. Southern people know what this means and you would have to be in Washington only about three weeks to realize what it is meaning to our Party in the Northern states. It is bringing it down to the lowest depths of degradation" (as quoted in Patterson 1967, 257).

[109] Babson, Roger W. 1935. "Government by Coalition." *Review of Reviews*. 91:47-48.
[110] *Herald Tribune* June 2, 1935, II, 1.

The question remained how could southern conservative Democrats change the course of their Party.

Southern conservatives longed for a return to the pre-Roosevelt Democratic Party when the South dominated the Party, but they proved unwilling to break with the Party altogether. Two factors helped keep southern Democrats within the Party. First, the one-party dominated South had no viable second party from which to run a successful campaign (Key 1984). Moreover, southern segregationists continued to associate the Republican Party with Reconstruction and federal power devoted to the protection of African Americans. Leaving the Democratic Party was distasteful but joining the Republican Party was anathema to southern segregationists.

Second, many conservative Democrats—particularly in the Senate—enjoyed the fruits of power-holding. This was particularly true since many southern conservatives had longer tenures than many of their Democratic colleagues. Since committee assignments were decided largely by seniority, the conservatives within the Democratic Party would have given up significant power and prestige if they left the Party. Not only were southern Democrats in good position to send benefits back to their home districts, but they also occupied key veto points in the legislative system, which enabled them to protect their preferences. Leaving the Democratic Party would have required them to yield their privileged positions. In the 1930s, the cost of leaving the Democratic Party outweighed the benefit of ideological congruity.

While southern conservatives had numerous incentives to stay in the Democratic Party, some liberal Democrats proved quite willing to show them the door. Roosevelt, in

particular, held a burning grudge against those southern conservatives who defected on the judicial reorganization bill. In consultation with several key advisors and Democratic leaders, Roosevelt planned to purge conservatives from the Democratic ranks in an effort to realign the party system (Burns 1956, 376-80). Initially, Roosevelt considered focusing on the ten Democratic committee members who had signed the adverse committee report on his judicial reorganization bill but he eventually targeted a more strategic group, which centered on opposing southern conservatives in the 1938 Democratic primary.

Roosevelt moved openly against five conservative Democratic senators and several Representatives.[111] Roosevelt desired unseating five additional conservative Democrats but the chances of securing their defeat was sufficiently low so as to warrant dedicating resources elsewhere.[112] Roosevelt campaigned particularly hard against Senators Walter George of Georgia, "Cotton Ed" Smith of South Carolina, and Millard Tydings of Maryland. Roosevelt's initial success in Florida[113] helped encourage the Administration that similar New Deal loyalists could also win in the South. However, Roosevelt's opposition campaigns in Georgia, Maryland, and South Carolina were unsuccessful. Lawrence Camp, Roosevelt's candidate in Georgia, came in a distant third in the Democratic primary, received only 23.9 percent of the vote. In Maryland, Roosevelt requested Harold Ickes interview potential candidates to oppose Senator Millard Tydings (Ickes 1954, 279). But their choice, Representative John Lewis, finished

[111] Olsen, Sidney. "Administration Out to Control Primaries." *The Washington Post* June 12, 1938, B3.
[112] Those Senators include Augustine Lonergan (D-CT), Alva Adams (D-CO), Bennett Clark (D-MO), Patrick McCarren (D-NV), and George Berry (D-TN).
[113] President Roosevelt helped Senator Claude Peppers retain the seat to which he was appointed two years

some 6,000 votes behind Tydings despite the Administration funneling money and Administration spokesmen actively stumping for Lewis. South Carolina's Governor Olin Johnston made some headway but Senator Smith's appeals to state's rights and white supremacy solidify his political support and carried him to a comfortable victory (Patterson 1967, 282 and 284).

Roosevelt's efforts were not a total loss. Six senators Roosevelt endorsed and actively supported won reelection.[114] However, it was clear from the outcome that Roosevelt and the New Dealers did not have sufficient political strength or popular support to turn the South into a bastion of progressive values. Senator Glass had warned that "the Southern people may wake up too late to find that the negrophiles who are running the Democratic Party now will soon precipitate another Reconstruction period for us" (as quoted in Patterson 1967, 285). The liberal wing of the Party may truly have held such a desire but it was not to be. Yet, New Dealers walked away from the campaign unbowed. Harold Ickes noted that "the fight the President has been making was necessary and proper. After all, we do not want to go into 1940 without the issue having been drawn between the New Deal and the Old Deal in the Democratic [P]arty" (1954, 466). The election of 1938 showed that Roosevelt and the New Dealers would not back away from their progressive agenda. It also showed that the South would not be pushed out of the Democratic Party and that the Party needed to contend with both its liberal and conservative wings and find a way to mitigate the growing intra-party tension.

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prior.

[114] Those senators were Peppers, Hill, Barkley, Caraway, Bulkley, and Thomas.

From 1939 through 1946, race faded into the background of American politics as the nation turned its attention to the increasing instability in Europe and Asia and eventually to winning the Second World War. As Klinkner and Smith noted,

> [T]he Roosevelt administration was at a loss as to how to handle racial issues. Jonathan Daniels, one of the president's closest advisors on race matters, typified this quandary. In August 1942, he mused that he was extremely "disturbed about the state of Negro-white relationships" because he saw the "rising instance of Negroes on their rights now" conflicting with the "rising tide of white feeling against Negroes." Although black demands were 'logically strong,' meeting them would leave the country "so divided in home angers that we would lack the strength for victory over our Fascist enemies" (1999, 176).

So, although race remained an important issue in American politics, during the war, the Democratic Party turned its attention away from race in a way that it did not do either before or after the war. African Americans secured a few gains during this period, including Roosevelt's creation of the Fair Employment Practices Committee in 1941—the signing of which Mary McCleod Bethune declared "the most 'memorable day' since Lincoln signed the Emancipation Proclamation" (Kirby 1980, 119). Yet, African American gains in employment protection were offset by delays in political and social advancement. As Klinkner and Smith stated, "the Roosevelt administration's efforts to maintain racial peace during the war cut both ways. Just as it was willing to make concessions to blacks to advance its political agenda and help the war effort, it was also willing to make concessions to whites for the same reasons" (1999, 178). Following the cessation of hostilities and the return of thousands of African American veterans from the European and the Pacific theaters, race once again came to the fore of American politics. Yet, during the transitions from peace to war to peace again, the United States Supreme

Court transformed from a bastion of conservative jurisprudence to a co-equal partner in the pursuit for a new progressive deal.

The Roosevelt Court

At the start of 1937, the Supreme Court was composed of four conservative (Van Devanter, Sutherland, Butler, and McReynolds), three liberals (Brandeis, Cardozo, and Stone), and two moderates who tended to lean conservative on economic regulation prior to 1937 (Hughes and Roberts). With four appointments between 1937-1939, Roosevelt altered the ideological disposition of the Court and created a new progressive constitutionalism that more easily fit the politics of the New Deal. As Kevin McMahon asserted, the Roosevelt "administration's judicial policy was primarily formulated as part of a larger institutional program – one that sought to supplant the existing institutional arrangement with one better suited to advance the values he endorsed" (2004, 99). By the time Truman assumed the presidency in 1945, nine proven New Dealers sat on the Court and its jurisprudence was distinctly progressive.

The Roosevelt Court gave early indication that it would defer to congressional judgment on matters of national economic regulation.[115] However, in *United States v. Carolene Products Co*.,[116] the Court declared that no such deference would be given to legislation that attempted to curtail the rights of minorities.[117] The Court's follow ups on

[115] See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby,* 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).
[116] 304 U.S. 144 (1938).
[117] In paragraphs two and three of the famed footnote four, Justice Stone wrote: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most other types of legislation…Nor need we

Carolene Products and the protection of racial minorities was ambiguous at best. In *Hirabayshi v. United States*[118] and *Korematsu v. United States*[119] the Court ruled that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"[120] and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny."[121] However, in both cases, the government restrictions on persons of Japanese ancestry withstood the applied scrutiny. The Court's application of the new test on racally restrictive laws may have netted few positive results but it showed that the Roosevelt Court would set a higher bar in the interest of protecting racial minorities than its predecessors.

The Court soon moved in much more aggressively against racially discriminatory legislation . Once the liberal wing of the Party created conditions ripe for judicial action, the Court no longer had to operate atomistically and could function as part of a larger political order. In other words, in order for the Court to begin dismantling racially restrictive institutions in the South, the Court needed both sympathetic jurists on the bench *and* the political support necessary to act in accord with their preferences. Political support came from the Truman Administration and the liberal wing of the Democratic Party when the liberal wing of the Party sought to maintain power and reconstituting the

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enquire whether similar considerations enter into the review of statutes directed at particular religious…or racial minorities…; whether prejudice against discrete and insult minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

[118] 320 U.S. 81 (1943).

[119] 323 U.S. 214 (1944).

[120] 320 U.S. 81, at 100.

Party during a period of acute intra-party tension between liberals and southern conservatives. This balancing act could only occur with the help of the Supreme Court. Truman used the Court as a means of reaching out to African American voters and, in so doing, used the Court as a transformative vehicle for the national Democratic coalition.

Truman and the Reconstruction of the Democratic Party

Initially, the liberal wing of the Party was concerned that Truman would not follow Roosevelt's liberal, activist agenda. In 1945, Truman replaced several liberal members of Roosevelt's cabinet with moderates. Tom Clark replaced Frances Biddle in the Attorney General's office and Lewis Schwellenbach replaced Frances Perkins as head of the Department of Labor. One critical columnist claimed that Truman's cabinet was composed of "Wimpys who could be had for a hamburger" (Stone 1972, xxi). The criticism was overstated but Truman clearly operated under different political conditions than had Roosevelt. For the first time since 1932, conservatives, both inside and outside the Democratic Party, prophesized a shift to the right in American politics. Truman, a New Dealer from a border state with centrist preferences, seemed likely to help move the Party in a conservative direction. However, Truman soon proved his liberal stripes. The subsequent disintegration of the national Democratic coalition forced liberal Democrats into a much more aggressive posture regarding national racial policy than might have otherwise occurred.

With a strong national economy and victory over the Axis powers, the Democratic Party suddenly faced normal politics without a unifying theme. Throughout

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[121] 323 U.S. 214, at 216.

the 1930s and early 1940s, the Democratic Party united behind the need for federal regulation, domestic aid, and meeting whatever demands the war wrought. As of 1946, the nation—and the Democratic Party—faced a new set of objectives. For southern conservative Democrats, the goal was to ensure economic stability by extending New Deal economic regulation but preventing African Americans from gaining social and political rights (Frederickson 2001, 47). For liberal Democrats, the aims were quite different. Throughout the Roosevelt Administration, many New Deal "race liberals" desired to change social and political conditions in the South but Roosevelt had refused to divide the party over race (Berman 1970, 7). However, now that the United States had defeated the illiberal Axis powers and African American soldiers had played an important role in the Allied victory, liberals increasingly argued that it was time to bring federal power to bear on the segregated South (Klinkner and Smith 1999, 200-1). Moreover, African Americans, especially African American veterans, increasingly demanded both attention from political institutions and substantial action on their behalf. By including African Americans in many New Deal economic programs, black voters increasingly cast their ballot on behalf of Democratic candidates, particularly in the North. Unsurprisingly, African Americans looked first to the Democratic Party to act upon their demands. For these reasons, the intra-party tension within the Democratic Party grew from considerable to profound in a relatively short period of time. Such was the state of the Democratic Party Harry Truman inherited. But the question remained, how would the Party manage the growing intra-party tension that threatened to divide the Party?

Southern conservatives believed that Truman was sure to side with them. Truman came from Missouri and may have briefly affiliated himself with the Ku Klux Klan (Berman 1970, 9). Privately, Truman used racial slurs when referring to African Americans (Klinkner and Smith 1999, 206). However, his tenure in the Senate told a more sympathetic story. Truman consistently voted in a pro-civil rights fashion and supported greater federal protection of African Americans. In fact, "only once did Truman stray from the pro-civil rights side of the issue" (Fink and Hilty 1973, 220). Historians have suggested that Truman's pro-civil liberties came from a variety of sources including political demands wrought by the constituency of the Pendergast political machine in Missouri (Berman 1970, 10; Fink and Hilty 1973, 229), his friendship with Justice Louis Brandeis (Savage 1997, 10), and personal sympathies (Sitkoff 1971, 599). Whatever the motivation, Truman was among the most liberal members of the Senate on the issue of civil liberties and minority protection.

Of course, if Truman followed this course of action due to constituency demands, it was plausible that Truman would alter his priorities upon reaching the White House. Afterall, the country and the Democratic Party had moved away from the extreme liberal activist agenda following 1938. Truman, a moderate within the Party, could easily have abandoned his commitment to civil rights and gained greater support in the conservative South. However, Truman did not follow the path that would have led him to greatest support in the South. Instead, he slowly sided with the liberal wing of the Party and developed a pro-civil rights agenda that secured greater political, social, and economic protection for African Americans.

The Move Toward Racial Egalitarianism

In the 1946 congressional elections, the Republican Party won a lopsided victory and the African American vote played a major role in aiding the Republican cause. As Frederickson explains,

> Between 1941 and 1944 more than 1 million southern blacks had migrated to northern cities where there was no systematic denial of the franchise. African Americans had turned from the party of Lincoln and had voted overwhelmingly for Franklin Roosevelt in 1936, but they had slowly begun to return to the Republican Party, which seemed to be more amendable and sensitive to their demands (2001, 52).

The liberal wing of the Democratic Party had grown dependent upon African Americans as party of their voting constituency. Their possible defection to the Republican Party threatened both the liberal wing's dominant position in the Party and the Democrats' ability to hold national power. As a result, liberal Democrats recognized the need to act to shore up their coalition despite the threat of southern conservative flight from the Party.

The demands of securing the African American vote also played into the hands of the far left of the liberal wing, which was growing increasingly discontented with the Party's moderation. In 1946, Truman forced Henry Wallace to resign as Secretary of Agriculture. Wallace, the former Vice President whom Truman replaced, was a well-known radical on civil rights issues and revered among African American voters. The loss of Wallace on the ticket and his departure from the cabinet caused African Americans to view the post-Roosevelt Democratic Party with growing skepticism. To make matters worse, Wallace threatened to start a far-left campaign, which would siphon

voters from the Party's liberal wing.[122] Thus, Truman and his liberal allies embarked on a course that attempted to maintain Party unity while bolstering the strength of the liberal wing of the Party.

On June 26, 1946, Truman sent a message to the annual convention of the National Association for the Advancement of Colored People (NAACP). In the letter, Truman roundly endorsed African American efforts to secure their voting rights. "The ballot is both a right and a privilege. The right to use it must be protected and its use by everyone must be encouraged. Lastly, every veteran and every citizen . . . must be protected from all forms of organized terrorism."[123] Truman left out the details on how those rights ought to be secured but the letter was an initial step to woo African American voters but it soon became apparent that he would rely on the Justice Department and the courts as the vehicles to deliver the African American vote.

Just four days later, Truman ordered the Justice Department to investigate incidents of racial violence in the South. In large part, Truman's action came in response to the growing violence. The national news covered a series of violent incidents, which led to a rise in national concern over racially motivated violence.[124] In September, Truman took another step against racially motivated violence when he met with the National Emergency Committee Against Mob Violence. Walter White, the chief spokesman for the committee and executive secretary of the NAACP, presented Truman

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[122] Wallace eventually did join the Progressive Party to much fanfare. However, the Party did not make a significant impact as Truman moved to the left and undercut many of the Progressive criticisms regarding racial policy. In addition, the Democratic Party engaged in a whisper campaign that linked the Progressive Party with communism, which undermined any chance at widespread appeal.

[123] Streator, George. "Negro Groups Aim at Wider Privilege." *New York Times* June 27, 1946, 19.

[124] For example, one gruesome event involved the Ku Klux Klan murdering four African American couples on their way to work. Several individuals were arrested and tried but all were acquitted. The matter was

with a petition calling for a special session of Congress to pass legislation that would address the escalating violence in the South. White recalled that after informing the President of the magnitude of the violence, Truman exclaimed "My God! I had no idea it was as terrible as that! We've got to do something!" (as quoted in White 1948, 330-1). Following the meeting, Truman promised to appoint a commission on civil rights.

Three months later, merely a month after the Democratic defeat in the 1946 congressional elections, Truman made good on his promise and issued Executive Order 9008, which created the President's Committee on Civil Rights (PCCR). The order authorized the Committee to "inquire into and to determine whether and in what respect current law enforcement measures and the authority and means possessed by federal, state, and local governments may be strengthened and improved to safeguard the civil rights of the people." The Committee was further empowered to make "recommendations with respect to the adoption or establishment, by legislation or otherwise, of more adequate and effective means and procedures for the protection of civil rights . . . ."[125]

If the South was alarmed by Truman's behavior, it didn't waste much energy in publicly opposing his rhetoric or the creation of the PCCR. In fact, relative silence from the southern press followed Truman's announcement.[126] Based on the non-reaction from southern political leaders and the press, southern Democrats had little motivation for

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covered extensively by the *New York Times*. See Sept. 1, 1946, 4E.

[125] Executive Order 9008, 11 Federal Record 14153.

[126] In fact, neither the northern press nor the southern press made much ado of Truman's *creation* of PCCR. The *New York Times* made no mention of the Committee in the week immediately following its creation. The PCCR's publicity came after it rendered its famous report.

partisan revolt based on indirect or symbolic civil libertarian action. However, direct action by the Administration to end segregation drew a different response.

On January 8, 1947, Truman sent his annual economic report to Congress. One of his legislative proposals was the familiar request to create a permanent fair employment practices commission. According to Truman:

> We must end discrimination in employment or wages against certain classes of workers regardless of their individual abilities. Discrimination against certain racial and religious groups, against workers in late middle age, and against women, not only is repugnant to the principles of our democracy, but often creates artificial "labor shortages" in the midst of labor surplus. Employers and unions both need to reexamine and revise practices resulting in discrimination. I recommend that, at this session, the Congress provide permanent Federal legislation dealing with this problem.[127]

Southern Democrats did not receive this proposal with the same ambivalence as they did Truman's creation of the PCCR. Rather, the response was quite hostile.

The *New York Times* reported that Truman's report split Congress, particularly within his own Party. As C. P. Trussell reported, "The President's recommendation for laws prohibiting racial and religious discrimination seemed to dispel the relief among Southern Democrats that was manifest after delivery of the State of the Union message."[128] Proposals for legislative action evoked a response among southern conservatives that using the Justice Department and the courts did not. Truman and other liberal Democrats quickly recognized the strategic advantage of using a court-centered strategy for realizing egalitarian racial policy.

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[127] Harry S. Truman, *Special Message to Congress: The President's First Economic Report*, January 8, 1947. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=12828&st=&st1=. (Visited on December 30, 2004)

[128] Trussell, C.P. "Congress is Split on Truman Report." *New York Times*, January 9, 1947, 15.

Liberal Democrats knew well the animosity their southern brethren held for a permanent FEPC. Given their ardent opposition, one wonders why Truman would peruse a proposal that would exacerbate intra-party tension. Truman's proposal was designed as a response to Republican efforts to secure African American voters in the North. In 1944, the Republican Party platform included a plank to make the FEPC permanent.[129] The Republican Party created a strategy to steal African American voters away from the New Deal coalition. While the effort failed in 1944, African Americans voted Republican in large numbers in 1946. According to one analysis of the 1946 congressional elections, "the shift from the Democrats [among African American voters] was evident in virtually every area" (Miller 1948, 328). With the 1948 presidential election looming, Truman needed to protect against losing African American voters even if that meant risking southern aggravation.

The liberal wing of the Democratic Party eagerly supported the creation of a permanent FEPC but failed to secure the bill's passage. Southern Democrats, with the aid of unenthusiastic conservative Republicans, obstructed the passage of the measure by filibustering it to its legislative grave; a tactic that worked in 1946 as well.[130] The lack of Republican support on the bill was enough to cast doubt on the sincerity of the Party's racial egalitarianism. Moreover, the complete inability of the liberal wing of the Democratic Party to make the FEPC permanent reveals its inability to enact progressive economic and social reform.

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[129] Republican Party Platform of 1944. Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1944. (Visited on December 30, 2004)
[130] "Foes Admit Success of FEPC filibuster." *Christian Science Monitor* February 8, 1946, 16.

Since African Americans demanded tangible policy changes in exchange for their vote, liberal elected officials needed to secure substantial victories in order to continue holding office. Of course, if the Party was also to continue holding power, party elites in government needed to find a way to balance the pursuit of the African American vote and the interests of southern conservatives. As the liberal wing soon realized direct executive action divded the Party but court action did not have the same effect. When the liberal wing moved toward direct action, the Party experience a serious rift between the conservative and liberal wings that would not heal until the Party compromised by using the courts as the primary vehicle for addressing national race policy.

Sent to President Truman on October 29, 1947, the PCCR's report, entitled *To Secure These Rights*, was a bold and forthright critique of the failings of modern American democracy when it came to racial equality. Sections three and four of *To Secure These Rights* were perhaps the most important—and most damaging—to the Democratic Party. Section three declared that the federal government must "strengthen the right to citizenship and its privileges."[131] Yet, the PCCR suggested a strategy that became central to the Democratic strategy on civil rights. The PCCR singled out the importance of the federal government becoming involved in civil rights litigation before the Supreme Court through amicus curiae briefs. The Truman Administration used this strategy to great effect and, in so doing, made the Supreme Court vital to transforming the Democratic Party's national coalition.

Section four detailed a "program for action" that sought to improve federal administrative capacity so to make it possible for the federal government to address

violations of civil rights. Specifically, the PCCR proposed to make the Civil Rights Section of the Justice Department a full division and create a permanent Commission on Civil Rights. The PCCR also urged congressional approval of these measures rather than rely only on direct executive action, thus, giving civil rights policy greater democratic legitimacy. Despite the unlikelihood of passing pro-civil rights legislation, the PCCR outlined a slate of legislative programs it desired Congress to enact. Such measures included greater protection of citizenship rights through the abolition of the poll tax and guaranteeing the right to participate in federal primary and general elections, and immediate integration of the armed forces.

Truman received the report with great warmth and optimism. In his official statement, Truman hoped the PCCR's report would compare favorably to the Declaration of Independence and hoped it would become "an American charter of freedom in our time."[132] The response should not have been a surprise to conservative southern Democrats who had grown fearful of Truman's direction following his speech to the NAACP four months prior. In that speech, the President boldly declared,

> We must make the federal government a friendly, vigilant defender of the rights and equalities of all Americans. And again I mean all Americans . . . [W]e can no longer afford the luxury of a leisurely attack upon prejudice and discrimination. There is much that State and local governments can do in providing positive safeguards for civil rights. But we cannot, any longer, await the growth of a will to action in the slowest State or the most backward community. Our National Government must show the way.[133]

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[131] See the *New York Times* October 30, 1947, 14.
[132] Truman, Harry S. *Statement of the President Making Public a Report by the Civil Rights Committee*, October 29, 1947. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=12780&st=&st1=. (Visited on December 31, 2004)
[133] Harry S. Truman, *Address before the National Association for the Advancement of Colored People*, June 29, 1947. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=12686&st=&st1=. (Visited on December 31, 2004)

Truman was singling out southern states that lagged behind the rest of the country in accommodating even the loosest conception of equality among its citizens. Bringing federal power to bear against "backward" regions of the country was entirely in line with the proposals of the PCCR and Truman largely endorsed "the need for effective Federal Action."[134]

Other members of the liberal wing of the Democratic Party endorsed the PCCR's conclusions. Representative Chet Holifield (D-CA) professed, "Everything I saw in it was all right . . . It is the most valuable and complete report that has been published in the field" (as quoted in Berman 1970, 71). Senator Lucas (D-IL) commended the Committee and stated that it "has dealt courageously with some fundamentals that the people of this country have got to recognize sooner or later and [the] sooner the better" (1970, 71).

As was expected, southern reaction was not nearly so congenial. Representative L. Mendel Rivers (D-SC) criticized the report as "a brazen and monumental insult to the Democratic South and the southern way of life for both white and colored" (as quoted in Frederickson 2001, 65). While the reaction of southern lawmakers tended to focus on the states' rights issue, the white southern public made more direct and more racist criticisms. One southerner wrote, "Mr. President, if the dogooders and Damyankees would keep their noses out of our Business as regarding the Negroes of the South we will get along fine as we have been getting along for years . . . Your civil rights body is fixing to stir up more Hell and Damnation than Carter has oats" (as quoted in Billington 1973, 131). A southern minister provided a more political critique when he argued, "If that

[134] Harry S. Truman, *Annual Message to Congress on the State of the Union*, January 7, 1948. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=13005&st=&st1=. (Visited on December 31, 2004)

report is carried out you won't be elected dog catcher in 1948" (1973, 132). Even southern newspapers decried the PCCR's report as an attempt "to extinguish a smouldering and slowly dying fire by drenching it with gasoline" (1973, 131). Southern members of the Democratic Party in the electorate were beginning to waiver in their support for Truman and the Democratic Party outside of the South due to their stance on civil rights; these sentiments only degraded after liberals publicly endorsed most of the PCCR's recommendations.

On February 2, 1948, Truman sent a special message to Congress regarding civil rights that endorsed ten of the PCCR's recommendations.[135] Four of those ten directly targeted southern segregation: an anti-lynching bill, protecting the right to vote, the creation of a permanent FEPC, and prohibiting discrimination in interstate transportation facilities. Along with these provisions, Truman pleaded with Congress to pass all of his legislative proposals:

> The Federal Government has a clear duty to see that Constitutional guarantees of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union. That duty is shared by all three branches of the Government, but it can be fulfilled only if the

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[135] The ten recommendations were as follows:
1. Establishing a permanent Commission on Civil Rights, a Joint Congressional Committee on Civil Rights, and a Civil Rights Division in the Department of Justice.
2. Strengthening existing civil rights statutes.
3. Providing Federal protection against lynching.
4. Protecting more adequately the right to vote,
5. Establishing a Fair Employment Practice Commission to prevent unfair discrimination in employment.
6. Prohibiting discrimination in interstate transportation facilities.
7. Providing home-rule and suffrage in Presidential elections for the residents of the District of Columbia.
8. Providing Statehood for Hawaii and Alaska and a greater measure of self-government for our island possessions.
9. Equalizing the opportunities for residents of the United States to become naturalized citizens.
10. Settling the evacuation claims of Japanese-Americans.

Harry S. Truman, *Special Message to Congress on Civil Rights*, February 2, 1948. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=13006&st=&st1=. (Visited on December 31, 2004)

> Congress enacts modern, comprehensive civil rights laws, adequate to the needs of the day, and demonstrating our continuing faith in the free way of life.[136]

The need for a unified front was clear. It was equally elusive and the liberals in the Democratic Party were well aware that these proposals did not have a chance of making it past a conservative filibuster in the Senate.

