"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court

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The exercise of constitutional review by an independent and active judiciary is commonly regarded as against the interest of current government officials, who presumably prefer to exercise power without interference. In this article, I advance an "overcoming obstructions" account of why judicial review might be supported by existing power holders. When current elected officials are obstructed from fully implementing their own policy agenda, they may favor the active exercise of constitutional review by a sympathetic judiciary to overcome those obstructions and disrupt the status quo. This provides an explanation for why current officeholders might tolerate an activist judiciary. This dynamic is illustrated with case studies from American constitutional history addressing obstructions associated with federalism, entrenched interests, and fragmented and cross-pressured political coalitions.

How do we account for judicial activism in a context in which judges are assumed to be favorably disposed toward a governing coalition's political agenda? It is relatively easy to understand why an institution like judicial review might be normatively appealing in the abstract and might be inserted into a constitutional scheme by politically detached draftsmen, for whom constitutional review might serve as an attractive enforcement mechanism to constitutional precommitments (Ackerman 1991; Elster 2000).[1] Similarly, current government officials who are fearful of losing power may attempt to build up judicial authority and entrench their allies in the courts in the hopes that judicial review will be used against future government officials (e.g., Ginsburg 2003; Moravcsik 2000; Ramseyer 1994). Government officials who expect to retain power, however, are less obvious supporters of constitutional review. Instead of building up judicial authority, they are likely to subvert it, and active judicial review may simply be a short-lived, transitional phenomenon that will be snuffed out once a political coalition consolidates its power over the government (Dahl 1957). Although a court with an accumulated stockpile of political capital with the general public might nonetheless be able to overcome hostile government officials in particular decisions (Caldeira 1986; Vanberg 2001), it seems likely that in time elected officials would be able to bring the judiciary into line. Does the judiciary sink into passivity at that point?

Though federal judges are protected by such securities as lifetime tenure and guaranteed salaries from political retaliation for their decisions, the judiciary as a whole is still vulnerable to politics (Ferejohn 1999). Most routinely, the political appointments process creates regular opportunities for elected officials to bring the Court into line with political preferences (Dahl 1957; Stimson, Mackuen, and Erikson 1995). Despite the life-tenure of judges, a variety of legislative sticks are available to punish the Court for politically unpopular decisions. Court-curbing actions, by constitutional amendment, statute, or impeachment, have been frequently threatened over the course of American history, and often that threat has been sufficient to alter judicial behavior (Epstein and Knight 1998; Nagel 1965; Rosenberg 1992). Government officials can also limit the power of the Court by simply evading judicial edicts, which highlights the vulnerability of a judiciary that lacks, as Alexander Hamilton promised, both the executive sword and the legislative will (Hamilton 1961; Rosenberg 1991; Vanberg 2001).

Even in the American context, the maintenance of the judicial authority to interpret the Constitution and actively use the power of constitutional review is an ongoing political project. For "judicial activism," in the sense of the frequent constitutional invalidation of legislation and executive action, to be sustained over time, the courts must operate in a favorable political environment.[2] Judges must find reason to raise objections to government actions, and elected officials must find reason to refrain from sanctioning judges for raising such objections.

I consider the conditions under which judicial activism by a relatively friendly court may emerge and be sustained.[3] Given the global rise of the power of constitutional review and the persistent activism of the U.S. Supreme Court, it is important to understand the political supports for the exercise of judicial review.

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[1] Judicial review may also be a useful device for making "credible commitments" by current government officials to other powerful actors who would otherwise threaten their power (Landes and Posner 1975; Moustafa 2003; Weingast 1997).

[2] Although "judicial activism" is an ambiguous term of limited general utility, I employ it here in the specific sense of invalidation of legislative and executive action (see also Caldeira and McCrone 1982). As such, it connects with popular discourse about the courts and is consistent with a prominent dimension of common usage.

[3] James Rogers (2001) has likewise suggested an informational theory of judicial review by which legislators might rely on sympathetic courts to exercise the power of judicial review to correct inadvertent constitutional errors. It is unclear how politically important such a judicial function might be in practice (Whittington 2003), but it could work in complement with the friendly judicial review laid out here.

The existing normative and empirical literature on judicial independence and constitutional review largely emphasizes how judicial activism emerges when the judiciary is relatively unfriendly to the current legislative majority.[4] An emerging literature is concerned with showing how Supreme Court doctrine fits within goals and tensions within the broader political regime, however (e.g., Gillman 2002; Graber 1993; Pickerill and Clayton 2004; Tushnet Forthcoming). This emerging literature has observed that the exercise of judicial review often does not fit the "countermajoritarian" framework, but efforts to develop explanations for the emergence of judicial review are still in their initial stages. Here I suggest how structural characteristics of political systems such as the United States encourage cooperation between judges and political leaders to obtain common objectives. In particular, the Court assists powerful officials within the current government in overcoming various structural barriers to realizing their ideological objectives through direct political action. After sketching the logic of judicial review as a solution to the structural obstacles to direct political action, I consider three such obstacles in American politics—federalism, entrenched interests, and fragmented political coalitions—and illustrate how significant episodes of judicial review in the past have been consistent with this logic.

JUDICIAL REVIEW BY AN ALLIED COURT

The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution. This delegation aspect of judicial review drives the entrenchment thesis, as current political majorities attempt to insulate their policy preferences from future political majorities by empowering sympathetic judges who will endure through