Yet, the liberal bid to win African American voters by pushing the civil rights agenda ostracized white southern voters. The more it became clear that southern Democrats would not support Truman the more imperative it became for Truman and liberal Democrats to win the vote of northern African Americans. In other words, to maintain its control over the government and the Party, the liberal wing would have to liberalize its domestic policies. Clark Clifford, Truman's special counsel, devised a strategy that would prevent the siphoning of liberal voters by Republicans and a third party movement on the left that eventually became the Progressive Party. Clifford argued that since African American voters made up nearly four percent of all potential voters in important northern states such as California, New York, New Jersey, Pennsylvania, Ohio, Michigan, and Illinois, the African American vote needed to be secured in order to win the general election (Phillips 1966, 197-8). Most notably, Clifford argued "Unless there are new and real efforts (as distinguished from mere political gestures which are today thoroughly understood and strongly resented by sophisticated Negro leaders), the Negro bloc . . . will go Republican" (as quoted in Sitkoff 1971, 597). In other words, any action undertaken by Truman would have to be tangible rather than symbolic. This caused real

[136] Ibid.

concern for the Democratic coalition given the conservative wing's ability to obstruct direct legislative action.

Based, in part, on the faulty belief by several liberal strategists that the South would not defect regardless of how far the Democratic Party moved to the left on domestic issues, Truman and the liberal wing increasingly pushed governmental action.[137] However, these strategists could not have been more wrong. Senator James Eastland (D-MS) declared that the South would fight the liberal's attempt to "sacrifice [the South] on the cross of political expediency" (Frederickson 2001, 70). In relatively short order, a sizable number of southern conservatives argued that fighting the liberalization of the Democratic Party could include defecting from the Party itself if liberals kept pushing the civil rights agenda. Governor Fielding Wright (D-MS) warned that "vital principles and eternal truths transcend party lines, and the day is now at hand when determined action must be taken" (2001, 70). Similarly, Governor Strom Thurmond hinted at defection when he warned that if the Truman Administration did not back down from its pro-civil rights stance, the South would "flex its collective political muscle in the electoral college" (2001, 79). He later warned that the Democratic Party could no longer consider the South "in the bag" (2001, 81). Mississippi, Alabama, and South Carolina state Democratic committees all severed formal relations with the Democratic National Committee.

Not only did the center-left coalition face the threat of southern defection but Henry Wallace also threatened to take voters from the left—particularly labor and

[137] Clifford and James A. Rowe, Jr. argued that the South would remain solid regardless of how liberal the Democratic Party went with its domestic agenda (see Sitkoff 1971, 597; Savage 1997, 114).

African Americans. On December 29, 1947, Wallace formally announced his candidacy for president under the recently formed Progressive Party. Wallace and the Progressive Party quickly ran into trouble when it appeared as though communists dominated the Party. While members of the Party refuted such claims, the similarities between the Progressive platform and the American Communist Party platform were striking (Savage 1997, 117). Yet, the potential siphoning of votes was sufficiently real to cause concern within the liberal wing of the Democratic Party.[138]

The liberal wing faced a threat of defection from both wings of the Party. Liberals needed to either uphold the status quo within the Party and hope that southern conservatives would rally or push the liberalization of the Party and hope that the African American defection to the Republican Party in 1946 was an aberration. Truman guided the liberal wing to choose the latter and embarked on a strategy designed to capture African American votes. In so doing, Truman began the process of weaning the national Democratic coalition off its dependence on the conservative South while bolstering the strength of the liberal coalition.

Truman's special message to Congress on civil rights inaugurated the new strategy. However, since the conservative bloc could obstruct legislative action in Congress, Truman adopted the PCCR's recommendation to attack segregation through the courts. Using a court-centered strategy for attacking the segregated South had two advantages. First, unlike working through the Congress, the strategy had a decent chance of being successful as the Supreme Court was now populated by liberal-minded jurists

[138] Democratic strategists Clifford and Rowe advocated for greater movement to the left than to the right as they feared defection to Wallace more than they the defection of southern conservatives (see Frederickson

appointed by Roosevelt, which had recently awarded African Americans several important legal victories.[139]

The second advantage to a court-centered strategy was that it proved less damaging to the national coalition than direct executive or legislative action. Administration involvement in civil rights pending before the Court did not elicit condemnation by southern Democrats. In fact, they rarely protested against the federal government's involvement in civil rights litigation. Truman's decision to file an *amicus curiae* brief in *Shelley v. Kraemer*[140]—the first time the federal government had filed a brief in such a case—did not cause an uproar among southern lawmakers, the southern

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2001, 68-9; Savage 1997, 113-120).

[139] During the mid-1940s, the Court ruled in *Smith v. Allwright* that the white primary was unconstitutional. In their holding, the eight member majority ruled that since the white primary was established by state convention, the action was not merely that of a private group but a state agency. Justice Reed wrote:

> We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. (321 U.S. 649 at 663)

The Court's action in *Allwright* led to the abandonment of numerous efforts to save the white primary system (Sullivan and Gunther 2001, 876). *Allwright* is particularly notable as "Attorney General Francis Biddle rejected [the Civil Rights Section's] argument that the Solicitor General's Office should file an *amicus curiae* brief in support of the challenge" (McMahon 2004, 153). The willingness of the Roosevelt Court to attack such vestiges of white political supremacy in the absence of direct political support indicated that the Court would be willing to do so again, especially at the direct request of the executive.

Two years later, the Supreme Court issued a ruling that invalidated a Virginia state law that required "all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses so that contiguous seats will not be occupied by persons of different races at the same time." (*Morgan v. Virginia*, 328 U.S. 373, 374) Justice Reed, writing for an eight member majority, argued that the Virginia statute created a burden on interstate commerce and declared that the need for "a single, uniform rule to promote and protect national travel" required the Court to nullify the statute. Interestingly, Reed also speculated, in dicta, that the increasing mobility of Americans may require greater federal co-optation of "state regulation of racial association" in interstate commerce. When the Court upheld the Civil Rights Act of 1964, the Court leaned on its line of precedent dating back to *Morgan* to support congressional authority (see *Heart of Atlanta Motel v. United States,* 379 U.S. 241).

press, or white southern voters. When comparing the reaction to Truman's court-centered action to the reaction to his civil rights legislative program, the contrast is striking for the lack of tumult in the former.

The low-profile, court-centered attack on segregation benefited the Democratic Party because it decreased intra-party tension by avoiding direct legislative action. While southern conservatives desired the maintenance of the status quo and were willing to obstruct proposed legislation that would alter it, southern Democrats never threatened defection due to Justice Department involvement in civil litigation against segregationist practices. The same cannot be said of Truman's attempts to press a civil rights agenda through Congress. Moreover, the NAACP—one of the most active, visible, and successful organizations attempting to realize equal citizenship rights for African Americans—used a legal, rights-based strategy to attack Jim Crow laws so elite African American leaders were attuned to Justice Department activity (Meier and Bracey 1999, 8). So, by attacking Jim Crow through the courts, Truman enabled himself and other liberal Democrats to claim credit with the African American community while limiting the damage among southern conservatives.

On October 30, 1947, the Justice Department announced its intention to file an *amicus curiae* brief in support of the NAACP-backed request that the Supreme Court rule racially restrictive covenants on real property violated the Fourteenth Amendment's requirement of equal protection. *Shelley* was quite monumental, even before the decision, in that it was the first time the government joined a civil rights case in which

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[140] 334 U.S. 1 (1948).

private litigants were the only parties (Kluger 2004, 250). The chief author of the government's brief, Philip Elman, was well aware of what was driving the government's sudden interest in civil rights cases. Elman recounted:

> Truman's Gallup poll ratings at that time were very low; it looked as though whoever was going to run against him in 1948, probably Dewey, would beat him badly. Tom Clark was Attorney General, and both he and [Solicitor General Philip] Perlman were political animals, very much aware of the Negro vote . . . Well, I don't know exactly what happened. Probably Tom Clark mad the decision after checking with Truman (1987, 817).

The Justice Department was being called upon to provide the "new and real action"[141] Clifford had suggested in his electoral strategy.

In the government's brief, Elman played to the central principles of American citizenship and wrote that the covenants "cannot be reconciled with the spirit of mutual tolerance and respect for the dignity and rights of the individual which give vitality to our democratic way of life" (as quoted in Kluger 2004, 252). Elman claimed that the brief was a "statement of national policy" (1987, 819). Whether the government's brief truly articulated national policy had yet to be determined but the brief certainly made clear the executive strongly desired the Supreme Court to make racially restrictive covenants impermissible.

As noted above, the Justice Department reasonably believed that the Court would respond positively to its brief based on its decisions in *Smith* and *Morgan*. However, a successful outcome was far form preordained. In fact, three of the nine sitting justices recused themselves and there was speculation that these justices had likely signed restrictive covenants in their real property holdings (Kluger 2004, 253). More

problematic, Chief Justice Vinson voted to uphold housing covenants when he sat on the DC Circuit Court of Appeals.[142]

Yet, the six members of the Court[143] who sat for the case unanimously agreed that restrictive covenants were judicially unenforceable and, thus, rendered impotent. Writing for the majority, Chief Justice Vinson abandoned his reasoning in *Hundley v. Gorewitz*[144] and adopted the government's position on state action within the sphere of judicial enforcement. While Vinson did not adopt Elman's flowery language of the principles of citizenship and the aspirations of democracy, he did adopt similar legal reasoning regarding state action in restrictive covenants. The government's brief stated:

> It cannot successfully be argued that the decrees involved in these cases do not constitute governmental action because the courts have acted solely to enforce private contractual or property rights . . . A court which enforces a contract is not merely a mechanical instrumentality for effectuating the will of the contracting parties. The law enforces contracts because there is a public interest in placing the force of the state behind the effectuation of private agreements not contrary to any recognized social policy.[145]

Chief Justice Vinson echoed this sentiment by declaring:

> It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint . . . [T]hese are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being

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[141] See supra note 151.
[142] *Hundley v. Gorewitz*, 132 F.2d 23 (1942). Wiley Rutledge, who sat for *Shelley v. Kraemer*, dissented in this case.
[143] Of the six member majority, four of the justices were Roosevelt appointees (Black, Douglas, Frankfurter, and Murphy) and two were Truman appointees (Vinson and Burton).
[144] See supra note 160.
[145] 1947 WL 30432, *Brief for the United States as Amicus Curiae*.

> denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.[146]

The Court effectively ended restrictive covenants and handed opponents of segregation their first major victory. Several years after the Court's ruling in *Shelley*, a leading scholar concluded that the government's brief most likely was decisive in the case (Abrams 1955, 220). Yet, southern lawmakers directed zero criticism toward the Administration for joining the suit and, instead, directed their frustration and anger at the Supreme Court.[147]

The need for a court-centered strategy was made all the more apparent by the utter failure of liberal lawmakers to gain passage of any of Truman's ten civil rights proposals. All ten proposals sent to Congress were either killed off in committee, filibustered, or never came to a vote. The liberal wing of the Party was neither large enough nor sufficiently well-placed to overcome southern obstruction. Moveover, tension between the two wings of the Party was sufficiently high to make a direct legislative assault a recipe for electoral defeat. The possibility of achieving "new and real action" through legislative activity looked virtually impossible in 1948.

To make matters worse for Democratic hopes of regaining control of Congress and holding the presidency, leading southern Democrats formed several committees and conferences that sought to devise a response to the liberalization of the Democratic Party. These committees reached a consensus to keep Truman from winning the Democratic nomination for a second term. If that failed, many southern Democrats threatened to leave the Party and form a third "states' rights" party. Moreover, southern lawmakers

[146] 334 U.S. 1, 19.

rallied in both the House and Senate against Truman. Fifty-two southern Democrats in the House formally condemned Truman's civil rights proposal.[148] Twenty-one southern Democratic brethren in the Senate vowed to "stand guard" to protect against any civil rights measure becoming law.[149]

As southern lawmakers voiced their displeasure with the liberal wing's desire to legislate new civil rights protections for African Americans, the southern voting public abandoned Truman. As historian Harvard Sitkoff recounts:

> George Gallup reported the President's support in the South dropped form 59 percent in October 1947 to 35 percent in late March 1948. In that same period the number of southerners disapproving Truman's policies leaped from 18 to 57 percent. Another Gallup poll indicated southern voters to be nine-to-one against the civil rights program (1971, 602).

The possibility of losing the entire South led Truman to back off his civil rights legislative agenda until after the national Democratic convention. But for Truman and other liberal Democrats, the trick was to minimize defection in the South while securing policy victories to secure the vote of northern African Americans.

To minimize southern defection and maximize civil rights claims, Truman and liberal Democrats relied on a court-centered strategy. In the words of Philip Elman, the Solicitor General's Office was "now in business looking for Supreme Court civil rights cases in which to intervene as *amicus curiae*" (1987, 820). With this in mind, the Solicitor General submitted another *amicus* brief in the only other civil rights case before the Court—*Takahashi v. Fish and Game Commission*.[150] As with *Shelley*, the

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[147] See "South in Turmoil over Sweatt Rule." *Austin American Statesman* June 6, 1950.
[148] *Congressional Record*, vol. 80, 1198-99.
[149] Ibid.
[150] 334 U.S. 410 (1948).

government's involvement resulted in another success and the Supreme Court struck down a California state law that effectively denied commercial fishing licenses to Japanese residents not eligible for citizenship. Justice Black rebuked the California law declaring, "The Fourteenth Amendment and the laws adopted under its authority . . . embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."[151] The Court's ruling in *Takahashi* did not garner the same excitement as did *Shelley*, however, the Justice Department's involvement still signaled that Truman had committed his Administration to fighting racially restrictive legislation; a fact that the mainstream media observed.[152]

The victories provided by the Court in May and June of 1948 enabled Truman to back off his civil rights agenda until after the Democratic national convention. In early July, the Democrats convened to draft a national platform and select a nominee for the 1948 general election. The major point of contention centered on drafting a civil rights plank consistent with liberal hopes for action yet also reserved enough for southern conservatives. Despite Truman's declaration that "there [would] be no compromise on any point" of his civil rights program,[153] his actions—or inaction—sent a different message and gave southern Democrats hope that northern liberals would not push the civil rights issue. Specifically, southern Democrats hoped to secure a replica of the 1944 civil rights plank, which contained only vaguely stated aspirations for equality.[154] Of

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[151] Ibid. at 420.
[152] *Christian Science Monitor* July 31, 1948, 15.
[153] *New York Times* February 8, 1948, 9E.
[154] The civil rights plank of the 1944 Democratic Platform read: "We believe that racial and religious

course, a plank so benign would certainly provide sufficient incentive for African Americans to continue the Republican voting pattern started in 1946 and put Dewey in the White House.

Leading up to the Democratic national convention, Truman had grave concerns over securing the Party nomination, especially in light of southern opposition. Yet, Truman's concern dissipated five days before the convention when Dwight Eisenhower sent a letter to Senator Pepper (D-FL) that unambiguously confirmed that he would not accept the Democratic presidential nomination. This put an end to the "draft Eisenhower" movement that was, oddly, popular among both the left and the right wings of the Democratic Party.[155] Truman's only other competition was Senator Richard Russell of Georgia who pushed a strong states' rights agenda that played well in the South. However, Russell's platform faltered everywhere else and Truman secured the nomination on the second ballot.

As with many national party conventions, the real tumult came when the typical legislative coalitions began to splinter over the fight for Party control. In the case of the Democratic Party in 1948, the civil rights plank pulled at the standard liberal-conservative coalitions and led to some unexpected results. As noted above, Truman and many members of the center-left coalition believed that the general election mandated a unified Party and that a strong civil rights plank would push the South to the breaking (or

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minorities have the right to live, develop and vote equally with all citizens and share the rights that are guaranteed by our Constitution. Congress should exert its full constitutional powers to protect those rights." (Porter and Johnson 1956, 404).

[155] Both wings of the Party seemed to believe that Eisenhower would support their respective civil rights positions. Eisenhower had remained largely mooted on the subject of civil rights but he did support continued segregation of the military so the liberal wing's interest in Eisenhower was particularly curious, if mostly based on Truman's poor showing in the polls.

bolting) point. Truman proposed a plank that ambiguously affirmed the "belief that racial and religious minorities must have the right to live, the right to work, the right to vote," but avoid any specific recommendations as to how to realize such aspirations. The plank was particularly vague when contrasted with Truman's ten point program proposed to Congress just five months prior and the recent aggressiveness of the Justice Department. Based on the initial support for Truman's proposal, centrist party elites evidently desired to build a Democratic platform based on compromise and unity. However, the best laid schemes of mice and men oft go astray[156] and so to did the plans for a compromise on a vague civil rights plank.

The Americans for Democratic Action (ADA), formed by members of the far-left wing of the Party, emerged as a potent force in the push for a more progressive civil rights plank. Led by Hubert Humphrey, a member of the platform drafting committee, the ADA forced a potent and specific civil rights proposal to the convention floor for debate and a vote. Given that a sizable portion of the ADA came from northern states where the disputed African American vote would matter most, they likely pushed strong a strong civil rights plank because of Republican efforts to win northern African American voters by adopting the following civil rights plank into their platform:

> Lynching or any other form of mob violence anywhere is a disgrace to any civilized state, and we favor the prompt enactment of legislation end this infamy.
>
> One of the basic principles of this Republic is the equality of all individuals in their right to life, liberty, and the pursuit of happiness. This principles is enunciated in the Declaration of Independence and embodied

[156] Burns, Robert. 1785. *To a Mouse.* Available at http://www.theotherpages.org/poems/burns01.html. (Visited on January 5, 2005) The original Gaelic version is "The best laid schemes o'Mice an'Men, Gang aft agley."

> in the Constitution of the United States; it was vindicated on the field of battle and became the cornerstone of this Republic. This right of equal opportunity to work and to advance in life should never be limited in any individual because of race, religion, color, or country of origin. We favor the enactment and just enforcement of such Federal legislation as may be necessary to maintain this right at all times in every part of this Republic.
>
> We favor the abolition of the poll tax as a requisite to voting.
>
> We are opposed to the idea of racial segregation in the armed services of the United States (Porter and Johnson 1956, 452-3).

If northern African American voters dumped the jackass for the elephant, the balance of power within the Democratic Party would swing to the conservative bloc. Humphrey and the ADA countered Republican efforts by proposing an even stronger civil rights plank:

> We highly commend President Harry Truman for his courageous stand on the issue of civil rights. We call upon the Congress to support our President in guaranteeing these basic and fundamental principles: The right of full and equal political participation, the right to equal opportunity of employment, the right of security of persons, and the right of equal treatment in the service and defense of our Nation (Brown 1948, 181).

In short, the plank would essentially marry the Democratic Party to Truman's ten point civil rights program, which only recently caused such turmoil within the Party.

To counter the ADA's proposed plank, several southern delegates introduced states' rights planks.[157] These measures garnered great support among southern delegates but failed wildly outside of the South and never came close to passing.[158] The divide between southern conservatives and the rest of the Democratic Party was evident in the lack of support for these measures. On the flip side, the ADA and Humphrey gained significant backing for their proposed plank from a coalition of northern African Americans and big city bosses. Both groups needed to protect against potential Republican gains that would occur if a weak civil rights plank passed. The progressive plank passed by a vote of 651½ to 582½ and was added to the Democratic platform.

Truman believed that its inclusion hurt the Democratic Party but he, by no means, found it objectionable in principle. In fact, Truman's acceptance speech did two things.

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[157] Dan Moody (TX), Cecil Sims (TN), and Walter Sillers (MS) each presented states' rights planks that articulated the principle of state sovereignty and limited federal powers (see Brown 1946, 178; Berman 1970, 110).

[158] Moody's plank failed by a vote of 925 nays to 309 yeas, only 11 votes in the affirmative came from outside the South (Berman 1970, 111).

First, Truman acknowledged the divide within the Democratic Party over civil rights and reaffirmed with which wing of the Party he stood. Second, Truman attempted to shift the blame for the failure to enact his ten point proposal onto the Republican Party despite the clear obstruction by southern Democrats. Truman declared:

> Everybody knows that I recommended to the Congress the civil rights program. I did so because I believe it to be my duty under the Constitution. Some members of my own party disagreed with me violently on this matter, but they stand up and do it openly. People can tell where they stand. But the Republicans all professed to be for those measures, but the Eightieth Congress did not act. They had enough men to do it and they could have had cloture. They didn't have to have a filibuster. There are enough people in that Congress that would vote for cloture.[159]

Faced with a general election, Truman wanted to shift the blame for the failed civil rights program onto the Republican Party despite his own Party's recalcitrance on the issue. This would be a difficult sell and Truman would soon shift his focus away from casting dispersions upon the intentions of Republicans to greater action designed to capture the African American vote.

Southern Defection and the Rise of the African American Vote

The white southern establishment immediately responded to the inclusion of the strong civil rights plank. Following the conclusion of the Democratic national convention, the call went out among disgruntled southern conservative Democrats that they needed to discuss their future in the Democratic Party and plan a course of action. On July 17, some 5,000-6,000 southerners, predominantly Democrats, responded by meeting in Birmingham to discuss the possibility of formally defecting from the Democratic Party and forming a third states' rights party. While the purpose of the

[159] Truman, Harry S. *Address in Philadelphia Upon Accepting the Nomination of the Democratic National*

convention was to push states' rights, the issue of race played the most prominent role.[160] Frank Dixon, the former governor of Alabama, gave the keynote address on the first day of the "states' rights" convention and articulated the oft-repeated theme of white supremacy. Dixon vehemently argued that Truman's civil rights proposal would "reduce us to the status of a mongrel, inferior race, mixed in blood, our Anglo-Saxon heritage a mockery" (as quoted in Frederickson 2001, 137).

As speaker after speaker took to the floor sounding the familiar themes of race, frequently shrouded in the cloak of states' rights, consensus built that forming a third party was the only viable option. Once the convention achieved this consensus, the delegates diligently set to work selecting a presidential and vice-presidential nominee. Eventually, the convention selected Strom Thurmond as the presidential candidate and Fielding Wright as the vice-presidential candidate. The convention also ratified a Statement of Principles that outlined eight points centered primarily on state sovereignty and their opposition to the elimination of segregation.

The final strategy to emerge from the convention was, unsurprisingly, obstructionist. The goal of the newly named States' Rights Democratic Party[161] was to capture the 127 Electoral College votes from the South, which would prevent either Truman or Republican nominee Thomas Dewey from reaching the 266 electoral votes necessary to win the presidency. In the House, a unified South would control 11 of the 48 votes, which meant that the South had a strong bargaining position it could use to

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Convention. July 15, 1948. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=12962&st=&st1=. (Visited on January 6, 2005)

[160] "Dixie Rebels Nominate Thurmond and Wright." *The Washington Post* July 18, 1948, M1.

[161] I use States' Rights Democratic Party, Dixiecrat Party, and Dixiecrats interchangeably.

force the Democratic Party to drop its civil rights plank in return for southern reconciliation.

With southern defection now tangible, Truman needed to gain the African American vote to secure re-election. Given the stakes, liberal Democrats counseled Truman to engage both the courts and direct executive action to secure African American voters. Truman moved on demands made in March 1948 by Grant Reynolds of the Committee Against Jim Crow in Military Service and Training and A. Philip Randolph of the Brotherhood of Sleeping Car Porters. Reynolds and Randolph demanded "unequivocal anti-segregation and civil rights safeguards for perspective draftees"[162] or threatened that their organizations would organize a campaign of civil disobedience. As Randolph told the Senate Armed Services Committee on March 31st,

> This time Negroes will not take a jim crow draft lying down. The conscience of the world will be shaken as by nothing else when thousands and thousands of us second-class Americans choose imprisonment in preference to permanent military slavery . . . I personally will advise Negroes to refuse to fight as slaves for a democracy they cannot possess and cannot enjoy (as quoted in Klinkner and Smith 1999, 219).

Realizing that he had the perfect opportunity to win favor with African American voters while averting the potentially embarrassing and problematic situation of civil unrest, Truman issued Executive Order 9981, which declared that

> the policy of the President . . . shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale . . . [163]

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[162] Grant Reynolds, A. Philip Randolph, and Albert Balck. *Memorandum to President Harry S. Truman on Occasion of 11 A.M. Conversation.* Available at http://www.whitehousehistory.org/04/subs/activities_03/d01_02.html. (Visited on January 8, 2005)

[163] 13 *Federal Register* 4313 (1948).

The military was to be desegregated and "direct action" by Truman provided one of the most significant civil rights victories to date.

On the same day, Truman also issued Executive Order 9980, which required "[a]ll personnel actions taken by Federal appointing officers [to] be based solely on merit and fitness" and empowered governmental officers to "take appropriate steps to insure that in all such actions there shall be no discrimination because of race, color, religion, or national origin."[164] The order created a review board in each federal agency, so governmental employees could appeal if they believed they were subject to discrimination.

African American leaders praised the orders as quickly as southern lawmakers condemned them. Senator Richard Russell (D-GA) roundly declared that the executive orders were an " . . . unconditional surrender to . . . the treasonable civil disobedience campaign organized by the Negroes . . . "[165] Southern and border state newspapers were more measured in noting that Truman's orders grew out of the need to win the African American vote. The *Shreveport Times* labeled the orders as Truman "grandstanding to try to get back some of the Roosevelt Negro vote which seems to be swinging to the Wallace-Communist Progressive banner in some areas" (as quoted in Berman 1970, 119). The *Baltimore Sun* wrote, "the timing of President Truman's executive orders against racial discrimination in civilian government employment and in the armed forces strongly suggests that they were politically inspired."[166]

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[164] 13 *Federal Register* 4311 (1948).
[165] *New York Times* July 28, 1948, 8.
[166] July 27, 1948, 2.

With the Democratic Party now pushing a liberal social agenda and southern segregationists defecting in healthy numbers to the Democratic States' Rights Party, the Party was now dependant on the center-left to win in the fall election. With the Progressive Party floundering under charges of communist capitulation, the far-left of the Party stabilized. However, Truman stilled faced his most significant obstacle to reelection, the Republican Party's effort to win northern African American voters.

Following Truman's efforts through the Justice Department and the two executive orders, the Republican controlled Congress attempted to reinvigorate several of the civil rights bills pending before it so to woo the national African American vote. On July 21, 1947, a cross-party coalition of liberal House Democrats and Republicans passed an anti-poll tax bill by a vote of 290 to 112.[167] However, the measure failed to get past the southern filibuster in the Senate. The same fate met all other civil rights bills. As historian William C. Berman observed, "The fact that Congress produced next to nothing in the way of significant legislation gave President Truman a ready-made issue: the domestic record of the Eightieth Congress" (1970, 122). Truman and liberal Democrats consistently used the failure of the Republican controlled Eightieth Congress to pass substantial civil rights legislation as a means of luring African American voters. Of course, the fact that southern Democrats were responsible seems like it would render this strategy ineffectual. However, the Dixiecrat secession helped accentuate the differences between liberal Democrats and southern conservatives. By early autumn of 1948, polls showed Truman gaining strong support among African Americans in the north and south.

[167] *Congressional Record*, vol. 80, 9551-52.

In fact, Democratic Party identification among African Americans jumped from 40% in 1944 to 56% in 1948 (Ladd and Hadley 1975, 60, 112).

On his final campaign tour, Truman made a speech in Harlem—the first president to do so. According to the *New York Times*, the audience of approximately 65,000 received Truman warmly. Truman concentrated his speech on civil rights and the steps he had taken to secure those rights. In summarizing his accomplishments, he emphasized both his executive orders and his court-centered strategy.

> So I went ahead and did what the President can do, unaided by Congress. I issued two executive orders. One of them established the President's Committee on Equality of Treatment and Opportunity in the Armed Services. The other covered regulations governing fair employment practices within the federal government. *In addition to that, the Department of Justice went to the Supreme Court and aided in getting a decision outlawing restrictive covenants*.[168]

African American groups did not overlook Truman's strategy. The National Council of Negro Women praised Truman's pro-civil rights agenda *and* his judicial victory in *Shelley*.[169]

Of course, when Truman campaigned in the South, he made no mention of his civil rights agenda nor his judicial victories. In fact, he never mentioned civil rights at all. Instead, Truman played to familiar New Deal themes of economic regulation, wage controls, and farm subsidies. Truman's civil rights policy must have been the proverbial pink elephant in the room but the strategy seemed to work as southerners who prospered under the New Deal grew increasingly suspicious that the Dixiecrat movement was as

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[168] Truman, Harry S. *Address in Harlem, New York, Upon Receiving the Franklin Roosevelt Award.* October 29, 1948. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=13078&st=&st1=. (Visited on January 8, 2005) Emphasis added.
[169] Reynolds, Genevieve. "Truman Is Praised for Rights Stand." *The Washington Post* October 14, 1948,

much about economic conservatism as it was about protecting segregation (Ader 1953, 365-6). In the end, the Democratic States' Rights Party only thrived in four states: Alabama, Louisiana, Mississippi, and South Carolina.[170] The rest of the South continued to vote for the Democratic candidate despite significant reservations about the Party's new domestic agenda.

In what seems counterintuitive, the Dixiecrat movement may have helped Truman defeat Thomas Dewey in two ways. First, southern defection illustrated the ideological dissimilarity between southern conservatives and northern and western liberals. African American voters could continue to vote Democratic with confidence that the Party was not under the control of southern segregationists. Second, the failure of the Democratic States' Rights Party to translate southern solidarity into Dixiecrat voting resulted in enough support for Truman that he won the majority of southern states.

Yet, The failure of the southern segregationists to create a sustainable third party movement should not cloud the true key to victory. The most important votes for both Truman and the liberal wing of the Party arguably came from African Americans in highly contested northern and western states. The *New York Times* credited the Democratic landslide, in part, to a "heavy Negro vote".[171] Truman's civil rights activities helped bolster Democratic voting among African Americans from 68 percent for Roosevelt in 1944 to 77 percent in 1948. Moreover, African American voting in close

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[170] In each of these states, the Democratic States' Rights Party had been listed on the ballot as the official Democratic Party. Therefore, Democratic voters could vote for the Dixiecrats without abandoning the Democratic Party.

[171] White, William S. "Democratic House Appears Assured." *New York Times* November 3, 1948, 9.

races helped give Truman a healthy Electoral College victory.[172] Berman, in his study of African American voting impact, explains:

> Truman carried California by 17,865 votes; in one black district of Los Angeles he received 30,742 votes as compared with Dewey's 7,146 and Wallace's 4,092. Truman won Illinois by only 33,612; yet Chicago's Negroes provided him with a plurality almost four times the margin by which he carried the state. The election in Ohio was particularly close: Truman squeezed out a 7,107-vote victory. Again, as in California and Illinois, his winning margin was provided by blacks, this time from Cleveland and Akron, who gave him a 65,000-vote plurality over Dewey" (1970, 129-30).

Truman's strategy to capture African American voters and, thereby, secure electoral victory was a monumental success.

In addition to helping send Truman back to Washington, African American voters helped the Democrats retake the House and Senate by a wide margin.[173] In urban districts where the African American vote was particularly large, the Democrats increased their number of Representatives from 41 in 1946 to 74 in 1948 (Savage 1997, 138-9). The gamble to liberalize the Democratic Party's domestic agenda turned into a sweeping success for the liberal wing. However, the ability of the Democratic Party to hold power would be contingent on maintaining the South's Democratic loyalty, which posed a peculiar problem given the way the liberal wing won so handily in 1948.

Whither the Liberals—Congress or the Court?

The political commentators and the press, especially the northern press, proclaimed Truman's surprise victory and the overwhelming success of liberal

[172] Truman secured 303 votes while Dewey managed only 189.
[173] The Democrats enjoyed a 92 member majority in the House (263 total members) and a 12 vote majority

Democrats an endorsement of the Party's liberal civil rights agenda.[174] According to political commentator Irwin Ross, "as Liberal strength increases within and without the Democratic party, the weight of dependence can eventually shift—and the liberals can end as masters in the house in which they were originally uneasy guests" (Ross 1949, 139). The *New York Times* noted that "President Truman and the rest of the Democratic Party . . . won despite [southern defection]."[175]

At first blush, it appeared as if Truman would indeed make civil rights his Administration's highest priority during the next four years. In his state of the union address shortly after the election, Truman declared:

> The fulfillment of this promise is among the highest purposes of government. The civil rights proposals I made to the 80th Congress, I now repeat to the 81st Congress. They should be enacted in order that the Federal Government may assume the leadership and discharge the obligations dearly placed upon it by the Constitution. I stand squarely behind those proposals.[176]

Truman proved true to his word insofar as he immediately sent his ten point civil rights program back to Congress for consideration.

Liberal Democrats in Congress also sought to push ahead with its civil rights agenda. The House of Representatives, as their first matter of business in the new session, sought to change an old rule that enabled southern conservative and Republican Rules Committee members to kill bills through their committee by refusing to bring them up for a vote. The new rule "required the House Rules Committee to call up any bill that

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in the Senate (54 total members). See supra note 188.

[174] White, William S. "Sweep in Congress." *New York Times* November 4, 1948, 1.

[175] Lawrence, W.H. "Election Brings Shift Within the Two Parties." *New York Times* November 7, 1948, E5.

[176] Truman, Harry S. *Annual Message to the Congress on the State of the Union*. January 5, 1949.

his committee has approved after it has been before the House Rules Committee for at least twenty-one days" (Savage 1997, 148). However, the liberal members of the Senate failed in their efforts to change the rules governing cloture, which enabled southern Senators to filibuster any bill that would provide greater protection to African Americans. Thus, Truman's proposals met with the same downfall as the year.[177]

Ardent supporters of civil rights legislation hoped that Truman would make his civil rights agenda the litmus test for party patronage. However, he did no such thing. In fact, Truman refused to press the issue and seemed resigned to losing in the Senate. In a March press conference, when asked about the on-going Senate filibuster, Truman weakly responded, "Well, I can tell you more about that at a later date. I can't comment on it now, because the matter hasn't reached the conclusion."[178] Truman followed this quip with a more anemic response commenting on his role in securing the civil rights agenda vis-à-vis Congress stating,

> I only advise the Congress on what I think is good for the country. Then they agree as they see fit. We have three independent prongs to the Government of the United States--executive, legislative, and judicial. And neither of the others ought to interfere with the duties of the other two.[179]

Once it became clear that the South still held a veto in the Senate, liberal Democrats refused to push the civil rights agenda in Congress and offered no future plan of attack.

The apathy towards civil rights is particularly noticeable when compared to other issues that liberal Democrats deemed either more winnable or more worthy of a fight.

Available at http://www.presidency.ucsb.edu/ws/index.php?pid=13293&st=&st1=. (Visited on January 10, 2005)

[177] The House passed two bill to make the FEPC permanent and an anti-poll tax measure but neither made it through the Senate.

[178] Truman, Harry S. *The President's News Conference at Key West.* March 18, 1949. Available at

Repeal of the Taft-Hartley Act[180] quickly became the most pressing issue for Truman and other liberals within the Democratic Party. On April 28, 1949, Truman declared that the vote on repeal of the Taft-Hartley Act would be a test of party loyalty and party loyalty would be considered when he distributed patronage.[181] Truman made no equivalent statement on civil rights and, with limited intervention from the Truman Administration, civil rights legislation languished in the Senate for the next two years. So why did Truman push civil rights so hard and then back down when he was closest to victory?

It appears from Truman's (in)action that he did not want to permanently split the Democratic Party so he was unwilling to press the issues that most divided it.[182] Moreover, southern Democrats maintained veto power through the filibuster. So, despite the overwhelming success of the 1948 electoral strategy and coinciding political agenda, Truman backed off from pushing legislative action to secure civil rights and, instead, focused on the courts—an institution that responded positively to liberal policy-making in the recent past. Once again, the Supreme Court was asked to realize liberal policy within the Democratic political order that the majority wing could not achieve through direct legislative action because of minority wing obstruction and the potential to destroy the coalition that kept them in power.

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http://www.presidency.ucsb.edu/ws/index.php?pid=13404&st=&st1=. (Visited on January 10, 2005)
[179] Ibid.
[180] The Taft-Hartley Act was a labor law unpopular with unions because it abolished "closed shops" in which all workers had to be members of a union. Absent such provisions, unions had a much more difficult time maintaining its membership rolls and recruiting new members.
[181] See Truman, Harry S. *The President's News Conference.* April 28, 1949. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=13444&st=&st1=. (Visited on January 10, 2005)
[182] "Compromise is No Solution." *New York Times* March 14, 1949, 18.

With a failed civil rights legislative agenda in both 1948 and 1949, Truman combated southern segregation through the courts. By the fall of 1949, Truman had appointed four new justices to the Supreme Court; adding to the Court's five Roosevelt appointees. Truman's appointees have been much maligned by scholars of the Court because Truman seemingly chose pragmatism over profundity. Scholars declared most of Truman's appointees "mediocre" at best and, less kindly, "failures" (Abraham 1999, 181). Moreover, Truman's selection criteria, which appears based more on personal loyalty than judicial capacity, has been labeled cronyism. Richard Kluger wrote that Truman's appointees, with the possible exception of Chief Justice Vinson, were "neither brainy or reflective and all devoid of leadership qualities" (2004, 269). They look particularly bereft of intellectual heft because they replaced some of the great minds of the Roosevelt Court and were later replaced by some of the eminent members of the Warren Court.[183] However, in the end, the four Truman justices served the Democratic political order quite well as they greatly aided in securing African American voters and maintained a "devotion to the power and policies of the federal government" (Kluger 2004, 269; see also Abraham 1999, 182).

Chief Justice Fred Vinson was an ardent New Dealer in the House of Representatives prior to his appointment to the US Circuit Court of Appeals. Justices Harold Burton and Sherman Minton both served in the United States Senate. Justice Minton was a particularly strong supporter of Roosevelt's court packing plan and highly

[183] Chief Justice Vinson replaced Harlan Stone and was replaced by Earl Warren. Sherman Minton replaced Wiley Rutledge and was replaced by William Brennan. Tom Clark replaced Frank Murphy and was replaced by Thurgood Marshall. Harold Burton replaced Owen Roberts and was replaced by Potter Stewart.

critical of the Supreme Court's anti-New Deal stance prior to 1937. Justice Tom Clark, as noted above, served as Truman's Attorney General and helped craft Truman's court-centered attack on segregation to win African American voters. While these justices often have been labeled conservative in civil rights issues, their rulings on segregation cases from 1950-1954 consistently sided with racial minorities and helped lay the foundation for the rights revolution that occurred in the 1950s through the 1970s.[184]

The Truman appointees jumped on their first opportunity to address racial segregation since *Shelley* and *Takahashi* to hold southern states to a more substantive form of equality than was previously practiced under the *Plessy v. Ferguson* ruling. In *Henderson v. United States*,[185] the Solicitor General's office submitted a brief in support of Henderson's position that the Interstate Commerce Act prohibited segregated dining cars, a practice employed by the Southern Railway Company and approved by the Interstate Commerce Commission. Most notably, the Solicitor General took a position contrary to the ICC, which urged the Court to uphold the practice of segregating African American passengers in dining cars as consistent with *Plessy*.[186] In a revolutionary move, the government argued, for the first time, that the doctrine of "separate but equal" was unconstitutional and should be overturned. The government also supported Henderson's contention that segregated dining cars violated the ICA, which provided the

[184] There is one important exception. In *Morgan v. Virginia*, Justice Burton was the lone dissenter in a decision that struck down a Virginia statute that required segregated seating arrangements on motor buses in interstate travel. However, Burton quickly abandoned this position as the Truman Administration became actively involved in segregation suits.
[185] 339 U.S. 816 (1950).
[186] Ibid. at 820.

Court a means of ruling for Henderson without overturning an established line of precedent.

The Court unanimously[187] sided with Henderson and ruled that segregated dining cars violated the Interstate Commerce Act. Writing for the majority, Justice Burton wrote,

> The right to be free from unreasonable discriminations belongs, under [section] 3(1), to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage.[188]

The Court may have been ready to strike down the policy but it clearly was not ready to strike down *Plessy v. Ferguson*. Justice Burton declined to "reach the constitutional or other issues suggested."[189] However, the victory was still a considerable one for the opponents of Jim Crow.

On the same day the Court decided *Henderson*, it handed down two momentous decisions in the campaign against segregated education. Both *Sweatt v. Painter*[190] and *McLaurin v. Oklahoma State Regents for Higher Education*[191] involved challenges to segregated higher education systems. Herman Sweatt filed an application with the University of Texas law school but was denied admission because he was African American. Sweatt first filed suit in a Texas state court. Although the state court ruled

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[187] The final vote was 8-0 as Justice Clark did not participate in the decision since he was involved in the decision to file an *amicus curiae* brief while he was still the Attorney General.
[188] Ibid. at 847.
[189] Ibid. at 847.
[190] 339 U.S. 629 (1950).
[191] 339 U.S. 637 (1950).

that Sweatt had been denied equal opportunity afforded under the Fourteenth Amendment, it refused to grant a remedy. Rather, the Texas court provided the state enough time to create a separate facility to educate African American law students. Such a facility was created but Sweatt refused to enroll and he pressed on with the suit. The court eventually found that the school did not violate Sweatt's rights as the "privileges, advantages, and opportunities for the study of law [were] substantially equivalent to those offered by the State to white students at the University of Texas."[192]

Upon Sweatt's appeal to the Supreme Court for a writ of certiorari, the U.S. government once again advocated for an end to the separate but equal doctrine. Arguing along similar lines as it had in *Henderson*, the US Government's brief stated,

> the 'separate but equal' theory of Plessy v. Ferguson is wrong as a matter of law, history, and policy. The United States in these cases again urges the Court to repudiate the 'separate but equal' doctrine as an unwarranted deviation from the principle of equality under law which the Fourteenth Amendment explicitly incorporated in the fundamental charter of this country.[193]

Both the NAACP and the Committee of Law Teachers Against Segregation in Legal Education made similar qualitative arguments regarding the nature of education and the role segregation played in creating barriers to a quality legal education.[194]

Writing for a unanimous Court, Chief Justice Vinson adopted the position of the petitioner and the US government by noting that segregated legal education could not

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[192] 339 U.S. 629, 632. Chief Justice Vinson quoting the Texas state trial court decision.
[193] *Memorandum for the United States as Amicus Curiae*, 9-10.
[194] The NAACP's brief stated "Whatever reasons may have caused the Court to adopt the 'separate but equal' formula in *Plessy v. Ferguson*, the whole history of its application conclusively proves that it has not, does not and cannot provide the equal protection which the 14th Amendment sought to secure" (66-7). The *amicus* brief for the American Federation of Teachers similarly argued "The Constitution is a living instrument, and a separate but equal; doctrine based upon antiquated considerations, should not, at this time, and in this advanced era, be permitted to perpetuate a situation which denies full equality to Negroes

achieve substantial equality required by the Fourteenth Amendment. According to Vinson,

> Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[195]

The decision was certainly a victory even if it did not give the Administration everything it requested. The Court, again, acted prudentially and refused to reexamine *Plessy v. Ferguson* despite the mounting evidence of the "effects of racial segregation."[196]

In the companion case of *McLaurin*, the Court issued a similar ruling. As in *Sweatt*, a combination of the NAACP and the US government argued that a graduate institution can not treat students differently based solely on race. George McLaurin, who gained admission to the Graduate School at the University of Oklahoma, was "required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the

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in the pursuit of education" (12).
[195] Ibid. at 633-34.
[196] Ibid. at 636.

regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria."[197]

Chief Justice Vinson, once again writing the opinion for a unanimous Court, declared that the mandatory segregation of McLaurin from white students denied him equal protection of the laws. Specifically, the segregated conditions resulted in a situation in which "appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[198] In a single day, the Court boldly announced its suspicion of the legal bases for "separate but equal" and its application. The combination of *Henderson, Sweatt,* and *McLaurin* gave southern segregationists their most significant defeat since the advent of separate but equal.

The Court's rulings proved important for Truman's court-centered strategy in several different ways. First, while Truman's appointees caused civil libertarians a good deal of initial concern, these rulings made clear that the Truman justices would not impede the Administration's judicial attack on segregation. In the three cases discussed above, the Truman justices voted to monitor southern segregationist activity and to hold segregationists to a standard never before required under the "separate but equal" doctrine. The Court did not go so far as to embrace the government's position that "separate but equal" ought to be discarded but they did not reject the contention either.

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[197] 339 U.S. 637, 640.
[198] Ibid. at 641.

Second, the standard of equality set in *Sweatt* and *McLaurin* took the idea of equality seriously and, as such, made the possibility of achieving true equality highly unlikely. In evaluating the nature of equality, the Court considered both tangible and intangible measures. This played into the hands of both the government and the NAACP. For quite some time, the NAACP's legal strategy attempted to force southern states into equalizing conditions, knowing full-well that such equalization could not be achieved.[199] Once the South realized that equalizing conditions was either fiscally impractical or, most likely, impossible, these states would either desegregate on their own or the NAACP would ask the courts to overturn "separate but equal" since practice proved its impossibility. The Court took a step closer to the latter by acknowledging that token forms of equality were unacceptable under the requirements of the Equal Protection Clause of the Fourteenth Amendment. With these two cases, the Supreme Court, at the behest of the Truman Administration, started unsettling its equal protection jurisprudence, which would result in the end of *Plessy*.

The press did not miss the consequences of these cases, particularly their implications for the end of segregation. Arthur Krock of the *New York Times* wrote that *Sweatt* and *McLaurin* made separate but equal "a mass of tatters . . . [T]he net of the decisions was that 'equal' must be as definitely proved as 'separate,' by tests which obviously will be difficult if not impossible for the states to meet, as Texas and

[199] Nathan Margold drafted a legal memorandum, submitted to the NAACP in May of 1931, which presented several legal routes by which segregation in the southern educational system could be challenged. The Margold Report laid out the strategy of forcing southern states to equalize black and white schools so that states would face the prospect of either merging their educational systems or equalizing spending to the point of fiscal insolvency. The end result in either case, Margold argued, would be an end to segregated educational systems (see Tushnet 1987).

Oklahoma failed to do today."[200] Both *Commonweal* and the *New Republic* sounded similar themes that these cases marked the beginning of the end of Plessy insofar as the cost of creating truly equal facilities would outweigh any possibility of maintaining separate educational systems (Tushnet 1987, 133). Interestingly, the press also gave greater credit to the Truman Administration for the Court's decisions than the NAACP. As Krock wrote in the *New York Times*, " . . . while [Solicitor General] Perlman did not get the *Plessy* doctrine specifically overruled, he got the Supreme Court to put a price-tag on it which may have the same effect in numerous localities . . . "[201] The NAACP pushed this legal strategy for nearly 17 years but the Administration's decision to put the US government squarely behind overruling "separate but equal" and appointing justices sympathetic to Administration policies resulted in the most substantial gains for African Americans since the Civil War Amendments.

Finally, *Henderson*, *Sweatt*, and *McLaurin* arguably helped minimize liberal Democratic loses in the 1950 congressional election. Although the Democratic Pary maintained control of both the House and Senate, their margin of control slipped considerably. The majority in the House fell from 263 to 234 and the Senate fell from 54 to 49. The Republican Party successfully thwarted Democratic efforts to make Truman's domestic agenda—the Fair Deal—the focus of the campaign and made domestic communism and the languishing effort in Korea the central themes of the election. The rise of Joseph McCarthy and his grand suppositions of a vast communist infiltration of the American government and military enabled Republicans to secure significant gains in

[200] Krock, Arthur. "An Historic Day in the Supreme Court." *New York Times* June 6, 1950, 28.
[201] Ibid.

northern and western states. Yet, these issues resonated with white, moderate voters more than African Americans and African American voters still predominantly supported northern Democrats. So, despite Republican gains in the North, Democrats outside of the South were able to win or hold 126 congressional and 9 senatorial seats due to the growing strength of the northern African American vote (Lemann 1991, 6). Without the growing support of African Americans, based on the tangible civil rights victories spurred by executive action through the courts, Democrats would not have maintained their hold on power.

With congressional gains the liberal wing secured in 1948 now erased by Republican victories and the 1952 presidential election looming, the Democratic Party largely abandoned legislative attempts to secure civil rights legislation. Yet, the Solicitor General's Office continued to pursue the Administration's civil rights agenda through the courts. As the 1952 election neared, the Solicitor General's Office and the Court seemed to be the last institutions actively pursuing the Fair Deal's civil rights program. In an effort to appease the South, which had proved willing to defect, the Democratic Party abandoned its progressive civil rights agenda. The 1952 Democratic Party platform included a civil rights plank more similar to its 1944 conservative plank than its most recent 1948 progressive plank. The watered down plank contained no specific proposals and read:

> . . . we favor Federal legislation effectively to secure these rights to everyone: (1) the right to equal opportunity for employment; (2) the right to security of persons; (3) the right to full and equal participation in the Nation's political life, free from arbitrary restraints. We also favor

> legislation to perfect existing Federal civil rights statutes and to strengthen the administrative machinery for the protection of civil rights.[202]

The Party also publicized the success of its court-centered strategy by commending the Justice Department's role in curtailing the reach of Jim Crow and promised to maintain this policy. The plank stated:

> The Department of Justice has taken an important part in successfully arguing in the courts for the elimination of many illegal discriminations, including those involving rights to own and use real property, to engage in gainful occupations and to enroll in publicly supported higher educational institutions. We are determined that the Federal Government shall continue such policies.[203]

The liberal wing of the Party fully relied upon the courts to do that which they otherwise could not do; namely, realize their civil rights agenda and, in so doing, secure the northern African American vote critical to the viability of the liberal wing.

In the last two years of his Administration, Truman continued to authorize the push against southern segregation. In 1952, the Solicitor General's Office filed a brief in yet another NAACP-backed case before the Supreme Court. The dispute in *Brown v. Board of Education* involved the segregated elementary school system in Topeka, Kansas. However, under its name, the Court consolidated three other cases challenging three other segregated state school systems.[204] The Solicitor General's Office once again filed an *amicus* brief in support of the plaintiff's challenge. The brief was filed at the

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[202] *Democratic Party Platform of 1952*, available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=D1952. (Visited on January 13, 2005)
[203] Ibid.
[204] The other cases came from Delaware, South Carolina, and Virginia. The Delaware state supreme court had ruled that the African American students should be admitted to the white high school as it was superior to the black high school. *Gebhart v. Belton*, 91 A.2d 137 (1952).

permission of Truman's latest Attorney General, James P. McGranery, and was signed both by McGranery and Philip Elman.

The government's brief took a similar, if more aggressive, approach as it did in *Sweatt* and *McLaurin*. The argument went as follows: First, the government offered the Court several ways to remedy the four cases before it without directly confronting the doctrine of separate but equal. In each case, the states could simply equalize conditions, while providing an intermediate remedy such as temporary integration of the school systems until sufficient resources could be dedicated to African American schools to render them equal to white schools. In an argument made by both the NAACP and the government, if certain intangibles, such as those recognized in *Sweatt*, made separate but equal impossible, then *Plessy* required desegregation since it was the only way to achieve equality. This line of argument would allow the Court to avoid overturning *Plessy* but abandon "separate but equal" as currently practiced.

Second, the brief again urged the Court to overturn *Plessy* and be done with "separate but equal" once and for all. Using unequivocal language, the government declared its favored position:

> "The Government submits that compulsory racial segregation is itself . . . unconstitutional discrimination. 'Separate but equal' is a contradiction in terms. Schools or other public facilities where persons are segregated by law, solely on the basis of race or color, *cannot in any circumstances be regarded as equal* . . . "[205]

Adding precedential force to their words, the government argued that the Court's decisions from 1944 through 1950 support the notion that *Plessy* was unworkable and, thus, bad judicial doctrine. In citing cases like *Smith*, *Takahashi*, *Shelley*, *Sweatt*, and

McLaurin, the government pointed out that if the Court ruled to uphold segregated elementary education, its decision would run counter to the direction of its own precedent.

The government's brief included a final argument that Philip Elman called "the one thing I'm proudest of in my whole career" (Silber 1987, 827). Essentially, Elman laid a legal foundation for an "orderly and progressive transition"[206] from the old segregated educational system to an integrated model. In other words, the United States government suggested what would become the remedy in *Brown II*: "with all deliberate speed."[207] The legal maneuver was not popular with the NAACP but it did provide a means of assuaging those justices who appeared most reticent of the practical implications if they struck down *Plessy*.

Based on the conference notes of Justices Burton and Jackson it looked as though four justices (Black, Douglas, Burton, and Minton) would vote to overturn *Plessy*, two justices (Reed and Vinson) would vote to uphold separate but equal, thereby, providing the South an opportunity to achieve real equality, and three justices (Clark, Frankfurter, and Jackson) withheld announcing their intentions, although it appears as if each of them leaned toward overturning *Plessy*. However, the justices did not take a final vote on the merits as Justice Frankfurter successfully persuaded his brethren to delay decision and restore the case to the Court's docket after instructing the parties on a series of questions

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[205] *Brief for the United States as amicus curiae*, 17. (Emphasis added.)
[206] Ibid. at 30.
[207] 349 U.S. 294 (1955).

that were "relevant to the respective cases."[208] Re-argument was set for October 12, 1953.

While the Court decided what to do with the segregation cases, the Republicans finally won a presidential election. Dwight Eisenhower swept into the White House with an overwhelming electoral victory and brought Republicans to power in the House and Senate on his coattails.[209] Truman had been able to retain a sufficient number of southern

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[208] 345 U.S. 972 (1953). The questions were as follows:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
(*a*) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
(*b*) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2 (*a*) and (*b*) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),
(*a*) should this Court formulate detailed decrees in these cases;
(*b*) if so, what specific issues should the decrees reach;
(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires.

[209] Eisenhower won 55.1% of the popular vote (33,936,137 votes) and 83.2% (442 votes) of the electoral college. In the 83rd Congress, the Republican Party held a 221 to 213 advantage in the House and a one member majority in the Senate.

voters that he garnered sizable southern support. However, southern Democrats in the electorate increasingly drifted from their moorings in the Democratic Party and cast their votes in favor of an alternative to the Democratic nominee for the presidency. [210] Southern voters continued their allegiance to conservative lawmakers in Congress but the Party needed to find a way to reclaim their hold on power without the guarantee of a Solid South.

Given the southern Democrats still voted for their conservative representatives in Congress, Republican success was short-lived. The Republican majorities in the House and Senate evaporated just two years after their victory in 1952 when the Democrats regained control of both houses of Congress. The Democrats did not lose the Senate again until 1981 and the House until 1995. Even the gains Republicans made in the South proved fleeting as white southerners continued to vote Democratic in congressional elections. One consistent trend that emerged in post-Fair Deal national politics was that the South increasingly cast their vote for an alternative to the Democratic presidential nominee. The Solid South was no more. As will be discussed below, the continuance of a court-centered civil rights agenda helped slow the decline of the Democratic South but once the liberal wing embarked on a direct civil rights campaign, the South abandoned its historic partisan roots.

Eisenhower also never challenged the fundamental tenants of the Democratic political order. As Stephen Skowronek observed,

> His was an opposition carefully tuned to its own limits. He successfully cultivated his own personal independence in politics by severely curtailing the disruptive uses of his powers. Eisnehower was content to prune the

[210] Eisenhower won Florida, Texas, Tennessee, and Virginia, along with several border states.

> radical edge off New Deal liberalism. The keynotes of his "New Republicanism"—moderation, sensibility, and accommodation—gave the GOP a new political respectability, breaking its identification with Hoover and the Depression and extending its appeal into the urban South (1997, 46).

Divided government undoubtedly constrained Eisenhower but, even during the brief period when the Republicans enjoyed unified control, neither Eisenhower nor the Republican Congress attempted to bring about a wholesale change to national political, economic, and social commitments. Instead, Eisenhower acted as a good Burkean conservative in that he largely maintained the institutional status quo and, when he institute change, he did so incrementally.

Nowhere can Eisenhower's moderation be seen as clearly as in civil rights (Mayer 1986). Eisenhower was reluctant to involve his administration in the re-argument of *Brown* but Truman's initial involvement in the case and the Supreme Court's request for governmental participation left Eisenhower little choice. Whether through strategy or by chance, Eisenhower's Attorney General, Herbert Brownell, was the most liberal member of the cabinet on civil rights so he encouraged the Administration to continue the government's involvement. In large part, Truman bestowed on Eisenhower the court-centered attack on southern segregation and, in so doing, bound a Republican president to the racial policy of the liberal wing of the Democratic Party.

After the death of Chief Justice Vinson and the appointment of Earl Warren[211] to succeed him, the Court heard re-argument and rendered its famed decision in *Brown*.[212] The *Brown* decision was made more controversial for its reliance on sociological data, a

[211] Klinkner and Smith described the appointment of Earl Warren as Eisenhower's unintentional "most important contribution to the struggle for civil rights . . . " (1999, 238).

supposition supported by the government in its amicus brief. In fact, the government paved the way for such reliance by consistently arguing that separate conditions, by their social and psychological nature "cannot in any circumstances be regarded as equal." Warren echoed such sentiments, leading up to one of the Court's more memorable lines:

> "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . Separate education facilities are inherently unequal."[213]

Brown effectively ended the reign of "separate but equal." However, it would take much longer to actually equalize conditions for African American school children (see Rosenberg 1991) and it was direct legislative action that eventually helped destroy the Democratic political order.

The Push for Direct Legislative Action and the Fall of the Democratic Political Order

During the first several years following the Democrat's loss of power, the liberal wing of the Democratic Party regressed from its once aggressive stance on civil rights and deferred to judicial action to realize *Brown* in the South. Even after the Democratic Party reclaimed control of Congress in 1955, southern lawmakers held important veto points in both the House and the Senate that enabled them to thwart any endeavor to pass civil rights legislation. Making the task more difficult, conservative Republicans consistently opposed efforts to increase the powers and obligations of the federal government. The coalition of southern Democrats and conservative Republicans made

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[212] 347 U.S. 483 (1954).
[213] Ibid. at 495.

comprehensive civil rights legislation virtually impossible to pass during the first half of the decade.

The strength of the opposition and concern over losing the already decaying support in the South led liberal Democrats to voice their support for the Court's efforts to desegregate the South but go no further. The Democratic Party platform of 1956 demonstrates this balancing act perfectly. The civil rights plank articulated general support for voting rights, security, economic and educational freedom. The plank also contained language supporting the Supreme Court's ruling in *Brown* and opposing the use of force to resist desegregation. However, the Party offered no legislative plan of action to realize the tenants of *Brown*. Specifically, the plank read:

> Recent decisions of the Supreme Court of the United States relating to segregation in publicly supported schools and elsewhere have brought consequences of vast importance to our Nation as a whole and especially to communities directly affected. We reject all proposals for the use of force to interfere with the orderly determination of these matters by the courts.

The plank was obviously an attempt to appease both liberals and conservatives within the Party. Yet, this disjunction signaled that substantial civil rights legislation would not be forthcoming from the Democratic Party unless the liberal wing achieved a series of electoral victories.

Within the platform, liberal Democrats also made sure that they rebuffed Republican efforts to claim *Brown* as their own. The statement was purely defensive in nature, designed to protect against sudden African American defection.

> The Democratic Party emphatically reaffirms its support of the historic principle that ours is a government of laws and not of men; it recognizes the Supreme Court of the United States as one of the three Constitutional and coordinate branches of the Federal Government, superior to and separate from any political party, the decisions of which are part of the law of the land. We condemn the efforts of the Republican Party to make it appear that this tribunal is a part of the Republican Party.

The Democratic platform was clearly an attempt to cull the New Deal coalition and reclaim the White House. But the liberal wing would begin to realize that the massive

resistance forming in the South was not marshaled exclusively against desegregation; it ran counter to the liberal domestic agenda as well.

That said, as the 1950s progressed, the liberal wing of the Democratic Party incrementally increased its strength as northeastern, midwestern, and western states sent liberal Democrats to Congress and reduced the relative power of the conservative South within the Party. By 1956, liberal Democrats believed their coalition was sufficiently strong in Congress to push for passage of civil rights legislation. Their opportunity arrived in 1956, 1957, and 1960 when the Eisenhower Administration backed two civil rights bills.

The liberal push for civil rights legislation in 1957 and 1960 threatened to destroy the Democratic national coalition. However, the Democrats used the courts to enable intra-party compromise. In both the Civil Rights Act of 1957 and 1960, southern conservatives proved more willing to empower the federal judiciary than to create a federal bureaucracy tasked with monitoring and enforcing civil rights in the South. The liberal wing compromised by privileging judicial intervention over bolstering the strength of African American voting rights. Both of these civil rights acts—passed during the Eisenhower Administration—showed that southern Democrats were willing to end obstructionist tactics to allow the passage of civil rights legislation if the legislation only empower the courts to monitor violations of civil rights and the Justice Department to pursue violations of *existing* laws.

Eisenhower initially proposed civil rights legislation in 1956. The House passed the bill but the Senate proved less accommodating. Southern conservatives promised to

filibuster the bill so the Judiciary Committee allowed the measure to die without consideration. However, just one year later, when Congress revisited the civil rights bill, Democrats from both sides of the Mason-Dixon line knew that a delicate balance was needed to avoid creating greater division in an already divided party, particularly with an election looming. Such a balance was struck by watering down some of the legislation's more stringent provisions and limiting new grants of power to the federal judicial apparatus. This gave southern judges oversight of civil rights gains in the South and liberals a legislative victory.

The Civil Rights Act of 1957 contained five provisions. First, it created an executive commission on civil rights that could investigate allegations of violations of suffrage rights. Second, it created an assistant attorney general position to head the elevated civil rights division of the Justice Department. Third, the measure expanded the jurisdiction of federal district courts to include civil litigation stemming from violations of civil rights. Fourth, the law empowered the Attorney General to seek injunctive relief to abate interference with *existing* voting rights. Finally, the law contained a few criminal penalties for violation of the act.

The Civil Rights Act was the first time Congress took a tangible step towards supporting the end of Jim Crow. However, the Act probably had greater symbolic value than substantial effect. The Act did not include the creation of new voter rights. It did not provide any administrative agency new powers to coerce resistant southern states into changing segregated conditions. Any benefit that would derive from the Act would either have to come from a civil rights commission investigation—and since the commission

only had investigatorial power, the commission's real power lied in its ability to publicize civil rights violations—or through the judicial action. Of course, southern lawmakers took comfort from southern judges hearing challenges to segregation in southern states. Local influence in the federal district and circuit courts provided sufficient protection for Jim Crow so that southern Democrats could compromise with their northern brethren without jeopardizing core social commitments or risking fallout in the electorate.

Southern conservatives' faith in southern judges proved true. Southern federal judges ruled in favor of African American plaintiff civil rights claims at a rate of well under 50% during the period following *Brown* (Vines 1964, 341; see also Peltason 1961, 244-54). Southern judges proved no more able or willing to overcome local social and political pressures than southern elected officials. Southern lawmakers did not fear federal judges who lived and worked in the South so empowering the federal courts made for a relatively safe compromise when compared to empowering federal bureaucrats in Washington DC. Therefore, southern lawmakers accepted the cost of federal judicial power in exchange for the benefit of abandoning an administrative superstructure to combat southern segregation that could have created greater protection for minority voting rights.

So the judiciary was a tale of two systems. The federal judiciary in the South accepted token change and other means of feet-dragging in desegregation while the appellate courts, particularly the Supreme Court, made bold assertions regarding the authority of the national judiciary to order desegregation. In *Cooper v. Aaron*,[214] the Court, in an opinion signed by all the justices, roundly declared resistance to

desegregating the Little Rock school system by the city school board and state lawmakers unconstitutional *Brown*. In one of its most unequivocal declarations, the Court asserted,

> "[Marbury v. Madison] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States' . . . "[215]

Judicial supremacy may not have been "settled doctrine"[216] as the Court asserted, but there is little doubt that Democratic prospects in the congressional elections of 1958 gave the Court significant confidence that it would have ample support among members of Congress for such assertions.

The 1958 congressional elections brought significant demographic change to the Democratic Party. In the Senate, Democrats picked up 12 seats—all of them from the North. Moreover, "[t]hey were a markedly liberal group" and "ideologically . . . heterogeneous" (Sinclair 1989, 31). The election effectively lowered southern membership in the Democratic Senate from approximately forty percent to thirty percent. The crucial southern filibuster that kept civil rights legislation from passing the Senate for decades was still viable but increasingly vulnerable.[217] In the House, Democrats picked up 50 seats, with the majority from northern and western districts. The Democrats picked up six seats in both Connecticut and Indiana and three in California, Illinois,

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[214] 358 U.S. 1 (1958).
[215] Ibid. at 18.
[216] Ibid. at 17.
[217] During the 1950s, it took a two-thirds vote in the Senate to invoke cloture.

Maryland, Ohio, and Pennsylvania (Polsby 2004, 21). The slow liberalization in the Democratic Party that Truman started in 1948 accelerated tangibly in 1958.

Evidence of the increasing liberalization came in 1960 with the passage of a second Civil Rights Act. In 1959, Eisenhower cited America's faltering international image as mandating further civil rights legislation.[218] Southern filibuster still made passing highly progressive legislation unlikely so northern and southern Democrats once again turned to the courts as a vehicle for compromise. The compromise legislation was quite similar to its predecessor insofar as the law's most important provision empowered federal judges to appoint special referees to assist African Americans in registering to vote and exercising the franchise. Liberal Democrats hailed the bill as a yet another victory in providing greater civil rights protection to their African American constituents while southern Democrats comforted themselves with the reality that challenges to segregated conditions had to go through southern judges rather than through a federal bureaucracy.

While southern conservatives certainly did not favor these issues, passage of such measures guaranteed little. The only significant improvement for civil rights advocates was the inclusion of criminal penalties for bombings or threatening such action and a provision that bolstered African American political power by increasing access to the

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[218] Eisenhower, Dwight D. *Annual Message to the Congress on the State of the Union*. January 9, 1959. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=11685&st=&st1=. (Visited on January 18, 2005) Eisenhower declared, "If we hope to strengthen freedom in the world we must be ever mindful of how our own conduct reacts elsewhere. No nation has ever been so floodlighted by world opinion as the United States is today. Everything we do is carefully scrutinized by other peoples throughout the world. The bad is seen along with the good. Because we are human we err. But as free men we are also responsible for correcting the errors and imperfections of our ways . . . We are making noticeable progress in the field of civil rights--we are moving forward toward achievement of equality of opportunity for all

ballot upon application for judicial protection. However, one political scientist noted, "welcome as they were to the proponents of the egalitarian revolution, neither the Civil Rights Act of 1957 nor that of 1960 significantly handicapped the backlash activities of the Massive Resisters" (Wilhoit 1973, 203). In other words, full southern integration would require more than perfunctory legislation.

The debate and passage of the civil rights laws could easily have splintered the Democratic Party. However, compromise provisions empowering the courts were sufficient to ease intra-party tension such that the Democrats once again consolidated power in the 1960 election. Interesting, a highly progressive civil rights plank in the 1960 Party platform caused relatively little electoral fallout.[219] It appears as if legislative practice over the past two congressional sessions trumped concerns that the liberal wing would break from the liberal-conservative compromise paradigm. Initially, it appeared as if the compromise would indeed hold throughout the Kennedy Administration. Unwilling to shatter the partisan coalition that brought him to power in 1960, President Kennedy dedicated a good deal of public rhetoric to civil rights and the end of segregation in the South but little legislative action. Rather, during the first two years of his administration, Kennedy relied on Truman's court-centered strategy of changing civil rights policy through the courts.

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people everywhere in the United States. In the interest of the nation and of each of its citizens, that progress must continue.

[219] Nixon managed to carry only Virginia, Tennessee, Florida, and Oklahoma in the South. Alabama named Harry Byrd as their Democratic nominee for the presidency and he successfully carried the state.

In *Baker v. Carr*,[220] several citizens of Tennessee contested their state's legislative apportionment scheme as a violation of equal protection. For most of the Court's jurisprudential history, the Court had held that apportionment was the exclusive authority of the House and any remedy rested with that body according to Article I, Section 4 of the Constitution.[221] However, the Kennedy Administration submitted a brief arguing, "Neither [Article I, Section 4], nor any other part of the Constitution, gives exclusive authority to Congress or to state legislatures to decide whether state legislatures are so discriminatorily apportioned as to violate the Fourteenth Amendment."[222] The Administration also refused to "accept the assumption that the federal courts possess no appropriate remedy, among their broad and flexible equitable powers, to prevent a violation of the Fourteenth Amendment arising from state legislative malapportionment."[223] Finally, the Administration's brief noted the centrality of the courts to its civil rights agenda by asserting that the Civil Rights Act of 1960 showed that "Congress . . . emphasized, once again, the national policy of relying on the Judiciary as the organ through which the right to vote is to be made fully effective."[224]

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[220] 369 U.S. 186 (1962).
[221] The Court signaled a new concern over voting rights jurisprudence in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), wherein it examined an Alabama law that had redrawn Tuskegee city boundaries in such a way as to exclude almost all of the city's African American (former) residents. Since the action was an obvious attempt to undermine the 15th Amendment, the Court ruled that the state action in question violated a federally protected right and was therefore unconstitutional. Justice Whittaker wrote a concurring opinion in which he argued that the Court should have found the act unconstitutional based on Equal Protection grounds and not the 15th Amendment. He argued that "it does seem clear to me that accomplishment of a State's purpose -- to use the Court's phrase -- of 'fencing Negro citizens out of' Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment . . . " (at 349). This line of argument would be used two years later in *Baker v. Carr*.
[222] *Brief for the United States as Amicus Curiae*. 1961 WL 64791, at 42
[223] Ibid. at 13.
[224] Ibid. at 32-33.

Due, perhaps, to the Court's growing comfort with the notion that the political branches of government looked to it as the national policy-making organ for civil and political rights, it agreed with the government's position. This seems particularly clear in the votes of Justices Stewart and Clark. Justice Stewart had indecisively abstained from voting the first time the Court heard arguments in *Baker* but, after re-argument, he adopted the government's position that the state could give no rational explanation for the system of apportionment. Moreover, Justice Clark changed his vote to side with the growing majority after researching the issue at greater length (Powe 2000, 201).

Taking a similar argument as the Solicitor General's brief, Justice Brennan, writing for the majority, argued that the federal courts did indeed have jurisdiction over apportionment cases and such a finding was consistent with precedent. Moreover, Brennan asserted that the Court had no reason "to doubt the District Court will be able to fashion relief if violations of constitutional rights are found . . . "[225] Again, the Court acted prudentially insofar as it limited its opinion to acknowledging jurisdiction. However, the Court waited two years to announced the constitutional requirements of apportionment schemes by coining the now-famous "one person, one vote" standard in *Reynolds v. Sims*.[226]

Reynolds v. Sims was yet another example of the Court acting with the explicit support of the Kennedy Administration. The Court invited the Solicitor General to participate and the Administration "pushed hard . . . to advocate as egalitarian a position as possible" (Powe 2000, 246). This time, the Court did not merely reflect the

[225] 369 U.S. 186, 198.
[226] 377 U.S. 533 (1964).

Administration's positions, it extended and expanded beyond what the government requested. The Court articulated a standard under the Equal Protection Clause that required states to provide apportionment schemes that would treat the population as equal as possible; that the upper chamber must be apportioned much in the same way as the lower chamber; and that popular ratification of voting schemes would not satisfy the constitutional requirement of "one person, one vote." The Court's egalitarian, individual-rights based jurisprudence and the sizable support from the political branches of government enabled it to move beyond its prudential phase and into an aggressive posture against inegalitarian institutions.

Liberals within the Democratic Party increasingly demanded greater legislative action but Kennedy, initially, only supported a limited measure designed to protect voting rights (Braver 1977, 222). However, the civil rights demonstrations during the spring of 1963, a series of violent incidents against African Americans in the South, and intensified pressure from large liberal wing within his Party led Kennedy to craft and submit an omnibus civil rights bill (Lichtman 1969, 363). The bill included

> a prohibition upon the denial of equal facilities to any person in restaurants, hotels, and the like; authorization for school desegregation suits to be instituted by the attorney general; a ban on job discrimination because of race; statutory creation of an Equal Employment Opportunity commission; a prohibition on racial discrimination in all federally funded programs; the establishment of a Community Relations Service to advice on the adjustment of racial conflicts; and a new and more comprehensive system of federal voter registration (Kelly, Harbison, and Belz 1991, 598).

Some wrangling occurred between the House and the President regarding the strength of the bill but it became clear that this bill was much stronger bill than any of its recent predecessors and it enjoyed significant support due to liberal dominance of Congress.

The story of the civil rights bill's passage is one of tragedy and triumph. The assassination of President Kennedy undoubtedly helped galvanize support for a civil rights bill. In his address to a joint session of Congress four days after Kennedy's assassination, President Johnson declared,

> no memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law.
> I urge you again, as I did in 1957 and again in 1960, to enact a civil rights law so that we can move forward to eliminate from this Nation every trace of discrimination and oppression that is based upon race or color.[227]

When Kennedy lived, the prospects of passing a strong civil rights bill were good; his death added a measure of inevitability.

This is not to say that southern Democrats merely stepped aside. Once it became clear that the liberal wing of the Party would not compromise as they had in 1957 and 1960, southern conservatives waged one of the most vigorous obstructionist campaigns in legislative history. The most intense fighting took place in the Senate where conservatives had the opportunity to filibuster the bill to death. Led by Majority Leader Richard Russell (D-GA), southern conservatives waged an 82 day filibuster before Minority Leader Everett Dirksen (R-IL) could persuade enough Republicans to join the cloture vote to achieve the two-thirds majority needed to end the filibuster. Upon invoking cloture, the civil rights bill was virtually guaranteed to pass and it did, after a few minor changes, by a vote of 73-27. Twenty-one of the 24 senators from southern

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[227] Johnson, Lyndon B. *Address Before a Joint Session of the Congress*. November 27, 1963. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=25988&st=&st1=. (Visited on January 20, 2005)

states voted against what became the Civil Rights Act of 1964. President Johnson signed the bill into law on July 2, 1964.

The impact of such a tangible sign of the Democratic Party's liberalization was immediate, if not obvious. Examining the landslide presidential victory of 1964 shows troubling fissures within the Democratic political order. While the election was an overwhelming victory for the Democratic Party as they picked up 37 seats in the House, one seat in the Senate, and Johnson won 44 out of 50 states, the South began to dessert the Party in its presidential voting. For the first time since 1928, more than two southern states dedicated their electors to the Republican candidate.[228] Alabama, Georgia, Louisiana, Mississippi, and South Carolina went for Barry Goldwater, the Republican candidate. Moreover, across the South, the rate of partisan defection among Democrats rose to a new high of 19 percent (Beck 1977, 479).

As Johnson and the liberal Democrats continued to enact voting rights and pro-integration policies, such as the Voting Rights Act of 1965 and the Elementary and Secondary Education Act of 1965, rates of defection among southern Democrats in the electorate continued to escalate. In 1968, the Great Society had irreparably damaged the old New Deal coalition such that southern defection rose to 39 percent in the presidential election (1977, 479). By 1972, Democratic defection in the South topped 50 percent. Direct legislative action greatly escalated the rate of partisan defection in a way that reliance on the national judiciary for civil rights policy never did. Rates of defection were relatively stable throughout the 1950s but rose rapidly following the passage of

[228] Prior to 1928, the only presidential election to see more than two southern states go to the Republican candidate was 1876 when Rutherford B. Hayes won three (Florida, Louisiana, and South Carolina).

sweeping civil rights legislation. There is little doubt that the 1964 and 1968 elections were transformative to the political order as it effectively ended Democratic dominance (Sundquist 1983, 289-91). In its stead, a new era of divided government occurred that saw a movement to curtail the growing welfare state and caste skepticism on the role of the government in remedying societal ills.

Once the South became as much the electoral territory of Republicans as Democrats in national elections, the Democratic Party lost its ability to hold the three branches of government. Republican dominance of the White House from 1968 through the present[229] had the effect of making the national judiciary much more conservative, even if the ideological shift was tempered by a Democratic Senate. Under the tenants of modern American politics, the presidency plays a unique role in setting the national agenda and this furthered the ability of the Republican Party to exercise control over the direction of national policy. Republican presidents did not directly challenge the strictures of Roosevelt's New Deal, but the post-1968 political order looked fundamentally different than its predecessor. Even the Supreme Court, thought to be the bastion of liberal activism, quickly tempered some of its most liberal decisions and began a new campaign to constrain the federal government by reinvigorating state power.

Abandoning the court centric strategy can not bare all of the blame for the collapse of the Democratic political order. Scholars have argued everything from the failure of foreign policy to the rise of statism (Plotke 1996, 338-41) are to blame for its collapse. However, it is remarkable that once the Democratic Party moved away from its

[229] From 1968-2004, a Republican president sat in the White House 24 out of 36 years or 67 percent of the time.

court-centered attack on Jim Crow and took direct action through its pro-civil rights legislative agenda, only then did the South dealign from the Democratic Party and enable the Republican Party to have significant success controlling the White House. The vigor with which southern conservatives fought civil rights measures reveals the salience of segregation. Liberal Democrats who pushed civil rights legislation and sang the loudest praise of Supreme Court anti-Jim Crow rulings eventually pushed too hard on the civil rights issues to maintain the old New Deal alliance. With the most significant civil rights legislation in the history of the country enacted in 1964 and 1965, southern conservatives would abandon their support of the national Democratic Party and forever change the make-up of the American political order.

Conclusion

In the Democratic political order of the 1930s-1960s, the Democratic Party used the national judiciary in a variety of ways to maintain and transform the Party. Liberla Democrats relied on the courts to realize egalitarian racial policy during a time when they were unable to overcome southern obstruction. Southern conservatives relied on the courts as a way of protecting core segregationist practices once the prospects of preventing the passage of civil rights legislation diminished. In both cases, the courts served to maintain and transform the Democratic Party in a way that would have been impossible without judicial intervention. Both wings of the Party reaped electoral dividends through their continued hold over national power and the ability to both thwart and realize their and their constituents' preferences.

While both wings of the Party benefited, it is clear that the dominant, liberal wing ultimately gained more from judicial action. The series of civil rights victories handed down by the Supreme Court facilitated the continued move of African Americans into the Democratic fold. The results were transformative insofar as the Democratic Party secured significant legislative victories in 1958 and 1960 that liberalized the Party in the House and Senate. With the strongest liberal-activist wing in the history of the Democratic Party, segregation was ripe for a frontal assault. Interestingly, the liberal wing of the Democratic Party either overestimated their ability to hold power without the southern bloc or underestimated the effect of direct legislative action on southern voters. Absent the Solid South, the Democratic Party found winning national elections much more difficult. Following 1968, the key to Democratic success in presidential elections was to win several southern states. Absent a strong southern showing, the Democratic nominee failed to capture the White House.

In effect, the key to holding power over an extended period of time proved to be a function of judicial action. The national judiciary, in its unique position outside the normal bounds of politics but still subject to political influence, served as a conduit of cooperation and transformation that enabled the Democratic Party to hold power and define the contours of American politics for nearly four decades. Absent the national judiciary to diffuse intra-party tension, the New Deal political order would never have transformed into a Democratic political order that transcended economic activism and created the impetus for wide-scale social activism. Moreover, without the help of the Supreme Court in winning African American voters in the North, it is unlikely that the

Democratic Party's liberal wing would have become sufficiently strong to engage in direct legislative action necessary to dismantle the caste system in the South. Such dismantling may have been inevitable, but its form was not; nor was the vehicle through which it was delivered. That the Democratic Party relied upon the courts for so long in attacking southern segregation, created an institutional path that resulted in the Civil Rights Act of 1964 and Voting Rights Act of 1965 relying heavily on legal mechanisms to alter existing conditions. A new federal bureaucratic apparatus was not created to destroy segregation as it was to address other social and economic ills. Rather, the Democratic Party relied on the courts, which were the only governmental institutions free to move aggressively against segregation.

Democratic reliance on the courts mattered because once the progressive Democratic political order was replaced by a more conservative one, the national judiciary was not well suited to continue liberal social policy. With the commitment to equalizing conditions practiced with less vigor, the courts rendered decisions that seemingly ended the drive to Great Society egalitarianism and recognized limitations on state mandated equality. While the retreat is regrettable regardless of its cause, the judiciary, as an institution, cannot be faulted because the retreat was consistent with the political order of its time.

Chapter 4

The Republican Party, a "conservative" Court, and Divided Government: Creating Conditions Ripe for a Republican Political Order

Introduction

The fall of the Democratic political order in the late 1960s was notable because, unlike the fall of the Republican political order that preceded it, no party-dominated political order immediately took its place. A period of extended divided government followed the 1968 national elections. Democrats tended to control the House and Senate while Republicans tended to control the presidency. Of course, exceptions occurred like Republican unified control from 1981-1983 or Democratic unified control from 1993-1995. However, up until 2001, these periods did not define the political order and were, obviously, short-lived. The persistence of divided government begs the question of whether we can coherently study partisan use of the courts to hold power during a period without a dominant political party.

I answer that question with a tentative yes. The purpose of this chapter is not to prove that a partisan political order existed but rather to acknowledge that one party was able to operate in such a way that created conditions ripe for the rise of a new partisan political order. Once again, the Supreme Court played a fundamentally important role in creating conditions suitable for one party control of the national government. Fate, luck, and/or historical contingency gave Republican presidents a disproportional number of Supreme Court appointments from 1969 through 2001. Of the thirteen appointments since 1969, Republican presidents nominated 11 of the justices. This is particularly notable as Republican presidents only held power for 60 percent of that same period. So while holding power 60 percent of the time, Republican presidents still managed 85

percent of the appointments. Thus, despite divided control of the political branches, the Republican Party succeeded in creating a High Court that would serve its interests.

This is not to say that the Court was ideologically congruent with the Republican Party. As Moraski and Shipan showed, periods of divided government temper the ability of presidents to secure the passage of a judicial nominee whose ideology is consistent with the president's preferences. Rather, the ideological position of the pivotal member(s) of the Senate largely decides how conservative or liberal a successful nominee can be (1999). In other words, periods of divided control are more likely to produce moderates (i.e. Kennedy and Souter) than ideological extremists (i.e. Bork). The prevalence of Republican presidents and Democratic senates resulted in a more centrist court with more "chastened" ambitions than what would have occurred had one party enjoyed unitary control over the national government (Tushnet 2003). However, as will be detailed below, a moderate Supreme Court actually helped the Republican Party diffuse intra-party tension resulting from significant ideological disjunction on social issues such that it enabled the Party to unify control over the national government at the close of the 20th Century. By keeping the median Supreme Court justice socially moderate, the Court has refused to render social policy that would create conditions ripe for libertarian defection from the Republican Party.

In order to understand the role the Supreme Court played in creating conditions ripe for a Republican political order, I first detail the formation of the national Republican coalition at the latter third of the 20th Century. Identifying the major intra-party coalitions reveals competing visions for American social policy within the Party

and exposes the tension between two dominant factions. I will then discuss the Republican Party's strategy of active issue deference on social issues and how this improved the Republican Party's opportunities for electoral success.

Finally, I should note that this chapter does not postulate explanations of Rehnquist Court jurisprudence. Numerous scholars have attempted to explain why a conservative Court would continue to act in "activist" ways despite conservative criticism of unelected judges substituting their will or preference for that of the democratically accountable political branches (see Keck 2004; Rosen 2000). Rather than explain what the Court is doing, I detail how the dominant coalition within the Republican Party left the Party's social agenda to the Court. With the Court playing the lead role in developing social policy, the Republican Party enjoyed high-levels of Party unity—bolstered by avoided taxing intra-party disputes over the distribution of Party energy and political capital—and successfully devoted most of their legislative resources to realizing free market economic policy.

The Rise of the Conservatives

As the Democratic political order reached its apex, the Republican Party made a dramatic shift that helped refocus Party politics and reform its political coalition. In 1964, the Republican Party nominated Barry Goldwater, the arch-conservative from Arizona, as their presidential candidate. The nomination of Goldwater is particularly notable as it marks the first time since 1932 that the Republican Party nominated someone who refuted the economic and social welfare principles of the New Deal

political order. Not only did Goldwater reject such principles but he also asserted principles consistent with the radical right, which is to say he not only wanted to roll back the size and strength of the welfare state but he also opposed exertions of federal power such as the Civil Rights Act of 1964. Additionally, Goldwater was the first Republican nominee since Herbert Hoover to adopt strong states' rights policies. All of these positions placed Goldwater in stark contrast with the "Eastern Establishment" that supported "me-too" Republicans (Schlafly 1964).

The 1964 election saw the beginnings of southern dealignment from the Democratic Party. Southerners jumped at Goldwater's conservatism. The renewed advocacy of laissez-faire and tacit support of white supremacy cut into the conservative wing of the Democratic Party. Southern conservatives were among the most likely to support Goldwater in both securing the Republican nomination[230] and in the general election.[231] At the Republican National Convention, Goldwater received 271 of 278 southern votes on the first ballot (Cosman 1966, 40). In the general election, Goldwater won the five states often labeled as the Deep South.[232] While Goldwater had great success in the South, the rest of his campaign was an utter disaster. Yet, in the long run, Goldwater's nomination marked the advent of a conservative shift within the Republican Party.

Following the 1960s, southern white Protestants gravitated toward Republican presidential candidates. Only when a white southern Protestant was the Democratic

[230] Mohr, Charles. "Aide to Goldwater Pledges to Deliver South's Delegates." *New York Times* January 19, 1964, 1.
[231] "Mandate" *New York Times* November 8, 1964.
[232] The Deep South is South Carolina, Georgia, Alabama, Mississippi, and Louisiana.

candidate did the Democrats win significant support in the South and, concurrently, the White House. As Everett Carll Ladd observed, "On only four occasions from the Civil War to 1976 did a Democratic presidential nominee lose majority support in the white Protestant South. And these were four presidential elections between 1960 and 1976 " (1981, 139). A fifth occasion occurred in 1980 when Ronald Reagan was able to unite southern rural Protestants and northern urban Catholics.

Over the next two decades, Goldwater Republicans successfully drove a wedge between class and political ideology such that many white, southerners from the middle and lower socio-economic strata defected from the socially and economically liberal Democratic Party (see Ladd 1981, 144). However, this defection was not complete and southern voters continued to display preferences for southern candidates whenever they secured either party's nomination. So rather than ushering in a new period of one-party control, or even a period of stable partisan control over one institution, the period from 1968-2000 saw electoral outcomes that regularly altered existing partisan arrangements.

However, Ronald Reagan did more to entrench the class-ideology split than any other Republican up to that point. By the late 1970s, overt attempts to undermine race relations fell outside the bounds of permissible politics. As a result, conservative politicians needed an issue that would further the class-ideology divide. Reagan and other conservative strategists found such a line of cleavage with appeals to traditional Judeo-Christian values. As one of Reagan's chief pollsters stated shortly after the 1980 election:

> Our coalition expressed a strong commitment to established values, and a sense of deterioration in the standards and traditional patterns in modern

> life. This perception was combined with a strong inclination to refute the idea that old values are gone, and the belief that established standards are still worth maintaining. The majority in our target groups also rejected the belief that values are relative and that decisions should be guided by circumstances rather than by established concepts of right or wrong . . . Furthermore, this group expressed a higher degree of what we call 'religiosity'; namely, the belief that God exists in the form in which the Bible describes Him, and that this country would be better off if religion had a greater influence in daily life (Wirthlin 1981, 242).

White southern Protestants, once solid members of the conservative wing of the New Deal coalition, found a new home in a Republican Party that not only espoused economic conservatism but also social conservatism (258-9). In other words, many of the heirs of southern New Dealers were, at a minimum, Reagan Democrats, and increasingly, members of the Republican Party. In fact, the 1980 election revealed that "[t]he eleven states of the old Confederacy [were] the eleven most conservative states in the union" (Schneider 1981, 211).

Reagan succeeded in uniting social conservatives in the South with economic conservatives in the North and West.[233] However, merging social and economic conservatives resulted in two coalitions with competing preferences housed in the same party. James Sundquist described the new coalition by noting this disjunction:

> At its heart . . . are political groups and forces that are quite distinct from the traditional conservatives of the Old Right, who had dominated the Republican party since the days of Lincoln. The New Right is composed of the groups, organized or unorganized, who have been spawned by the crosscutting social and moral issues that arose in the 1960s—right-to-life organizations that sprang up after the Supreme Court's 1973 abortion decision, religious groups mobilized to protest the same court's decision

[233] I do not mean to imply that there were not social conservatives in the North or economic conservatives in the South. Indeed, the South has been both socially and economically conservative throughout much of the 20th Century. However, in order to win southern states, Reagan needed to find a way to get conservatives from the lower economic strata to consider ideology first and economics second when casting their ballot.

> barring organized prayer from public school classrooms, organizations formed to oppose gun control in any form, neighborhood groups opposed to busing for purposes of school integration, inheritors of the anti-civil-rights forces of the 1960s who resented what was perceived as government favoritism toward minorities, and so on . . . The New Right was distinguished from the Old Right not only in its doctrinal views but in its heightened political zeal and in its geography—centered more in the South and the West than in the old Republican areas of the North (1983, 413-4).

The Old Right that advocated economic nationalism in a distinctly pro-business tone was allied with moral conservatives that had little enthusiasm for the expansion of corporate power and the growth of international markets. Making matters more difficult, economic conservatives preferred centrist social policy to hardline social conservatism. Economic elites within the Republican Party did not support the politics of the Moral Majority (Wattenberg 1990, 165).

Yet, the "Old Right" of economic conservatism was not old as much as it was established and, more importantly, entrenched. As political events soon revealed, economic conservatives were still the dominant wing of the Party and, in matters of national domestic policy, the dominant wing exercised a near-monopoly on directing Party energy toward realizing its preferences. Economic conservatives were willing to provide rhetorical support and limited political resources for social conservatism, but Party energy would focus heavily on the national economic agenda. One need look no further than the Republican Party of 1980 for confirmation of this hierarchical arrangement.

In order to grasp the rhetorical changes the social right brought to the Republican Party, you need only contrast the abortion planks of the 1976 and 1980 platforms. The 1976 plank is stunningly ambiguous.

> The question of abortion is one of the most difficult and controversial of our time. It is undoubtedly a moral and personal issue but it also involves complex questions relating to medical science and criminal justice. There are those in our Party who favor complete support for the Supreme Court decision which permits abortion on demand. There are others who share sincere convictions that the Supreme Court's decision must be changed by a constitutional amendment prohibiting all abortions. Others have yet to take a position, or they have assumed a stance somewhere in between polar positions.
>
> We protest the Supreme Court's intrusion into the family structure through its denial of the parents' obligation and right to guide their minor children. The Republican Party favors a continuance of the public dialogue on abortion and supports the efforts of those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children.[234]

Weakly worded opposition to restrictions on parental notification and support for a constitutional amendment was the best the Party could muster. Four years later, the Party was able to secure a less equivocal plank but hardly one that boldly supported the claims of the Religious Right:

> There can be no doubt that the question of abortion, despite the complex nature of its various issues, is ultimately concerned with equality of rights under the law. While we recognize differing views on this question among Americans in general—and in our own Party—we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children. We also support the Congressional efforts to restrict the use of taxpayers' dollars for abortion.
>
> We protest the Supreme Court's intrusion into the family structure through its denial of the parent's obligation and right to guide their minor children.

By 1980, "those" of 1976 became "we" in support of a constitutional amendment that recognized the right to life. The Party's platform also included support for other social

[234] *Republican Party Platform of 1976*. Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1976. (Visited on March 11, 2005)

reform measures such as reining in affirmative action programs, strengthening and protecting families and paternal rights.

However, the Party dedicated the vast majority of its time and attention to the subjects of reducing governmental spending, tax reform, promotion of national economic growth, and reforming or eliminating numerous features of the New Deal/Great Society welfare state. The same can be said of Reagan's inaugural address. Although inaugural addresses are rarely heavy on policy, Reagan worked in a few lines on reducing the size of the national government[235] and then called for economic renewal.

> [T]his administration's objective will be a healthy, vigorous, growing economy that provides equal opportunities for all Americans, with no barriers born of bigotry or discrimination. Putting America back to work means putting all Americans back to work. Ending inflation means freeing all Americans from the terror of runaway living costs. All must share in the productive work of this "new beginning," and all must share in the bounty of a revived economy.[236]

Reagan's focus would be on the economic agenda as articulated in the Party's platform. Social issues would play second fiddle to the Stradivari of economic concerns.

This is not all that surprising. After all, every political party must establish priorities and allocate resources for the purposes of organizing its membership in government. Yet, the Republican leadership did not simply rank economic matters ahead

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[235] Reagan declared that "government is not the solution to our problem; government is the problem. From time to time we've been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people. Well, if no one among us is capable of governing himself, then who among us has the capacity to govern someone else?" He continued, "It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government."
Inaugural Address, January 20, 1981. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=43130&st=&st1=. (Visited on March 11, 2005)

[236] Ibid.

of social concerns. Rather, they signaled their desire to delegate much of their social agenda to the national judiciary. This strategy of evasion was alluded to in the Party's plank on the judiciary. "We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."[237] Thus, the Republican Party embarked on a strategy of supporting a constitutional amendment and appointing judges sympathetic to social conservatism. If the Party planned to storm the castle of New Deal/Great Society liberalism, it was to destroy the vestiges of a bloated welfare state, not to undercut much of the rights revolution. As Lewis L. Gould noted, Reagan was "[c]areful not to push the agenda of the Moral Majority into substantive legislation, Reagan gave these groups and their leaders enough rhetorical endorsement to keep them reasonably contented throughout his administration" (2003, 420). The courts would be left to deal with the substance of social policy.

Reagan's first six months in office confirmed his focus on the national economy. The president actively pursued economic recovery and reduction of the federal government through executive orders and budgetary cuts. For example, Reagan's first order was to declare a federal hiring freeze within the executive branch.[238] Just a few days later, Reagan began a series of orders that deregulated and decontrolled various industries such as crude oil and refined petroleum.[239] Yet, he only made one comment on abortion during a press conference in which he stated his belief that it was up to Congress

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[237] *Republican Party Platform of 1980*. Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1980. (Visited on March 11, 2005)
[238] See Reagan, Ronald. *Remarks on the Signing the Federal Employee Hiring Freeze*. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=43490&st=&st1=. (Visited on March 11, 2005)
[239] *Executive Order 12287—Decontrol of Crude Oil and Refined Petroleum Products*. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=43901&st=&st1=. (Visited on March 11, 2005)

to figure out when life began.[240] Additionally, Reagan was silent on school prayer and other social issues.

But why did the Republican lawmakers, particularly economic conservatives, rely on the courts? First, the federal judiciary facilitated this role by delving into national social policy throughout the 1960s and 1970s. Some of the judicial policy-making was a function of New Deal/Great Society liberalism such as their rulings in church-state cases and criminal due process (Powe 2000, 358-411) while others seemed to occur without a direct invitation from political actors such as abortion (Graber 1993, 183-91). However, entrenching social policy in the politics of rights helped cement the judiciary's role beyond the New Deal/Great Society order. Second, the regime of judicially crafted social policy helped bring the Republican Party to power in 1981. Elected officials have little incentive to change the conditions that brought them to power, particularly, when those changes threaten the cohesion of the Party. Moreover, the costs to economic conservatives in the Republican Party were extremely low as the judicialization of social policy facilitated the rise of symbolic politics in these areas. Thus, so long as no clear consensus formed within the Party, actively seeking continued judicial policy-making on controversial social issues served the interests of the dominant wing of the Party by displacing risky and depleting issues while simultaneously enabling the minority wing to address social ills, albeit through largely symbolic, juridical politics, which appeased their constituents. Since the national judiciary, particularly the Supreme Court, was apt to craft centrist policies because most jurists came to the bench during periods of divided

[240] Reagan, Ronald. *The President's News Conference*. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=43505&st=&st1=. (Visited on March 11, 2005)

government, moderate social policy would persist. Maintaining the social status quo would not disrupt the alignment of the party system (Gates 1999, 105) and, thus, any political advantages gained by the Republican Party would be maintained. As the United States neared the 21st Century, the Republican's advantage became increasingly evident.

The "Republican" Supreme Court

As the Republican Party enjoyed its first period of control over the presidency and Senate under its new coalition, the Supreme Court was a centrist institution. Seven of the nine Supreme Court justices were appointed during periods of divided partisan control. Of the two justices appointed to the Court during unified control, only Justice Thurgood Marshall is considered a faithful delegate of the liberal regime that appointed him.[241] While some of the seven remaining justices leaned either conservative (e.g., Rehnquist) or liberal (e.g., Brennan), most occupied the political center. The result was a Court that looked quite conservative compared to the Warren Court of the 1960s but continued to uphold and expand certain civil liberties.[242]

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[241] Byron White was also appointed when the Democrats controlled the presidency and the Senate. Throughout his tenure on the Court, White proved liberal when it came to the exercise of federal power over economic regulation but conservative when it came to rights-based social policy.

[242] The Court's most familiar example of expanding on Warren Court rights-based jurisprudence was *Roe v. Wade* (410 U.S. 113), which expanded the right of privacy to include a woman's right to abort her pregnancy until the state's interest becomes compelling. This same line of cases would later be used to extend (after first being used to deny) protection to homosexuals. The Court also refused to abandon efforts to force integration in the public schools even if it meant using the highly unpopular method of establishing racial quotas and enforcing them through court-ordered busing (*Swann v. Charlotte-Mecklenberg Board of Education*, 420 U.S. 1). Additionally, the Court upheld use of affirmative action as the "[s]tate . . . has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effect of identified discrimination." (*Regents of University of California v. Bakke*, 438 U.S. 265, 307) The *Bakke* decision was hardly a wholesale victory for civil rights advocates but the Court did uphold the use of racial preferences. Even when the Court issued conservative rulings on civil rights, it did not always act conservatively. For example, following the Court's decisions in *Miller v. California* (413 U.S.

Given the Burger Court's ideologically ambiguous legacy, it is somewhat curious that social conservatives believed that the institution that wrought "the counter-revolution that wasn't" (Blasi 1983) would dramatically reverse course and provide them with a new socially conservative jurisprudence. Reagan's first appointment to the Supreme Court should have done little to change social conservatives' hopes for judicial transformation. While campaigning in 1980, Reagan promised, "One of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can find one who meets the high standards I will demand for all my appointments" (as quoted in Abraham 1999, 282). Less than half a year into his first term, Reagan got the opportunity to keep his promise when Justice Potter Stewart formally announced his intention to retire. Reagan eventually decided to appoint Sandra Day O'Connor, a judge on the Arizona Court of Appeals. The appointment sat well with economic conservatives within

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15) and *Paris Adult Theatre I v. Slaton*, (413 U.S. 49) the Court's efforts to find a workable approach to regulating obscenity "diminished dramatically" (Sullivan and Gunther 2001, 1078).

While the Court maintained rights largely associated with Warren Court social policy, the Burger Court also shifted its jurisprudence to accommodate conservative concerns in business and criminal justice. For example, the Court extended part of its free-speech jurisprudence to corporations. The Court first changed its First Amendment jurisprudence in *Bigelow v. Virginia* (421 U.S. 809) by recognizing that advertising "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'." (421 U.S. 809, 822) In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, (425 U.S. 748) the Court refined its decision in *Bigelow* by making it clear that simply because "the advertiser's interest is a purely economic one . . . [t]hat hardly disqualifies him for protection under the First Amendment" (425 U.S. 748, 762). *Virginia Pharmacy Board* essentially "welcome[ed] commercial speech into the 1st Amendment domain" (McIntosh 2002, 21). Corporate free speech claims quickly created the unusual arrangement of allying civil libertarian groups, media conglomerates, and conservative legal organizations (see *Nike v. Kasky*, 539 U.S. 654).

In certain areas of criminal justice, the Burger Court retreated from Warren Court jurisprudence. The Court largely gutted the exclusionary rule when it came to warrentless vehicle searches. Essentially, the Court changed its approach from allowing "police with probable cause to conduct a warrantless vehicle search under exigent circumstances . . . to allow[ing] warrantless searches of vehicles when police easily could have obtained a warrant" (Hjelmaas 1986, 1161). Such jurisprudence was consistent with conservative calls to "[a]ppoint[] judges whose respect for the rights of the accused is balanced by an appreciation of the legitimate needs of law enforcement" (Republican Party Platform of 1972).

the Republican Party but social conservatives did not feel the same. As Henry Abraham recounts:

> Although members of the Old Right (most significantly its guru Senator Goldwater) professed their support for Judge O'Connor, leaders of the New Right, who had backed President Reagan so fervently in his 1980 campaign, unleashed a wave of protests against his first Supreme Court nominee. The Reverend Jerry Falwell, head of the fundamentalists Moral Majority, encouraged all 'good Christians' to express concern over "'Connor's nomination . . . Anti-abortion groups also criticized O'Connor for several pro-abortion votes during her career as a state legislator" (1999, 284).

Potter Stewart's retirement provided the Reagan administration with an opportunity to change a pro-Roe vote[243] to an anti-Roe vote. Yet, they opted instead for a center-right conservative who appeared unlikely to support an outright assault on *Roe* or other social rights. Moreover, this was not simply an error by the Administration. The Reagan Administration was well aware of O'Connor's support for certain abortion rights (Yalof 1999, 139). If the Administration was serious in its efforts to transform radically the Court's social jurisprudence, it could have opted for a nominee who articulated a more hostile position to abortion and other social issues.[244]

Immediately following O'Connor, Reagan sought to appease angered social conservatives by elevating William Rehnquist to chief justice and appointing the equally conservative Antonin Scalia. Liberal Democrats made their concern for the degree of

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[243] Justice Stewart wrote a separate concurring opinion in *Roe v. Wade*. Stewart articulated a position that made clear that states can regulate abortion practices "as it does other surgical procedures" when "health and safety of the pregnant woman, and protection of the potential future human life within her" make a state's interest able to pass "particularly careful scrutiny." 410 U.S. 113, 170.

[244] As will be noted below, O'Connor's approach to social issues is mixed. In the area of affirmative action, O'Connor seems to find constitutional difficulty with gender and racial quotas. Yet, she voted to uphold numerous other preference schemes. She has been willing to scale back certain reproductive rights but these have largely been at the margins of abortion policy. Additionally, governmental displays of religious symbols are constitutional if they do not endorse religion but prayer or moments of silence

conservatism known in the case of Rehnquist's promotion.[245] Senator Edward Kennedy strongly objected to Rehnquist's social conservatism claiming he was "too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be Chief Justice" (as quoted in Abraham 1999, 292). Yet, unified control of the presidency and the Senate enabled Republicans to confirm both Rehnquist and Scalia despite serious objections raised about the former's commitment to a post-*Brown* understanding of racial egalitarianism and general conservatism.

By the time Reagan's final appointment rolled around, social conservatives had fully bought into the judicialization of social politics and were demanding another social conservative. Despite the potential impact of conservative social policy on the Republican national coalition, Reagan seemed to adhere to the social conservative understanding of the bargain by nominating a social conservative to the Court. However, the nomination of Robert Bork floundered from the start. The Democratically controlled Senate voiced immediate concerns over Bork and mobilized to oppose his confirmation. Bork's skepticism regarding the right to privacy (the basis for reproductive rights) and certain aspects of equal protection also pushed several economic conservatives to oppose the nomination.[246]

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specifically for prayer in public school is unconstitutional.

[245] Scalia sailed through the confirmation process without receiving a negative vote in the Senate Judiciary Committee or on the Chamber floor. Scalia's success may have stemmed from the fact that Democrats were distracted by their efforts to prevent Rehnquist's promotion.

[246] Taylor, Jr., Stuart. "Bork Could Tilt Law at Once If Seated." *New York Times* July 6, 1987, 8.

Religious conservatives mobilized in support of Bork[247] but they received only rhetorical support from the Administration. More damaging, numerous economic conservatives failed to support Bork and a few openly opposed him.[248] While Reagan nominated Bork and rendered public supported throughout the confirmation fight, he never utilized his waning political capital to secure Bork's confirmation. Social conservatives strongly criticized Reagan's "lackluster and detached efforts on behalf of Bork" (Silverstein 1994, 123) and denounced the failure (McGuigan and Weyrich 1990, 220-1). But, as political commentator E.J. Dionne, noted, "Some libertarians [in the Republican Party] . . . often disagree with the religious rights [and] opposed Judge Bork's nomination."[249] Simply stated, the support for a radically social conservative jurist such as Bork was not present in either party and economic conservatives were sufficiently uncomfortable with Bork to facilitate his defeat.

Much to the benefit of the Republican Party, Reagan learned the "politics of the swing seat" (Abraham 1999, 298) and, eventually,[250] nominated Anthony Kennedy. The nomination of Kennedy looked much like the nomination of O'Connor. The Reagan Administration knew of his predisposition toward upholding abortion rights as his jurisprudence was marked by "[a]n unpredictable streak of libertarianism" (Yalof 1999, 165). Following the debacle over Bork, economic conservatives strongly desired a policy of judicial moderation on social issues when it came to Supreme Court justices.

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[247] Noble, Kenneth B. "Bork Backers Flood Senate with Mail." *New York Times* September 3, 1987, 16.
[248] Dionne, Jr., E.J. "High Tide for Conservatives But Some Fear What Follows." *New York Times* October 13, 1987, 1
[249] Ibid.
[250] Reagan nominated Douglas Ginsburg immediately after Bork's rejection. However, Ginsburg withdrew himself from consideration after the disclosure of marijuana use while at Harvard. Ginsburg was quite conservative in his own right but he was an economic conservative, not a social conservative.

Kennedy's appointment secured a moderate Supreme Court that would view altering its social rights jurisprudence with skepticism. In refusing to abandon its social commitments, the Supreme Court rendered a significant service to the Republican coalition. It is to that benefit we now turn.

Interestingly, economic conservatives held no such demands for the lower courts. At both the district and circuit court levels, socially conservative jurists were regularly appointed with the open support of economic conservatives (Goldman 1997, 309-22). Perhaps due to the sectionalism associated with social conservatism, appointing socially conservative judges to districts and circuits in the south and parts of the west appeased social conservatives in the electorate but did little to alter national social policy that was protected by a moderate Supreme Court. Socially conservative judges at the local levels appeased social conservatives and gave them limited victories. Socially moderate justices ensured that alignment of the partisan system would not suddenly shift in favor of the socially liberal Democratic Party.

In order to understand the benefits a socially moderate Supreme Court that upheld core social rights brought to the Republican Party, we need only turn to the fragility of the Republican Party. Socially liberal economic conservatives within the Republican Party would not tolerate a socially conservative Supreme Court.[251] Thus, Party elies needed to create equilibrium in both the Party and the Court. By appointing two moderates and two conservatives, Reagan kept the pivotal vote on the Supreme Court in

[251] In a more contemporary example, when Jim Jeffords quit the Republican Party in 2001, one of the many reasons he cited was his opposition to President Bush's socially conservative judicial strategy. See Johnson, Glen. "Upheavals in the Halls of Power: GOP Losing Senate with Jeffords as Independent." *Boston Globe* May 25, 2001, A1.

line with Old Guard ideology. Such equilibrium clearly favored the agenda of economic conservatives. As Mark Silverstein observed:

> Until the judiciary was transformed, administration support for a pro-family, Christian moral and social agenda would be mainly symbolic. On the other hand, economic elites could easily support a Reagan presidency, secure in the knowledge that Supreme Court rulings on a host of privacy and First Amendment issues precluded enactment of the New Right's agenda. Winking at the language of the devout was a tiny price to pay for a reduction in marginal tax rates (1994, 117).

A judicially enforced status quo enabled Republican Party stability that could not have been achieved without the courts.

Thus, for the Republican Party, judicial politics quickly became entangled in the language of judicial philosophy rather than legal substance. This policy was indirectly articulated in the 1980 Republican Party platform, which stated:

> We pledge to reverse [Carter's judicial policies], through the appointment of women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens, and is consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials.[252]

In 1984, the Republican Party sounded a familiar theme by pledging to "continue to appoint Supreme Court and other federal judges who share our commitment to judicial restraint."[253] The Reagan Administration made devolving power to the states and fostering judicial restraint its primary goals. While it is possible that these issues were sufficiently vague to encompass social issues, the Republican Party desired a national

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[252] Supra note 254.

[253] *Republican Party Platform of 1984*. Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1984. (Visited on March 5, 2005)

judiciary, first and foremost, concerned with reducing the size and power of the federal government. These goals hardly announced the end of liberal social policy.[254]

We gain perspective on Rehnquist Court conservatism by examining the intra-party tension within the Republican Party. Devolving power back to the states fit the preferences of both wings of the Party. Yet, the preferences of social conservatives met with, at best, fleeting success in the areas of abortion rights, affirmative action, and homosexual rights at the national level while gaining more significant, if limited, victories at the lower levels of the federal judiciary. Although the Court from the 1980s

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[254] True to form, the Rehnquist Court embarked on a quest to renew state power by placing limitations on sources of federal power. *United States v. Lopez* (514 U.S. 549) and *United States v. Morrison* (529 U.S. 598) placed greater restrictions on the ability of Congress to regulate non-economic activity through the interstate commerce clause. The Court limited the ability of the federal government to "direct the States" (*New York v. United States,* 505 U.S. 144, 188) to implement administrative programs and "conscript[] the State's officers" (*Printz v. United States*, 521 U.S. 898, 925) to perform federally mandated action. In *New York* and *Printz,* the Court resuscitated the Tenth Amendment and, thereby, placed limitations on expansive use of federal power. In addition, the Rehnquist Court altered its Eleventh Amendment jurisprudence to prohibit congressional annulment of state sovereign immunity (*Seminole Tribe of Florida v.* Florida, 517 U.S. 44) or mandating state courts hear suits against their respective states (*Alden v. Maine*, 528 U.S. 706). Legal scholars spilled significant ink either condemning the tenets of New Deal society or praising the Court for reinvigorating the American federal system (See "The New Fedealism After United States v. Lopez, *Case Western Reserve Law Review* Symposium, 1996). Whether glorifying or castigating the so-called "new federalism," few of these scholars denied that a change occurred.

However, the Court once again engaged in a "chastened" approach to redefining the constitutional order. Mark Tushnet described *Lopez* and *Morrison* as

> show[ing] that the Court is willing to pare back what it regards as the excesses of legislation adopted by Congresses that accepted the principles of the New Deal-Great Society constitutional order. The Congresses of the new constitutional order are far less likely to engage in what the Court regards as excesses, in part because they will learn the lesson of *Lopez* and *Morrison* but, more important, because they themselves do not accept the older order's principles (2003, 42).

Tushnet's observation taps into the consistency of the Rehnquist Court with Reagan conservatism. After all, the Republican Party recommended that "non-essential federal functions [] be returned to the States and localities wherever prudent" (Republican Party Platform 1984). It was never the policy of economic conservatives (or social conservatives) to rebuke the New Deal regulatory state in its entirety. Rather, the goal was to scale back regulatory control over certain areas of the national economy, reduce the tax burden, and decrease the size of the national government by devolving power back to state and local governments. Such a nuanced understanding of the Rehnquist Court helps explain why the Court handed the states a series of setbacks.

through the early 2000s granted certain wins to social conservatives in the areas of public funding of religious schooling and school desegregation,[255] the Court's rulings coincided with economic conservative preferences.

Much as with the preceding political orders, issues that cut against the cohesion of the Party ended up before the national judiciary. As with other ears, the dominant wing benefited from this judicial policy-making through its ideological congruence with the Supreme Court as well as its ability to gain and consolidate power over time. Social conservatives did not fair as well, however, social conservatives in government benefited from Party unity, which eventually led to the consolidation of national power under the Republican Party. Yet, to the detriment of the minority wing, national social policy hinged on judicial decree and a rhetorical commitment to appointing socially conservative jurists. A socially conservative majority never materialized on the Supreme Court and members of the economic conservative wing did little to realize social conservative preferences other than espouse platitudes and pass the occasional (symbolic) law.

To expose this pattern, I will detail the areas of abortion, gay rights, and religion and education[256] and highlight both the legislative and judicial strategies engaged in by the Republican Party. Such an analysis exposes intra-party dynamics and the role the courts play in easing intra-party tension and framing social policy.

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[255] See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237 (1991).

[256] These three issues were identified by social conservatives as issue criteria on which they will vote above all other domestic issues. See Salmans, Sandra. "Christian Fundamentalists Press Own Campaign within

Religion and Public Education

As briefly noted above, Ronald Reagan successfully united two historically opposed groups: evangelical Protestants and Catholics (Fowler et al. 2004, 85). His stance on abortion certainly helped facilitate this union but this was not the only social issue that united them. The Republican Party's stance on prayer in school and religious access to public facilities appealed to evangelical Protestants in a way that public funding of parochial education appealed to Catholic voters. Historically, Protestants in America opposed public monies funding religious education as it supported a predominantly private, Catholic education system. Not only did funding go to Catholic institutions, the leading rival to Protestant hegemony in America, but it provided an alternative to public education, which presented secularism in a distinctly Protestant fashion. However, as public education began to move away from Protestant-informed secularism to a more religious-neutral form of secularized education, conservative evangelicals became less comfortable with public education socializing their children. Court-ordered desegregation accelerated this trend as southern fundamentalists and evangelicals turned to (white) private Christian academies and soon found that these schools helped reestablish Protestant hegemony in education undermined by "the triumph of secularism [in] public education" (Jefferies and Ryan 2001, 282-3). The financial difficulties that private schooling imposed caused evangelicals to drop their opposition to public funding for religious schooling; an institution once, and still, dominated by the private Catholic education system.

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the G.O.P Drive." *New York Times* August 17, 1984, 10.

In order to understand Republican successes in this sphere, we must bifurcate the analysis into religious observance in public schools and public financing of private (religious) schooling. The Republican Party has been willing to support policies that either coincide with the secular preferences of economic conservatives or take the form of largely symbolic action with little tangible policy impact. Those areas that do not accord with the preferences of economic conservatives are defaulted to the courts. Absent support among economic conservatives, the courts, specifically the Supreme Court, have responded in ways largely antagonistic to the preferences of social conservatives.

Starting in 1972, the Republican Party asserted "that voluntary prayer should be freely permitted in public places—particularly, by school children while attending public schools . . . "[257] The timing of the Party's assertion was somewhat curious in that, a decade prior, the Supreme Court declared that "nondenominational" prayer and voluntary readings from the Bible in public schools both violated the Establishment Clause of the First Amendment.[258] Yet, Nixon's efforts to capture southern votes and the growing political strength of southern social conservatives within the Republican Party resulted in the addition of a plank affirming a place for prayer in public schools. All subsequent Republican Party platforms contained similar pronouncements.[259]

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[257] *Republican Party Platform of 1972*. Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1972. (Visited on March 15, 2005)
[258] See *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp* , 374 U.S. 203 (1963).
[259] See the Republican Party platforms from 1972 through 2004. Available at http://www.presidency.ucsb.edu/platforms.php. (Visited on March 15, 2005)

The inclusion of support for school prayer should not be confused with copious support for the practice. Republicans did little to alter national policy until 1982, when Reagan proposed a constitutional amendment that would "restore the simple freedom of our citizens to offer prayer in our public schools and institutions."[260] The proposed amendment read: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."[261] The rhetorical strength of the amendment gave it limited support in Congress, but, the measure failed nonetheless in the Senate nearly two years after Reagan initially proposed it.[262] What seems clear is that Reagan did not spend much political capital in securing its passage. Rather, he proposed it and left it to Congress. This is not to say that Reagan did not take credit for proposing the amendment.[263] This issue was just subservient to the supremacy of economic matters.[264]

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[260] Reagan, Ronald. *Message to the Congress Transmitting a Proposed Constitutional Amendment on Prayer in School*, May 17, 1982. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=42527&st=&st1=. (Visited on March 15, 2005)

[261] Ibid.

[262] "Senate Roll-Call Vote on School Prayer" *New York Times* March 21, 1984. The amendment failed to make it through the Senate. The final vote was 56-44; eleven votes short of passage. Of the 18 Republican Senators who voted against the amendment, only two were from the South—both border states—where the evangelical movement was the strongest. Most of the remaining opposition came from northern, Midwestern, and Pacific states.

[263] On March 8, 1983, Reagan spoke to the National Association of Evangelicals and spun the proposed amendment into evidence of his ideological accord.

"Last year, I sent the Congress a constitutional amendment to restore prayer to public schools. Already this session, there's growing bipartisan support for the amendment, and I am calling on the Congress to act speedily to pass it and to let our children pray." Available at http://www.presidency.ucsb.edu/ws/index.php?pid=41023&st=&st1=. (Visited on March 15, 2005)

[264] One "Reagan loyalist" summed up Reagan's legislative focus at the beginning of 1983: "[Reagan] is going to hold the course, with the same supply-side emphasis – and keeping taxes in line and cutting them this next fiscal year, increasing taxes only if Congress comes along with some other cuts in spending." Cattani, Riachrd J. "GOP grows restive as '84 nears." *Christian Science Monitor* January 28, 1983, 10.

Social conservatives tried a secondary tactic but met similar resistance. In September of 1982, the Republican-controlled Senate considered a bill, sponsored by Jesse Helms (R-NC), that proposed stripping the Supreme Court of jurisdiction to hear voluntary school prayer cases. The bill gained strong backing by members of the social right but failed to gain the support of economic conservatives. As one commentator put it, the bill "was about as 'conservative' as tearing up a copy of the Constitution on the Senate floor."[265] Senator Helms recognized the problem of passing socially conservative legislation shortly after the bill's defeat when he label the Senate, "Conservative it ain't, Republican it is."[266] Absent the support of economic conservatives, socially conservative measures were doomed to failure in much the same fashion as Helms' school prayer jurisdiction bill, which failed 50-39.

Following these failures, Reagan resigned the resolution of prayer in school to the courts, stating, "The courts themselves can restore a more balanced view of the first amendment . . . "[267] Such resignation indicates the majority wing of the Republican Party did not desire changing national school prayer policy. If the economic conservatives had favored such a change, party leaders could have made the vote on jurisdiction stripping a test of Party loyalty or, in the alternative, aggressively pursued constitutional amendment. While passing a constitutional amendment was exceedingly unlikely due to the

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[265] Wicker, Tom. "A Small 'c' Victory." *New York Times* September 26, 1982, 19.
[266] Roberts, Steven V. "Senate Makeup on Social Issues: 'Conservative it Ain't'." *New York Times* September 25, 1982, 9.
[267] Reagan, Ronald. *Statement on Senate Action on the Proposed Constitutional Amendment on Prayer in Schools*. March 20, 1984. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=39665&st=equal+access&st1=. (Visited on March 15, 2005)

difficulties of Article V amending procedures, the commitment of the Republican Party to securing school prayer was questionable at best.

Yet, wholesale abandonment of the issue would have angered the minority wing in an election year, something the Party wished to avoid. Thus, Reagan took up the issue of equal access to public facilities for religious and non-religious groups—an issue that touched on religion in school. The equal access legislation gained support from both libertarians and social conservatives as it was widely advertised that the bill would have negligible impact on substantive education policy but was seen as "pro-religion". The bill was seen as so innocuous that even liberal Democrats supported it.[268] By passing the Equal Access Act, Republicans shored up their national coalition in an election year as the social right had few victories in the first four years of the Reagan administration. True to form, the Party made sure it claimed credit for its passage.[269]

Around the same time the Republican Party praised its efforts to open up public facilities to religious groups, the Administration joined several socially conservative groups[270] in their efforts to persuade the Supreme Court that an Alabama statute that authorized a one minute moment of silence dedicated to meditation or voluntary prayer was constitutional. The *amicus curiae* brief filed by the Solicitor General's office argued,

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[268] See Taylor, Jr., Stuart. "School Prayer Bill: A Trojan Horse?" *New York Times* July 27, 1984, B11. Safire, William. "Reagan as Pandora." *New York Times* July 30, 1984, A21.

[269] The 1984 Republican Party Platform declared. "We have enacted legislation to guarantee equal access to school facilities by student religious groups. Mindful of our religious diversity, we reaffirm our commitment to the freedoms of religion and speech guaranteed by the Constitution of the United States and firmly support the rights of students to openly practice the same, including the right to engage in voluntary prayer in schools." Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1984. (Visited on March 15, 2005)

[270] These socially conservative groups included the Christian Legal Society, the Legal Foundation of

> provision for a moment of silence in the public schools is not an establishment of religion, but rather a legitimate way for the government to provide an opportunity for both religious and nonreligious introspection in a setting where, experience has shown, many desire it. It is an instrument of toleration and pluralism, not of coercion or indoctrination.[271]

Yet, the Court outwardly rejected the Government's argument in *Wallace v. Jaffree*.[272] Justice Stevens, writing for the majority, rejected the idea that the moment of silence served a clear secular purpose and roundly declared that a moment of silence "no secular purpose."[273] Stevens noted that the sponsoring legislator openly espoused his hoped to return voluntary prayer back to public schooling.[274] Since the law was passed with the intent "to convey a message of state endorsement and promotion of prayer," the practice violated the Establishment Clause of the First Amendment.[275]

Reagan's then-sole appointee to the Court concurred with the result. In a separate opinion, O'Connor took a more benevolent view of the moment of silence. O'Connor argued that moments of silence in public schools may not violated the Establishment Clause, depending on the intentions of the state. To O'Connor, "The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer."[276] Simply "[b]y mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period."[277] O'Connor left the door open to the possibility that such practices could pass constitutional muster. However, by requiring a careful examination of the "history,

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America, and the Moral Majority, Inc.
[271] *Brief for the United States as Amicus Curiae Supporting Appellants Rex E. Lee*, 1984 WL 564160.
[272] 472 U.S. 38 (1985).
[273] Ibid. at 56.
[274] Ibid. at 57.
[275] Ibid. at 59.
[276] Ibid. at 73.

language, and administration of a particular statute," O'Connor precluded the possibility that fundamentalist interest groups could use such practices as a means of re-entrenching Protestant hegemony in the public schools. Secularizing moments of silences seemingly assuaged wary economic conservatives while enabling the practice to continue in a carefully monitored form.[278]

After Reagan and George H.W. Bush appointed five justices combined, media commentators and academics predicted that the Court's religion jurisprudence would likely shift. Linda Greenhouse noted at the beginning of the 1991 term that the Court would soon "test the dimensions of the conservative counterrevolution that gathered force during the term that ended three months ago."[279] However, rather than abandon nearly thirty years of precedent, the Supreme Court, in *Lee v. Weisman*,[280] continued to prohibit prayer in school and expanded the prohibition to include religious activity at public school ceremonies. Commentators labeled the opinion as "[d]efying almost all expectations"[281] and critics decried the Court as "destroy[ing] the tradition of nonsectarian prayers at high school graduations . . . "[282] The rulings may have been a surprise in light of the rhetoric of the Republican Party but the Party's failure to secure a

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[277] Ibid.
[278] See *Brown v. Gilmore*, 533 U.S. 1301 (2001). Linda Greenhouse hinted at the similarities between the Senate debates over a Constitutional amendment on school prayer and the likely disposition of *Wallace* by the Supreme Court. See "Justices to Decide on Silent Prayer in Public Schools." *New York Times* April 2, 1984, A1.
[279] Greenhouse, Linda. "Justice Return to Work: Consequential Cases are Likely to Test the Supreme Court's New Majority." *New York Times* October 7, 1991, 1.
[280] 505 U.S. 577 (1992).
[281] Greenhouse, Linda. "Changed Path for the Court? New Balance Is Held By 3 Cautious Justices." *New York Times* Jun 26, 1992, 1.
[282] Bork, Robert H. "Again, a Struggle for the Soul of the Court." *New York Times* July 8, 1992, 19.

socially conservative majority on the Court meant that key decisions would be made by jurists unwilling to radically alter existing First Amendment jurisprudence.[283]

In *Lee v. Weisman*, Justice Anthony Kennedy followed a pattern akin to the Court's decision in *Wallace*. Kennedy rejected the Administration's urging to overturn *Engel*[284] and *Schempp*[285] and struck down the constitutionality of nonsectarian prayer at public school graduations ceremonies. Kennedy's opinion is particularly striking in light of his reliance on public and peer pressure in his analysis of state action.

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.[286]

Not only had the Court upheld its Establishment Clause jurisprudence but also it conceptualized state compulsion in a sufficiently amorphous way to cast significant skepticism on the constitutionality of any kind of prayer activity in public education.

The response to the Court's rulings was similar to other restrictive Establishment Clause rulings. Areas of the country with large, active evangelical communities protested the decision and pledged to resist.[287] President Bush released the obligatory statement of disappointment with the Court's ruling, which undoubtedly appeased social conservatives

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[283] Supra note 316.
[284] Supra note 293.
[285] Supra note 293.
[286] Ibid. at 593.
[287] "Students Challenge Ban on Prayer at Graduation." *New York Times* May 26, 1993, A14. L.A. Powe, Jr. observed that evangelical resistance to the Court's school prayer jurisprudence constitutes one of the most notable forms of popular constitutionalism in modern America. He notes that a majority of southern public schools have refused to change their prayer policies following Supreme Court rulings prohibiting such practices (2005, 876).

during a tightly contested electoral campaign.[288] However, the Court's opinion was met by relative ambivalence throughout the rest of the country and, subsequently, the Court expanded the prohibition against prayer activity at public educational extra-curricular activities.[289]

Similar ambivalence occurred when Congress again attempted to adopt a constitutional amendment that would "secure the people's right to acknowledge God according to the dictates of conscience." The Religious Freedom Amendment, proposed by Rep. Ernest Istook (R-OK), enjoyed significant support among the social right, including groups like the Christian Coalition,[290] the Family Research Council, and Focus on the Family (Fowler et al. 2004, 239). Despite what constitutes largely symbolic action, given that 38 state legislatures would have to pass the proposed amendment, the social right could not prevent defections within the Republican Party or secure the requisite votes to pass the House.[291] The votes were simply not there.

While the Supreme Court refused to allow religion to seep into secularized public education, it had little problem finding secular reasons for permitting public educational facilities and monies to support and fund nonsecular activities, including education. As mentioned above, the Equal Access Act of 1984 permitted "noncirriculum-related student groups" to hold religious meetings in public high schools during periods outside regular

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[288] Bush, George. *Statement on the Supreme Court Decision on the Lee v. Weisman Case*. July 24, 1992. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=21139&st=prayer&st1=. (Visited on March 16, 2005)

[289] *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000). In *Doe,* the Court struck down a policy that permitted student-led and student-initiated prayer at public high school football games.

[290] The Christian Coalition spent over $500,000 to run radio ads in 50 legislative districts to bolster the possibility of passage. See Torry, Jack. "School Prayer Amendment Falls Short." *Pittsburgh Post-Gazette* June 5, 1998, A14.

[291] "Votes in Congress." *New York Times* June 7, 1998, A14.

school hours. Republican Senator Jeremiah Denton, one of the bill's sponsors, argued that the bill was a means of overcoming the censorship of religious speech.[292] This may have been the objective of the social right but the law opened school facilities to all student groups, including political groups, which thrilled civil libertarians.[293] Moreover, the voting in the House and Senate revealed both support between the economic and social wings of the Republican Party and overwhelming support among Democrats.[294]

Given the law's wide applicability and sweeping political support, it came as no great surprise that the Supreme Court ruled to uphold the Equal Access Act. In *Westside Community Board of Education v. Mergens*,[295] Justice O'Connor, writing for the majority, interpreted "noncurriculum-related student groups" to "mean any student group that does not directly relate to the body of courses offered by the school,"[296] which includes religious groups. As such, the Court held that "denial of respondents' request to form a Christian club denies them 'equal access' under the Act."[297] Interestingly, O'Connor used the "wide, bipartisan majorities in both the House and the Senate" to reflect "consensus on a broad legislative purpose"[298] and used this broad application and purpose as evidence of its constitutionality.[299] The Court expanded this accommodation

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[292] Taylor, Jr., Stuart. "School Prayer Bill: A Trojan Horse?" *New York Times* July 27, 1984, B11.
[293] Ibid.
[294] The bill passed the Senate by 88 to 11and the House by 337 (181 Democrats and 156 Republicans) to 77 (72 Democrats and 5 Republicans). See "Roll-Call Vote on Religious Meetings at Schools." *New York Times* July 26, 1984, A16.
[295] 496 U.S. 226 (1990).
[296] Ibid. at 239.
[297] Ibid. at 247.
[298] Ibid. at 239.
[299] Specifically, Justice O'Connor used the "bipartisan majorities" to overcome the three-pronged test established in *Lemon v. Kurtzman*, 406 U.S. 602 (1971). The three test were "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" How "wide, bipartisan majorities" defeat these prongs is less than clear other than by inference.

throughout the 1990s, requiring public schools to permit religious groups to use their buildings outside of normal class hours if that school offers its facilities to other community groups.[300]

Neither economic conservatives, which formed the dominant wing of the Republican Party, nor the Supreme Court were willing to support most social conservative preferences on school prayer. However, social conservatives have faired better on the issue of school choice and voucher programs. Both economic conservatives and the Supreme Court proved willing to accommodate public monies going to private, religious schools for secular purposes. At first glance, this issue seemingly cuts across the same coalitions as school prayer. However, on the private school choice issue, free market libertarians and religious conservatives stood united (Cookson 1994, 17-37). James D. Ryan and Michael Heise argued that Republican leaders jumped at opportunities to "support [] market-based educational reform [through voucher programs] that would operate largely within the confines of urban school districts" (2002, 2085). Economic conservatives favored school choice because of its roots in free market choice and the possibility to minimize government expenditures. Social conservatives favored voucher programs due to their allegiance to Christian academies and their desire to alleviate "the financial burden [private education] places on devout parents" (Jefferies and Ryan 2001, 283).

The Court has long held that public funding for certain secular components of private, religious education—the state's so-called "benevolent neutrality"— does not

[300] *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

violate the Establishment Clause.[301] The Court expanded this accommodation relatively early in the Reagan presidency by upholding an annual tax deduction for parents of children in private schools, both religious and nonreligious.[302] In 2002, the Court further extended its jurisprudence to permit grants of tuition aid to individuals who can chose to use it to send their children to private school. Justices O'Connor and Kennedy once more cast their votes in the majority. O'Connor wrote a separate concurring opinion, which, among other things, articulated her position that the Court's decision was consistent with *Everson* and did not announce a new Establishment Clause jurisprudence.

In late June 2002, the Supreme Court issued its most significant ruling on using public money for private education. In *Zelman v. Simmons-Harris*,[303] the Court upheld Cleveland's school choice program, which enabled children to use vouchers to attend private schools. The major sticking point was that 82 percent of the private schools participating in the voucher program were religiously affiliated and 96 percent of students using the vouchers enrolled in religious schools. Chief Justice Rehnquist declared that the sizable percentage of parochial schools was not "constitutionally significant"[304] and that the Constitution only requires a "genuine choice."[305] While critics labeled this maneuver "an advanced yoga twist,"[306] Rehnquist clearly emphasized the benefits of parental *choice* in the educational marketplace. In a separate concurring opinion, Justice O'Connor echoed the value of market-driven choice:

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[301] *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).
[302] *Mueller v. Allen*, 463 U.S. 388 (1983).
[303] 536 U.S. 639 (2002).
[304] Ibid. at 657.
[305] Ibid. at 658.
[306] "The Price of Vouchers." *The Boston Globe* June 28, 2002, A22.

> In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of *true private choice* . . . I find the Court's answer to the question whether parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools persuasive. In looking at the voucher program, all the choices available to potential beneficiaries of the government program should be considered.[307]

Social conservatives quickly hailed *Zelman* as a victory and a "tipping point" in Establishment Clause doctrine. Yet, this has not been the case. In *Locke v. Davey*,[308] the Court upheld the State of Washington's constitutional prohibition on funding religious institutions. Thirty-six additional states have similar constitutional provisions (Fowler et al. 2004, 237). So *Zelman* looks less like the "tipping point" and more like a constitutional affirmation of free market experimentation. The permissibility of choosing a free market educational system did not equate to a state's obligation to offer such a system.

When it came to religion and education policy, economic conservatives only supported social conservatives' preferences when it overlapped free market values, such as school choice, or had no significant impact on national education policy. Key economic conservatives reinforced the idea that the courts must play a central role in redefining the contours of church-state relations in public education. And, Reagan appointees, Justices O'Connor and Kennedy, repeatedly created moderate judicial opinion that maintained the preferences of economic conservatives to the detriment of social conservatives. In other words, preferences of the dominant wing trumped preferences of the minority wing in both Congress and the Court. Following the defeat of

[307] Ibid. at 672 (emphasis added).

social conservative religion in education preferences in Congress and before the Court, the issue has largely faded from public prominence. By monitoring the contours of religion in education, the Supreme Court removed an issue that divided the Republican Party and, thereby, enabled the Party to have greater unity. Absent judicial intervention and moderation on social issues, the Republican Party would have been forced to address this intra-party disjunction in a much more direct and, most likely, divisive way.

Homosexual Rights

Throughout the 1980s and 1990s, the issue of extending gay, lesbian, and transgendered Americans civil rights protections rose to a new level of prominence and became increasingly problematic for the Republican Party. Gay rights do not fit as neatly into the crosscutting issue paradigm as many of the other issues addressed to this point. First, the issue slowly gained salience throughout this but did not readily appear on the national agenda until the early 1990s. Second, as gay rights gained salience, the degree to which statutory and constitutional protection of homosexuals cut across the Republican coalition increased. Throughout much of the 1980s and into the 1990s, the gay rights movement gained wider acceptance among Americans.[309] Social conservatives increasingly became isolated in their resistance to homosexual rights as free market libertarians grew increasingly uncomfortable with governmental regulation of sexual

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[308] 540 U.S. 712 (2004).

[309] From 1977 to 2003, the percentage of Americans who supported equal rights for homosexuals in employment rose from under 60% to nearly 90% (Fiorina 2005, 60). From 1982 through 2003, the percentage of Republicans supporting the legalization of homosexuality grew from approximately 43% to 51% (2005, 63). Even in the South, where social conservatism is strongest, support for legalization of homosexual relations topped 50% in 2003 (2005, 62). The most notable figure from these polls is that Independents overwhelmingly support legalization of homosexual relations. Securing Independent voters

behavior among consenting adults. While this steady change has yet to transform into sweeping egalitarianism, it has placed economic conservatives at odds with social conservatives who actively attempt to prevent or undermine civil libertarian gains made by homosexuals.

As with most other social issues, the Republican Party has attempted to leave a good deal of the policy-making on gay rights up to the courts. This is not to say that significant legislation and executive action has not been attempted or achieved; simply that such action has not met with broad support by the Republican Party. During the late 1980s and early 1990s, several states passed gay rights laws that protected against discrimination in employment, housing, education, public accommodation, and credit. However, most of these states were northern states, like Connecticut, Massachusetts, New Jersey, and Vermont, where the citizenry is socially liberal, even where it is economically conservative. The Bible Belt has not been nearly so accommodating. As Dan Pinello explains: "[T]he appellate courts of Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia decided lawsuits involving child custody, visitation, adoption, and foster care at rates about 50 percent less favorable to homosexual parents than the rest of the nation" (2003, 144). So, while homosexuals gained certain protections in socially liberal areas of the country, these gains have not been universal. Moreover, protection against discrimination is hardly the same thing as affirmative equality and both the states and national government have been relatively reluctant to enter into this area to craft substantive policy.

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is increasingly vital to winning national elections and holding power.

Most legislative and legal victories occurred following the successful political mobilization of the gay community. In contrast to all national elections that preceded it, the 1992 election saw "gay and lesbian issues [] being raised — and fought over."[310] All five major contenders for the Democratic nomination for the presidency promised to permit gays in the military, as did Ross Perot. During this same period, gay rights groups began actively and openly contributing to national campaigns and lobbying national officials. In turn, national officials began seeking out their contributions. However, with this mobilization and increasing acceptance with social liberals came a growing countermovement among the social right.

The debate over Robert Bork's nomination to the Supreme Court opened the floodgates to an anti-homosexual advocacy previously unseen in American politics. Christian Voice, an evangelical political organization, published a four-page letter supporting Judge Bork's nomination, which included a direct link between the appointment of Bork and the end of gay rights. The letter stated, "Robert Bork does not support the idea of a constitutional right to engage in sodomy. He may help us stop the gay rights issue and thus help stem the spread of AIDS."[311] Of course, Bork helped fuel this rhetoric by appearing anti-gay as a matter of policy preference[312] and constitutional

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[310] Schmalz, Jeffery. "Gay Politics Goes Mainstream." *New York Times* October 11, 1992, SM18.
[311] Quoted in Noble, Kenneth B. "Bork Backers Flood Senate with Mail." *New York Times* September 3, 1987, A16.
[312] While working as a professor at Yale Law School, Bork actively opposed a policy that barred law firms that discriminated against homosexuals from recruiting on campus. During this campaign Bork wrote, "Homosexuality is obviously not an unchangeable condition like race or gender . . . [Homosexual] behavior, it is relevant to observe, is criminal in many states."
As quoted in Russakoff, Dale and Al Kamen. "The Life and Ideas of Robert Bork." *St. Petersburg Times* August 30, 1987, 1D.

interpretation.[313] Needless to say Bork's nomination centered on social issues[314]—including gay rights—and his defeat, in part, stemmed from the failure to reframe his social conservatism and emphasize issues that would play with economic conservatives, such as his law and order jurisprudence.[315] Bork's defeat also marked the rise of gay organizations as a powerful lobbying force in Washington.[316] The failure to secure Bork's confirmation and defeat the pressure mounted by gay organizations was heralded as a victory for pro-civil libertarian forces.[317]

A few years prior to Bork's nomination, the discomfort with homosexuality within the Republican Party, and even the population as a whole, undoubtedly contributed to the Supreme Court's adoption of a social construction averse to protecting homosexual activity. Rather than extend the *Griswold-Eisenstadt-Roe* line of privacy protection to consensual, homosexual activity in the privacy of the home, the Court adopted a traditionalist framework and recognized a social tradition in criminalizing homosexual activity. In *Bowers v. Hardwick*,[318] the Court ruled that Georgia's criminal prohibition against sodomy was constitutional as it was "constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under

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[313] In *Dronenberg v. Zech*, 741 F.2d 1388 (1984), Judge Bork wrote, " . . . private, consensual, homosexual conduct is not constitutionally protected." He later explicitly rejected Supreme Court precedent by "extend[ing] the right of privacy created by the Supreme Court to cover appellant's [homosexual] conduct here."

[314] Taylor, Jr., Stuart. "Bork Could Tilt Law At Once If Seated." *New York Times* July 6, 1987, 8.

[315] Senator Humphrey noted this when he observed, "the most important aspect of the Supreme Court's caseload is in the critical area of criminal law. Some 30 percent of the Court's cases are criminal law cases, and those cases are the ones which most directly affect the average citizen. I have no doubt that most Americans care far more deeply about effective law enforcement against violent criminals than about whether homosexual sodomy is protected under the 'generalized right of privacy' -- which so many Senators seem to consider the pivotal issue of our age." 133 *Congressional Record* 14937, October 23, 1987.

[316] Keen, Lisa M. "Behind the Scenes, But Not on the Stand." *The Washington Blade* October 2, 1987.

[317] Greenhouse, Linda. "Bork's Nomination is Rejected, 58-42." *New York Times* October 24, 1987, 1.

the Due Process Clause, the courts will be very busy indeed."[319] Of course, by constructing the ruling as such, Justice White built the moralists' house on a foundation of sand. If contemporary morality changed, then it follows that the law, even constitutional law, must change concordantly. The religious right lauded the 5-4 decision as a victory but, based on their support for Bork and his hostility toward homosexual rights, social conservatives clearly recognized the vulnerability of the *Bowers* ruling and the precarious position of denying homosexuals minimal legal protections.

The social right was correct to fear the vulnerability of *Bowers*. Shortly after the Court rendered its decision, the American polity moved in a libertarian direction regarding homosexuality. As Americans became more tolerant, both the left and the right mobilized to realize or protect their preferences. This rising debate was made abundantly clear during the 1992 presidential campaign. In some ways, social conservatives picked a perfect time to voice their concerns over the moral degradation of society. George H.W. Bush was floundering in the polls based on weak economic performance and arguably weak leadership, at least when contrasted to Reagan, the great communicator. In order to bolster support within his Party, Bush increasingly embraced the socially conservative wing of the Party. Ironically, upon entering the White House, Bush was much less socially conservative than Reagan, yet, by the end of his four years, the social right enjoyed more executive pandering than any time to date. The 1992 Republican platform reflected this effort to cast Bush and the Republican Party as the party of traditional values and uncompromising morals:

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[318] 478 U.S. 186 (1986).
[319] Ibid. at 186.

> . . . we oppose efforts by the Democratic Party to include sexual preference as a protected minority receiving preferential status under civil rights statutes at the federal level, State, and local level. We oppose any legislation or law which legally recognizes same-sex marriages and allows such couples to adopt children or provide foster care.[320]

While such unambiguous support for the social right's agenda certainly helped Bush's standing with evangelical Christians, it also isolated Party centrists uncomfortable with the increasing moralism of the Party. Pat Buchanan published advertisements criticizing the Bush Administration for being "too indulgent of homosexuality."[321] Buchanan also made clear that he believed there was "a religious war going on in our country for the soul of America. It is a culture war, as critical to the kind of nation we will one day be as the Cold War itself."[322] While President Bush steered clear of fundamentalism in his speech, he made veiled references to traditional values and the damage had been done. As one commentator noted,

> Vehement attacks at that convention by speakers like the Rev. Pat Robertson and Pat Buchanan – as well as from the Bushes and the Quayles under the rubric 'family values' – seem to have backfired, engendered less support for the G.O.P. according to polls, than sympathy for gay men and lesbian.[323]

Moderate Republicans in the electorate faced a choice between a Republican Party teetering on the brink of social conservatism or more socially liberal candidates. Both Bill Clinton and Ross Perot adopted more liberal social policies, including extending

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[320] *Republican Party Platform of 1992.* Available at http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1992. (Visited on March 26, 2005)
[321] Stanley, Alexandra. "Gay Groups React Mildly to Ad for Buchanan." *New York Times* March 8, 1992, 26.
[322] Buchanan, Patrick J. "1992 Republican National Convention Speech." August 17, 1992. Available at http://www.buchanan.org/pa-92-0817-rnc.html. (Visited on April 13, 2005)
[323] Schmalz, Jeffery. "Gay Politics Goes Mainstream." *New York Times* October 11, 1992, SM18.

greater protection to homosexuals in the workplace. Moderates in the electorate did indeed defect as Ross Perot, who adopted a more liberal social policy, siphoned a sizable portion of votes away from Bush by also appealing to the preferences of economic conservatives.[324]

The rejection of a socially conservative Bush Administration may have actually helped economic conservatives in the Republican Party over the long term. President Clinton appointed two Supreme Court justices, both moderate liberals who favored liberal social policy. Ruth Bader Ginsburg took the place of the socially conservative Byron White. Steven Breyer replaced social liberal Harry Blackmun. The two Clinton justices helped shift the Court's social jurisprudence slight to the left, which was sufficient to change constitutional protection for homosexuals.[325]

The first indication of a shift in the Supreme Court's gay rights jurisprudence came in 1996, when the Court ruled on the constitutionality of an amendment to the Colorado state constitution in *Romer v. Evans*.[326] Amendment 2, a popularly ratified amendment, read as follows:

> No protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, not any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of

[324] Perot polled particularly well among voters concerned with the budget deficit and the economy (see Gold 1995, 755).
[325] The Supreme Court's shift to the left on social issues also guaranteed the continuation of national abortion policy and bar religious practice from public education.
[326] 517 U.S. 620 (1996).

> discrimination. This Section of the Constitution shall be in all respects self-executing.[327]

Justice Kennedy, writing for a six-member majority, strongly criticized the events in Colorado, even going so far as to quote Justice Harlan's famed dissent in *Plessy v. Ferguson*:

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.[328]

The Court's opinion in *Romer* was hailed as a victory for homosexual equality in the United States. Additionally, several legal scholars argued that *Bowers* "was overruled sub silencio in *Romer*" (Estin 1997, 366; see also McDonnell 1998, 300). The national media was more ambiguous as to *Romer*'s standing vis-à-vis *Bowers* but they noted that Romer was a "significant victory for gay rights"[329] and that the Court's jurisprudence now opposed "tough social policy [that] defy the norm."[330]

The reaction of social conservatives was vociferous, if unsurprising. Gary Bauer, president of the Family Research Council, declared that the Supreme Court was "an out-of-control unelected judiciary that send[s] chills down the back of anyone who cares whether the people of this nation any longer have the power of self-rule."[331] A leading official of Focus on Family said the Court "disparage[d] the moral views of the people of

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[327] As quoted in *Romer v. Evans*, 517 U.S. 620, 624.
[328] Ibid. at 623.
[329] Greenhouse, Linda. "Gay Rights Laws Can't Be Banned, High Court Says." *New York Times* May 21, 1996, 1.
[330] Biskupic, Joan. "Court Declares Gays Not Legally Different." *Washington Post* May 22, 1996, 1.

Colorado."[332] However, their economic conservative counterparts made no protest. In fact, moderate Republican lawmakers were notably muted in their criticism of the Court's decision. So what explains the disparity?

In his work on homosexual rights and American law, Daniel R. Pinello observed, "environmental variable[s are] the most important influences in courts of last resort" (2003, 82). Such environmental variables reflect the permissibility of homosexuality and homosexual rights. As homosexuality became increasingly acceptable in American society, libertarian economic conservatives have also grown increasingly acceptant of homosexuality. This is not to say that the Republican Party embraced homosexual rights. Far from it. The Defense of Marriage Act of 1996 (DOMA) passed relatively untrammeled through the Republican-controlled House and Senate. However, the measure did not take away pre-existing (or at least pre-recognized) rights and the bill was of sufficiently suspect constitutionality—something recognized throughout the floor debates—that it was unlikely that DOMA would pose an obstacle to gay marriage should such a policy gain popular support. Moreover, numerous lawmakers noted that the suspect constitutionality of the bill should not prevent its passage as courts bear the ultimate responsibility for deciding the bill's fate.[333] Such observations are consistent with legislative deference to the national judiciary on matters of social policy.

Given the growing social moderation of economic conservatives, it came as no great surprise that when the Supreme Court considered a case with facts remarkably

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[331] Supra note 364.
[332] Ibid.
[333] See Representative Bob Barr's (R-GA) speech on the Defense of Marriage Act. 142 *Congressional Record* 7445.

similar to *Bowers*, many commentators predicted the demise of *Bowers*.[334] In *Lawrence v. Texas*,[335] the Court reversed its decision in *Bowers* and recognized a broader social tradition in due process protection against intrusive governmental action. Justice Kennedy, writing for the majority, opted not to craft a narrow decision based on the Equal Protection reasoning he employed in *Romer*, which would have only prevented discriminatory regulation targeted against homosexuals. Instead, Kennedy argued,

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.[336]

Not only did the Court undermine the validity of class-based legislation, as *Romer* mandated, but it also extended a liberty interest in private sexual conduct among consenting adults.

Many have wondered why the conservative Rehnquist Court would render such a socially progressive decision, particularly when a Reagan appointee wrote the opinion. The answer undoubtedly lies with the growing skepticism of sexual paternalism and the greater acceptance of homosexuality in American society and politics. If the Court's decision was truly out of step with the American polity, then more would have been made of the decision in mainstream American politics. Rather, decriminalization of sodomy,

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[334] See Yoshino, Kenji. "Can the Supreme Court Change Its Mind?" *New York Times* December 5, 2002, 43.
[335] 539 U.S. 558 (2003).

homosexual or otherwise, did little to upset the vast majority of American people. Such unconcern no doubt stems from the fact that most Americans support some sort of protection for gays.[337] By the time the Court rendered *Lawrence*, nearly nine out of ten Americans thought gay Americans should have more progressive protections than the one the Court rendered.[338]

The due process victory, however, did not translate into greater support for all gay rights. Particularly notable is the issue of gay marriage. Americans across the political continuum have been particularly slow to embrace same-sex unions, particularly marriage. Nearly 70% of Republicans oppose gay marriage, which helps explain why gains in this area have come exclusively at the state level.[339] Gay marriage does not cut across the Republican Party as other areas of gay rights did and do. As such, gay marriage is still a legitimate target for legislative redress. However, if the preferences of economic conservatives shift to accommodate same-sex civil unions and/or gay marriage, it is likely that the Court will intervene as it did in *Romer* and *Lawrence*.

Evaluating homosexual rights over the past two decades reveals a largely court-centered strategy that benefited the Republican Party. Following the electoral failure of 1992, which saw the Republican Party actively embrace its socially conservative wing, the economically conservative wing of the Party eschewed anti-gay rhetoric and policy-making in most areas save gay marriage. Moreover, by appointing socially moderate

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[336] Ibid. at 576-77.
[337] Supra note 341.
[338] See Booth, Michael. "When 'Hate' Became Resolve. State's Amendment 2 led to gay protections." *Denver Post* September 29, 2002. Booth wrote, "Nearly 9 out of 10 Americans now think gay people should have equal job and housing opportunities, after steady increases since Gallup started asking the question in 1977."
[339] Bumiller, Elisabeth. "Cold Feet: Why American Has Gay Marriage Jitters." *New York Times* August 10,

jurists to the High Court, the dominant, economically conservative wing of the Republican Party helped create a Court unsympathetic to illiberal governmental regulation of sexuality. While the Court has not recognized those rights that remain outside of majoritarian preferences, such as the right of homosexuals to wed, it has removed socially conservative policy that is unpopular among socially libertine Americans, including the dominant wing of the Republican Party. By leaving recognition of homosexual rights to the courts, the Republican Party has avoided addressing the inherent tension between socially libertine economic conservatives and social conservatives, all the while securing the preferences of economic conservatives.

Abortion

The party-court dynamic noted for religion in public education and gay rights applies to Republican abortion policy. In fact, other scholars have observed a pattern of displacing abortion policy (Graber 1993, 54) while maintain policy that appealed to the economic conservative wing of the Republican Party (Graber 1996, 4).[340] Yet, despite the long-standing pattern of legislative deference to judicial policy-making in the area of abortion policy, social conservatives maintain great faith that the Republican Party will appoint justices that will overturn *Roe v. Wade* and its progeny.[341] Such hope is

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2003, 1.

[340] Since other scholars have noted this phenomenon, this section is designed only to highlight the consistency of Republican abortion policy with other social issues rather than provide a comprehensive account of abortion policy development vis-à-vis parties and courts.

[341] For example, the Christian Coalition's number one priority on its Agenda for the 109th Congress is securing sufficient votes to confirm all of President Bush's nominees to the circuit court of appeals. This is striking given that it precedes support for a bill that would criminalize taking minors across state boundaries to abort a pregnancy, support for a constitutional amendment that "protects" traditional marriage, and several bills that seek to promote the exercise of religious faith in the public sphere. See http://www.cc.org/issues.cfm. (Visited on April 5, 2005)

predicated on the assumption that the Republican Party would be best served by yielding to the demands of its minority wing. As a matter of electoral politics, this assumption helped keep social conservatives firmly entrenched in the Republican Party without having to aggressively alter abortion policy. Again, the Republican Party avoided appointing five socially conservative jurists to overturn the core of *Roe*. As such, social moderates within the Party could vote their economic preferences while relying on the Supreme Court to safeguard national abortion policy.

Ronald Reagan made anti-abortion rhetoric a fixture of his domestic policy speeches. Early in his presidency, Reagan declared, "I have been one who believes that abortion is the taking of a human life."[342] He actively espoused such pro-life discourse throughout his presidency even though he openly abandoned his social agenda whenever his economic agenda needed the Administration's full attention.[343] Reagan's successor continued the anti-abortion rhetoric and even took a more aggressive posture close to the 1992 election. But President Bush maintained Reagan's policy of appointing a moderate median justice to the High Bench.

The rhetorical strength of the abortion issue stems largely from its importance as a tool for electoral success. Since the Supreme Court removed a substantial portion of abortion policy-making from state and national lawmakers with its ruling in *Roe v. Wade*, political rhetoric and judicial appointments have taken center stage in the debate over abortion policy. Republicans have used this issue to pay electoral dividends by tapping

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[342] Ronald Reagan. *The President's News Conference.* January 19, 1982. Available at http://www.presidency.ucsb.edu/ws/index.php?pid=42476&st=abortion&st1=. (Visited on April 5, 2005)
[343] Lescaze, Lee and Lou Cannon. "Delay is Favored on Social Issues." *Washington Post* March 29, 1981, A1.

an active pool of single-issue voters that cast their ballot on a candidate's anti-abortion advocacy (Cook, Jelen, and Wilcox 1992, 183). However, because pro-choice members of the electorate outnumbered anti-abortion members, taking the abortion issue away from the courts would be highly detrimental to the Republican Party. While abortion politics is currently limited to low-cost political rhetoric, if lawmakers were forced to take real action, the current Republican Party coalition would collapse. Thus, keeping abortion policy under the control of the courts by upholding *Roe* was (and is) in the best electoral interests of the Republican Party (1992, 170).

In a series of cases, the Supreme Court increased the power of states and national government to regulate abortive practices. In many of these cases, the Administration submitted a brief requesting that the Court overturn *Roe*. However, the Court—more specifically, the median justice—refused to overturn the core of *Roe*. As two leading constitutional scholars observed

> Justice O'Connor has never questioned *Roe*'s central premise that liberty to choose abortion is fundamental nor accepted Chief Justice Rehnquist's and Justice White's [in *Webster*] view that any state interest at any point in pregnancy may, if a state legislature chooses, outweigh a woman's right to choose" (Estrich and Sullivan 1989, 133).

Yet, the *Akron-Thornburgh-Webster*[344] line of cases casts sufficient skepticism on *Roe*'s durability that many speculated that the next abortion case would render an unmitigated victory for the social right.[345]

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[344] *Akron v. Akron Center for Reproductive* Health, 462 U.S. 416 (1983); *Thornburgh v. American College of Obst. & Gyn*., 476 U.S. 747 (1986); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
[345] For observations regarding the downfall of *Roe*, see Kamen, Al. "Supreme Court Restricts Right to Abortion, Giving Wide Latitude for Regulation." *Washington Post* July 4, 1989, A1; Marcus, Ruth. "Abortion-Rights Groups Expect to Lose." *Washington Post* April 22, 1992, A1.

The Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[346] ended such speculation. The moderate center of the Court—O'Connor, Kennedy, and Souter, all Republican appointees—acknowledged that the protection of "constitutional liberty" includes a woman's right "to decide to terminate her pregnancy."[347] Of particular note, Justice Kennedy switched his position from *Webster*, wherein he sided with a plurality that *Roe* should be overturned to strongly recognizing the right to choose in *Casey*. Yet, the switch may be less surprising if one examines the regulatory scheme Kennedy designed. His opinion declared that certain forms of regulation including delaying an abortion for 24 hours and parental or judicial consent for teenagers were permissible. But, the Court stated it would strike down any regulation that placed "a substantial obstacle in the path of a woman seeking an abortion before the fetus reached viability," including spousal notification. Thus, *Casey* largely reflects centrist Republican ideology, which favors regulation but not abolition of abortive options.

Throughout the 1980s, American public opinion was marked by significant skepticism over *Roe*. However, by the early 1990s, public opinion had stabilized and was overwhelmingly supportive of *Roe.*[348] Most notably, despite being the anti-abortion party, the vast majority of Republicans in the electorate do not support the social right's agenda (Fiorina 2005, 41). In fact, only approximately 20-25% of the Party took the position that abortion should be "illegal in all circumstances" (2005, 41). The more

[346] 505 U.S. 833 (1992).
[347] Ibid. at 922.
[348] By 1992, Gallup polls indicated that well over 60% of Americans supported *Roe v. Wade* (see Fiorina 2005, 36).

libertine economic wing of the Republican Party clearly supported the "essence of *Roe*[]"[349] and the economic conservatives on the bench crafted an opinion largely reflective of this trend.

Following *Casey*, the salience of abortion politics faded considerably. Undoubtly, the Democratic Party's success in 1992—particularly Bill Clinton's successful bid for the White House—helped reduce pressure to change national abortion policy by assuring presidential veto of overly conservative abortion policy. The appointment of Justice Ginburg to replace the socially conservative Justice White also helped concretize *Roe*'s standing. Yet, the Republican Party also backed off the push to overturn *Roe*[350] and the debate shifted to the periphery of abortion policy. President Clinton repealed Reagan's "global gag rule" that ended U.S. funding of global NGOs that provided, referred, counseled, or advocated abortion. Clinton subsequently compromised with House Republicans to create a modified gag rule in order to secure the $1 billion the U.S. owed the United Nations. The gag rule has important implications for international foreign policy but it hardly retains the salience of domestic abortion policy.

Throughout the mid and late 1990s, a similar détente occurred on the Court as it shifted its attention from abortive practices to abortion protestors. In 1994, Congress passed the Freedom of Access to Clinic Entrances Act, which criminalized threatening, obstructing, and destructive conduct intended to "injure, intimidate or interfere with any person because that person is or has been . . . obtaining or providing reproductive health

[349] Supra note 381 at 869.
[350] The lynchpin of the Republican Revolution of 1994, *The Contract with America,* did not mention abortion (Gillespe et al. 1994).

services."[351] The federal courts consistently rebuffed challenges to the Act and the Supreme Court upheld several state-created limitations on abortion protestors around clinics.[352] Essentially, the Court balanced the privacy interests of clinic workers and patients with the free speech interests of protestors, with the former consistently trumping the latter.

This period also saw multiple attempts to ban the practice of partial-birth abortions, a practice widely unpopular with the American people. The House passed four different bans in 1995, 1996, 2000, and 2002 but the measure was either unable to muster sufficient support in the Senate or overcome presidential veto. However, public opinion polls showed that 70% of Americans favored such a ban so long it included an exemption when the health of the mother was in jeopardy.[353] The latter provision is central to the support of the ban. In 2000, the Supreme Court re-entered the debate regarding abortion policy by striking down a Nebraska law that banned partial-birth abortions without an exemption for the health of the mother. In 2003, President Bush signed into law a partial-birth abortion bill that accounted for the Court's correction by including an exemption for the life of the mother. Given the level of support in the electorate, the measure passed with wide support among Republicans. However, as leading social conservatives noted, the ban had little impact on the number of abortions performed[354] and, as such, was largely symbolic, designed to appease the social right.

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[351] 18 U.S.C. 248.
[352] See *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753 (1994); *Hill v. Colorado*, 530 U.S. 703 (2000); see also *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997).
[353] See Holland, Judy. "Abortion Foes Have the Edge on 'Roe v. Wade' Anniversary." *The Times Union* January 19, 2003, A9.
[354] Senator Rick Santorum, a noted social conservative, noted that the future law would have little effect on the abortive practices. See McFeatters, Ann. "Abortion Law Goes to Bush." *Pittsburgh Post-Gazette*

By leaving the most substantial portion of abortion policy to the courts and enabling the socially conservative wing to secure a few symbolic victories, the Republican Party has managed to avoid formulating national abortion policy and, thereby, risking electoral rebuff. Based largely on the constitutionalization of abortion politics, the Republican Party has successfully sold judicial appointees as a proxy for abortion policy. However, appointing key moderates to the bench while maintaining the need for conservative jurists resulted in maintaining a coalition of social libertines and social conservatives, both in government and the electorate. Absent the courts, the Republican Party would have to address an issue that cuts across their national coalition and would likely cause serious electoral difficulties. National electoral success for the current Republican Party depends on the courts continuing to craft moderate abortion policy. Given the fragility of the national coalition, a Republican president would be best served by appointing a social moderate should the median or swing position on the Court become vacant. Counterintuitive though it may be, the Democratic Party may be better served electorally if a Republican president were to appoint a social conservative as the electoral repercussions of judicial conservatism in the area of national abortion policy would likely result in sizable Democratic victories.

Conclusion

In 2000, George W. Bush won a controversial and contested presidential election. Despite losing the popular vote, his 271 electoral votes carried the Electoral College and unified Republican control over the national government. Two years later, the

Republican Party increased their hold over the national government. The events of September 11, 2001 certainly played a role in the victory[355] but, whatever the impetus, the Republican national coalition grew in strength nationwide. The 2004 election saw the Republican Party maintain their hold on power despite a faltering national economy, tepid support for the Iraq War, strained relations with many western allies, and a highly mobilized Democratic Party still smarting from the 2000 election. Bush became the first president in American history to win re-election after failing to secure a popular victory his first term. While both the 2000 and 2004 presidential elections were close, the result was unified control over the national government and, possibly, the advent of a Republican political order.

In what may prove to be the ratifying election of the new Republican political order, evangelical Christians turned out in record number to support Republican candidates.[356] Political observers widely credited the social right with carrying President Bush to victory,[357] particularly, in key swing states, like Ohio and Florida. Despite nearly two decades of frustration or, at best, highly limited success, social conservatives continue to back the Republican Party in overwhelming numbers.

Much as before, the Republican Party responded by actively moving on its conservative *economic* agenda. Within the first three months of 2005, the Republican Party passed laws that extended greater protection to corporations against class action law

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[355] Van Drehle, David. "Democrats' Payback for 2000 Must Wait." *Washington Post* November 6, 2002, A24.
[356] Eisenberg, Carol. "Election Aftermath: Religious Political Revival." *Newsday* November 5, 2004, A28.
[357] Debrosse, Jim, Larence Budd, and Ken McCall. "Moral Issues Swung for Bush." *Cox News Service* November 6, 2004.

suits[358] and reduced the ability of families to gain bankruptcy protection against their creditors but left corporate bankruptcy untouched.[359] Moreover, the Party is actively moving to create "personal" social security accounts that could push billions of dollars into corporate reinvestment and attempting to open up the Arctic National Wildlife Refuge to oil drilling.[360] The only efforts made by Republicans for their social constituency was granting the federal courts jurisdiction to hear claims by the parents of Terri Schiavo in their attempt to reinsert her feeding tubes. But this action was symbolic as it did not change substantive policy and was designed primarily to play with social conservatives at virtually no cost.[361]

Despite serious division, the Republican Party managed to consolidate power after nearly three full decades of divided government. The ability of the Republican Party to win national elections depends in no small measure on the role of the courts as a moderate social policy maker. Absent the courts, the Republican Party would be forced to directly address the inherent tensions between social conservatives and libertine economic conservatives. Embracing greater religion in school, the exclusion of homosexuals from certain civil liberties, and severely curtailing a woman's right to choose would likely push social moderates into the Democratic Party, which in addition

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[358] The Class Action Fairness Act removed most class action law suits from state to federal courts, which have been more skeptical of class action claims. So while federal courts have not changed their social jurisprudence greatly, they have been more conservative on economic matters. See Harris, John F. "Victory for Bush on Suits." *Washington Post* February 18, 2005, A1.

[359] A reporter for the *Washington Post* described the victory as follows: "[The bill's passage] would be the second major victory for big business in Bush's second term, after passage last month of legislation intended to curb class-action lawsuits against corporations." Day, Kathleen. "Senate Passes Bill To Restrict Bankruptcy." *Washington Post* March 11, 2005, E1.

[360] Stolberg, Sheryl Gay. "Senate Supports Arctic Drilling." *New York Times* March 17, 2005, 1.

[361] Kirkpatrick, David. "Schiavo Memo is Attributed to Senate Aid." *New York Times* April 7, 2005, 20.

to social liberalism became more appealing to corporatists during the 1990s.[362] Similarly, if the Republican Party simply dismissed or ignored the social right's demands, the social right would, at best, support the Republican Party in lower numbers, and, at worst, defect and seek a third party option.[363] In short, the courts have stabilized the Republican Party by offering an alternative policy-making institution that renders moderate policy on an issue that threatened to divide the Party. In so doing, the Court has created conditions suitable for a Republican political order.

This is not to say that a new political order is inevitable. If Bush moves to embrace the agenda of the social right and push it through traditional policy avenues, then the coalition will have to adapt to a new distribution of Party energy to policies the "Old Guard" finds odious. Or, if one of the socially moderate members of the Supreme Court retires and Bush opts for a social conservative, a significant shift in social jurisprudence could push centrists to defect from the Republican Party. Scholars have noted that the abortion issue has the potential to realign the national party system and could do so if the Court overturns *Roe*. The Democratic Party may move to accommodate a greater share of the American center. Or, a new issue may arise that cleaves the Party system in a way inconceivable at present. The possibilities are endless but they all depend on maintaining the status quo on the Court and within the Republican national coalition.

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[362] See Torricelli, Robert G. "Is GOP still the Party of Business?" *The Record* July 21, 1998, L09.
[363] Pat Robertson was urged to run as an independent in 1988 as many Evangelical Christians believed George H.W. Bush was too moderate on social issues. Bush was quite liberal entering the 1988 election but by 1992 he embraced the rhetoric necessary to appease social conservatives. See Harsch, Joseph. "Third Parties: Wild Cards in Politics." *Christian Science Monitor* January 16, 1986, 15.

While a Republican political order may not occur, all indicators seem to point to a continued alliance between economic and social conservatives. Even after the social right mobilized in record numbers to ensure that Bush did not meet the same electoral fate as his father, the Republican Party agenda has been strikingly economic in nature. Of course, this is not surprising if we look at the Reagan years as a model. Reagan pushed his economic agenda at the cost of the social agenda and was rewarded by being made the icon of the modern Republican Party. George W. Bush has largely followed this pattern and continues to rely on the Supreme Court in the same fashion.

A testament to the success of the Republican's court-centered strategy may well be the fact that there appears to be more problematic fissures within the economic conservative wing than between the economic and social wings. As Bush continues to press for making tax cuts permanent despite the growing national deficit, balanced-budget Republicans and tax-cutting Republicans are increasingly at odds over national economic policy.[364] The national judiciary will not be able to facilitate compromise over national budgetary or tax policy so the Party will have to deal with this one on their own.

However, the media discusses this fissure little while continually focusing on the social issues associated with socially conservative Republicans. Media coverage of divisive issues like abortion and tragic stories like Terri Schiavo make more compelling stories than the nuances of national economic policy. By portraying the entire Republican Party as in step with social conservatives, the media perpetuates the misconception that the Republican Party will appoint conservative jurists to the bench who are likely to change American social jurisprudence. While socially conservative

jurists do make it onto the national judiciary, it is in the best interests of the majority wing of the Republican Party to continue to place moderates on the Supreme Court and then decry the Court when it crafts moderate social policy. Judging by past action and the composition of the Republican Party, it is highly unlikely that the Court will be used as a conduit through which to achieve conservative social policy in line with the desires of the social right.

[364] Nagourney, Adam. "Squabbles Under the Big Tent." *The Nation* April 3, 2005, 1.

Chapter 5

Rethinking Parties and Courts

Throughout the 20th Century, political parties empowered and entreated national courts to do things the parties could not do on their own. Concurrently, courts stabilized the party-in-power by addressing issues that threatened to undermine partisan unity. Whether the task was to retrench threatened commitments, change social conditions, or facilitate maintenance of the status quo, the courts—particularly the Supreme Court—did what the party-in-power could not do on its own and performed the task without great difficulty. The courts regularly responded to the party with the greatest influence over judicial appointments—usually the party that held power over an extended period of time—by securing the preferences of the party's dominant wing. Members of the dominant wing in government rarely get exactly what they want (e.g., the Court refused to overturn the Hepburn Act of 1906 as certain conservative Republicans desired and it did not overturn *Plessy* as quickly as requested by liberal Democrats), but they frequently get more of their collective preferences by simultaneously avoiding a split in the party and enabling the courts to protect and/or realize their preferred policies. Members of the minority wing can secure limited victories in lower federal courts, although national policy usually runs counter to their preference. However, minority wing lawmakers in government benefit by judicial stabilization of the party through the ability of the party to gain and hold power.

The three case studies show how courts can extend the life of parties-in-power, transform party coalitions to maintain their hold on power, and, in periods of divided government, create conditions ripe for the rise of a new political regime. The multifaceted role courts play in American partisan politics results in relatively healthy

regime politics despite a party system insufficiently strong to carry out the task on its own. This means that courts are an important source of power not regularly associated with judicial power. The nature of this power helps courts extend the life of parties-in-power, which makes the judiciary a vital component of American party government. Thus, scholars of American politics and constitutional theory would be well served to analyze the role courts play in realizing political commitments and partisan visions of the good society. Because the party-court dynamic has important implications for judicial power, party government, and constitutional theory and practice, it is to each of these I now turn.

Judicial Power in Partisan Context

A better understanding of the role courts play in regime politics elucidates the nature of judicial power in American politics. For too long the exercise of judicial review was associated with countermajoritarianism (see Bickel 1986). As the case studies illustrate, the court can exercise its powers of review in ways normatively problematic for democratic theory, yet, not easily categorized as countermajoritarian. Congressional majorities can pass legislation inconsistent with the will of popular majorities that courts subsequently strike down.[365] Parties can use courts to circumvent veto points that consistently protect minority preferences at the cost of majority will.[366] Yet, this is not to say that courts never act in ways that are countermajoritarian. In fact, courts may be predisposed to operate in countermajoritarian ways but do so because they are requested

[365] See Chapter Four.
[366] See Chapter Three.

to fill that role by well-positioned political coalitions.[367] Rather than cling to normatively and empirically problematic labels, judicial scholars must scrutinize political coalitions and the role they ask courts to play within political regimes.

If we shift our analysis from asking "what do courts do" to asking "what do political regimes ask courts to do," then we expose the layers of judicial power. First, the judiciary has formal *institutional powers*. Courts regularly assert authority through statutory interpretation and constitutional review. Courts also have the power to remedy harms against the state and private citizens. Such formal institutional powers are relatively uncontroversial as either empirical or normative propositions.[368]

Second, we can conceptualize judicial power through the lens of political regimes. Courts gain power by enabling political parties to stabilize and/or transform their national coalitions. Prolonged periods of partisan stability can result in a political order. In other words, courts exercise a sort of *regime power* by providing a forum through which crosscutting issues can be resolved with minimal electoral cost to the party-in-power. Most political parties recognize the role the courts play and continue to provide the courts with the institutional powers and autonomy necessary to bring about this stability. Parties grant courts varying degrees of political space in which to make policy whenever operation within that political space jeopardizes the unity of the party. Judicial scholars conceptualize the Rehnquist Court as particularly "active" in large part because the Republican Party (and, perhaps, the Democratic Party as well) requires the Court to handle a wide swath of social issues that would otherwise divide the Party. Thus, the

[367] See Chapter Two.
[368] For a recent normative examination of judicial review, see Mark Tushnet, *Taking the Constitution Away*

Rehnquist Court's significant *regime power* flows from the Republican regime's inability to manage a large dimension of salient policy-making space. Regimes depend on the courts and courts enjoy power as a result.

Third, the courts enjoy a *functional power* derived from what the regime asks the courts to do. In other words, when parties-in-power need courts to take on issues that cut against their national coalition, the judiciary develops policy within that policy dimension. This means that the courts will be directly involved in any of the following: defining institutional powers, protecting old political commitments, extending civil rights and liberties to certain pivotal groups, maintaining the status quo, and numerous others. The case studies above show the courts—particularly the Supreme Court—exercise significant policy-making authority over highly salient issues and parties-in-power welcome it. When parties empower courts to hear certain issues or defer such issues to the courts, the national judiciary derives policy-making authority as a function of its role within the political regime. Of course, whenever the courts operate as a policy-making institution, American constitutional and/or political development is affected. Choices on one dimension preclude alternative paths and dimensions (see Silverstein *forthcoming*) so we cannot understand political and constitutional development without understanding how courts exercise this functional power within the wider political order.

Looking at judicial power through the lens of regime politics adds dimension to judicial review as a constitutional enterprise. As the case studies reveal, the ordering of institutions within a constitutional system creates recurrent patterns in politics. Political outcomes are by no means predestined but the likelihood that certain institutions will

attempt to resolve certain types of policies (e.g., policies that cut against the party-in-power's national coalition) is assured by features of the American constitutional order. First-past-the-post voting districts tend to create two-party systems and two-party systems depend on large (often heterogeneous) coalitions to secure political victories. Reducing internal tension within a party helps it compete for and hold national power. Diffusing such tension is facilitated by the existence of auxiliary policy-making institutions, such as the courts. As the case studies show, this pattern was present throughout the 20th Century. Other scholars have observed instances of it in 19th Century America (Graber 1993; 1998), which may indicate that regimes have relied on the national judiciary to stabilize their national coalitions throughout American political history.

Moreover, placing the exercise of judicial power in the context of regime politics reinforces the relative consistent exercise of the power despite the fact that the courts engage in distinct forms of policy-making during different historical periods. The dominant wing of the party-in-power tends to secure preferred policies by enabling and utilizing judicial power. Of course, the results of such judicial policy-making can be strikingly different in outcome and ideological direction. Hardline conservatives used the courts to temper progressive regulatory schemes throughout the Progressive Era while liberal New Dealers depended on the courts to bring about progressive change. Such policy-making looks incongruous if examined in isolation but, when viewed through a longitudinal perspective that accounts for institutionally motivated patterns, the nature of the policy-making looks similar.

Finally, this analysis indicates that judicial power is less vulnerable than certain scholars imply.[369] Since political regimes depend on the courts for stability, certain intra-party coalitions will be invested in judicial power. Whenever the exercise of judicial review serves the interests of pivotal members of the political regime, the courts will enjoy protection from those who seek to reduce the power of the courts. Thus, the Progressive Era saw hundreds of proposals to reduce the authority of the national judiciary—many of them coming from the Republican Party—but these assaults never materialized into law because of strong conservative resistance. Rather, the Republican Party eventually bestowed the Supreme Court with greater authority and autonomy through the Judges' Bill of 1925. So long as the courts buttress the stability of parties-in-power the way they have for much of the 20th Century, robust judicial power will continue to be a feature of American politics.

Party Government

Examining the dynamic between parties and courts also explains features of party government otherwise inaccessible. As E.E. Schattschneider famously quipped, " . . . political parties created modern democracy and modern democracy is unthinkable save in terms of parties" (1942, 1). American democracy depends on political parties as the primary vehicle for collective political action in the electorate and in government. Parties establish national priorities, advance policy commitments, and serve as a vital link

[369] Scholars have noted that Supreme Court justices act strategically when they move off their ideal point and take a position at which other institutions will be indifferent. Such moves are motivated by a desire to minimize the ideological difference between their preferred policy and the policy actually created *and* the desire to protect the institutional integrity of the Court (see Epstein and Walker 1995, 315-46).

between the people and lawmakers. Parties can also create "a certain unity of control" over the national government (Croly 1914, 346) and have successfully done so throughout much of the 20th Century. Yet, in order for political parties to be successful in achieving even a small portion of their vision for a good society, they must remain unified. Since the natural tendency of national parties is to unite coalitions with competing or inconsistent preferences, maintaining party unity can be highly elusive. By using courts in the manner illustrated in the case studies, parties-in-power have successfully found a way to extend the life of their respective coalitions.

Scholarship on political parties and political regimes tends to neglect any role for the courts. Yet, the courts serve a vital role by enabling political parties to hold power longer than would otherwise be possible. Adding to the importance of the courts in the life of a political regime, the courts can serve as alternative policy-making institutions when it becomes necessary to circumvent well-placed opposition coalitions. The New Deal/Great Society used the courts as the primary vehicle for civil rights policy as it was acceptable—or less offensive—to both wings of the Party. Judicial victories also aided the liberal wing by binding African American voters to the Democratic Party. In this way, courts enable parties-in-power to do that which they otherwise could not do. The court's role in stabilizing parties is rarely associated with the judicial function or judicial power but, absent the courts, it is difficult to see how a party could hold power long enough to realize much of its political commitments.[370]

[370] The inability of the Republican Party to survive the tariff issues in the early 1910s resulted, largely, from the absence of an alternative institution to resolve the issue. The courts were ill-suited to developing national tariff policy and, as such, the Republican Party dealt with it on its own. The resulting electoral defeat testifies to the importance of the courts in diffusing intra-party tension.

Of course, minority wing preferences tend to suffer when the Supreme Court acts to secure dominant wing preferences as national policy. As such, while making policy on a highly divisive issue can stabilize the party-in-power, the Court is not simply propping up one party to the disadvantage of the other. Rather, by transforming political questions into legal ones, the courts end up making policy and, often, taking the blame for controversial policy outcomes. Thus, the tendency is for minority wings of parties-in-power to view the courts with disdain. Both insurgent Republicans in the Progressive Era and socially conservative Republicans at the end of the 20th Century actively lobbied for reducing judicial power despite their respective parties appointing the majority of federal judges during these periods. Hostility toward the Supreme Court grew among southern Democrats once the Court began to dismantle Jim Crow institutions in the South. Yet, members of the minority wing, whether in government or in the electorate, are extremely slow to defect from their party when the courts play the primary role in formulating policy that cuts against their preferences. For example, social conservatives in the Republican Party turned out in record numbers to support George W. Bush in the 2004 presidential election despite significant loses on many of their most valued issues.

As the recent 2004 election shows, the ability to hold power over an extended period or to create conditions ripe for such an occurrence should not be taken lightly. Political parties that hold power over a series of elections can significantly alter the direction of American public policy and successfully promulgate new constructions of constitutional meaning. With its recent success, the Republican Party altered American fiscal policy in ways that benefit corporations and the upper socio-economic strata. The

previous Democratic political order did just the opposite. In both cases, absent a loyal minority wing, the political party would not have succeeded in altering preexisting economic policy. The New Deal regulatory state has been reduced and replaced with a global free market paradigm because social conservatives remain in the Republican Party, not because they necessarily endorse the benefits of free markets. In fact, there is reason to believe that many members of the conservative right would be better served through greater governmental regulation of the national economy.[371] However, the social right's preoccupation with the courts and judicial policy-making seemingly distract it so that social conservatives remain in the Party.

Situating judicial decision-making in light of party politics elucidates intra-party conflict and the mechanisms employed to control competing coalitions. Studying political orders without examining judicial function within a political order misses the fundamental importance courts play in regime politics. The courts not only play a role in developing public policy but they also can extend the life of a party-in-power so that it can further realize and entrench its political commitments. Applying a regime politics perspective reveals the impact of judicial decisions on political coalitions and, often, reveals where the true focus of the party-in-power lies.

Constitutional Theory and Constitutional Practice

The case studies reveal a cautionary tale regarding constitutional theory. Legal scholars frequently theorize that the nation would be infinitely better off if the Supreme

[371] Members of the "evangelical left" started making this argument during the 2004 election. The lack of electoral response may indicate that evangelicals are unsympathetic to the argument, but this remains to be

Court would maintain the commitments of the Warren Court and, to those ends, provide judges with better interpretive theories or historical narratives through which to achieve those ends. More recently, suggesting alternatives to judicial supremacy came into vogue. Departmentalism (Burt 1992; Alexander and Schauer 1997) and/or popular constitutionalism (Kramer 2004; Tushnet 1999) are the trendiest alternatives to judicial supremacy currently promulgated. These arguments are normatively sophisticated and intriguing propositions.[372] However, as attractive as these theories are from a normative perspective, they seemingly overlook that Supreme Court decision-making flows largely from grants of authority by political institutions (see Landes and Posner 1975; Graber 1999; Whittington *forthcoming*). As illustrated above, political parties rely on the courts because first-past-the-post electoral districts in the United States make small defections from heterogeneous parties detrimental to electoral success. Thus, the Constitution's incentive structure inclines toward judicial empowerment. Rather than attack judicial power, scholars and practitioners would be better served by pushing institutional reform designed to better promote deliberation by political officials. If electoral incentives favored addressing highly controversial political and constitutional issues, then ambitious office-seekers and -holders would more willingly seek out these issues rather than push them onto the courts.

In addition, forms of constitutionalism that place greater emphasis on dialogue—whether among institutions or by the polity—may be better served by making the American electorate aware of how political parties can undermine preferences through

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seen.

[372] Admittedly, I am sympathetic to these arguments particularly as they pertain to enhanced constitutional

the courts. Parties can play an important role in American constitutionalism but only if party members willingly recognize that the judicial strategies advocated by their party may signal a lack of commitment to certain preferences held by minority coalitions within the Party. The state of coalition politics in the United States is such that political coalitions regularly place their faith in the courts to secure their preferences. However, unless that coalition occupies a unique (dominant) position within the party-in-power, such faith goes largely unrewarded. Minority coalitions in the party-in-power might be better served by leaving the party rather than continuing allegiance to a party that cares little for its preferences. Coalitions testing their worth in a competitive political market system can gain greater voice in constitutional debate if parties must bid for their loyalty through tangible political victories.

On the flip side, should American party politics continue as is, parties-out-of-power would do well to recognize the tensions inherent in the opposition party. For example, the current Democratic Party expends significant political capital protecting against arch-conservative jurists. However, making political stands on judicial issues takes energy and resources away from resisting other policy initiatives. So, marshaling the necessary resources to defeat the likes of Miguel Estrada and Charles W. Pickering, Sr. takes political capital away from resisting the conservative economic agenda. This strategy of resistance is likely unnecessary given that it is in the best interest of economic conservatives to maintain the social status quo and key Republican lawmakers will likely push for moderates on the Supreme Court, particularly when the median justice's seat is

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discourse throughout the polity.

vacated.[373] Even if social conservatives succeed in appointing a sympathetic jurist to the Court, socially conservative jurisprudence will likely cause a shift in the current partisan alignment so as to bring to power a socially liberal regime. Either way, it is in the long term interest of the party-out-of-power (the Democratic Party) to be attentive to the nature of intra-party tension in the party-in-power (the Republican Party).

By focusing on the role the courts play in constitutional interpretation and largely ignoring how "normal" politics informs constitutional meaning, constitutional theorists have underappreciated the impact of political parties on constitutional politics. In fact, constitutional theory largely ignores extra-constitutional institutions—those institutions not constructed through the constitution-making process. This oversight is not terribly surprising given the greater constitutional authority vested in institutions like the presidency, Congress, and the judiciary. However, if constitutional theorists began to look at the development of political institutions and account for how and why these institutions changed over time and what role they serve in constitutional politics, then theorists will be better equipped to address the appropriate roles of institutions, like political parties, within a constitutional order and the best way to achieve their vision of the good society.

In the context of the American Constitution, the inner workings of political parties help determine the distribution of ideological preferences on the federal bench (especially on the Supreme Court), what types of cases the courts will be asked or empowered to hear, and the degree of policy-making space afforded the courts. Not accounting for the

[373] Senator Arlen Specter (R-PA), chair of the Senate Judiciary Committee, espoused such a philosophy, sparking strong protest from social conservatives. See Hulse, Carl. "Abortion Remark by GOP Senator

importance of parties (and other institutions) facilitates the erroneous assumption that the courts act largely independent of the political order. Accounting for how courts consistently make policy on those issues that create the greatest intra-party tension within the party-in-power enables political strategists and constitutional theorists to develop strategies for protecting jeopardized constitutional commitments. In addition, political coalitions with constitutional aspirations different than those of their current political allies can evaluate their chances of succeeding in changing constitutional meaning through the courts. A greater emphasis on the roles various institutions play in developing constitutional meaning will help bridge the gap between constitutional theory and constitutional practice.

Parties, Courts, and American Democracy

The dynamic between parties and courts has mixed implications for democratic outcomes. At times, courts can act to overcome well-placed minority coalitions that obstruct change. The Supreme Court served in this capacity throughout the 1950s and early 1960s when it pushed national majority preferences on racial equality over local (southern) preferences. Yet, the Court does not always act in accordance with national preferences. When a party-in-power must compromise on preferred policies to maintain party unity, the dominant wing of the party empowers the courts if they believe the majority of justices on the Court sympathize with their values and preferences. For example, hardline Republicans compromised with progressive insurgents only when regulatory legislation contained statutory language that guaranteed judicial oversight.

Puts Heat on Peers." *New York Times* November 6, 2004, 1.

Legislative compromise created sufficient incentive for progressives to remain in the Party despite continued frustration with achieving their vision of a progressive regulatory state.

In other words, courts are neither inherently majoritarian nor countermajoritarian. Judicial action frequently functions concordantly with partisan action (or inaction). While courts may promote political participation and pluralism (Peretti 1999), they do not always function to promote such democratic traits as Chapter 2 shows.[374] Moreover, while we may want courts to act when other institutions refuse to act (Graber 1993), action is no guarantee that judicial policy-making will conform to majoritarian preferences. In fact, it may promote a regime that realizes preferences not held by a majority of American voters.

The difficulty in analyzing the role of the national judiciary is that its role is not static. The courts will operate as coordinate institutions within the larger political regime. Scholars have recognized this relationship by elucidating how parties can use courts in different political settings (see Gillman 2002; McMahon 2004; Whittington 2001; Graber 1998) and this study extends the analysis of the party-court dynamic through a longitudinal perspective. However, the literature to date is merely the tip of the proverbial iceberg. Scholars concerned with the functionality of American democracy will find employing a regime politics approach highly beneficial when analyzing how non-democratic institutions act within a democratic political order. By employing such an approach, scholars can detail the conditions under which institutions with larger

[374] Keith Whittington makes a similar observation, noting how courts sometimes foreclose political debate and dialogue when it constitutionalizes certain policies (2004).

democratic deficits act to secure majority preferences and when they act in ways that privilege the values of minorities. Courts likely protect both the interests of majorities and minorities simultaneously, simply on different policy dimensions. By examining intra-party tensions, we will gain a better appreciation for why the courts act one way on one set of issues and the opposite way on another. Such seemingly contradictory action becomes clear when we account for the political and ideological tensions inherent in political parties and the regimes they attempt to create.

Finally, the American polity would be better served if it began to evaluate Supreme Court decision-making in light of the wider political order. Too often, the American people seemingly assume that the courts act as disinterested, apolitical decision-makers. But judges clearly make some decisions based on ideological preferences (Segal and Spaeth 2002; Perreti 1999). While such preferences do not predetermine case outcomes, they are useful for evaluating political interests served by judicial decisions. Liberal Republicans during the Progressive Era would have benefited from examining Supreme Court rulings in light of their own political allegiances. Social conservatives today continue to give their loyalty to a party that channels social issues through the courts, which consistently renders center-left social policy. Clearly, the courts operate in ways that run counter to the preferences of minority coalitions within the party-in-power. The persistence of voting for parties that appoint judges unsympathetic to minority wing preferences is a curious, yet, persistent feature of American politics that goes largely ignored. Considering what courts do as a function of party politics can result in reconsidering political alliances. Regardless of the results, the

ability to conceptualize judicial action as derivative of party politics will enable political coalitions within the polity to evaluate their chances of success through current arrangements. Democratic practice will be better served through consistent evaluation of party commitments and court action.

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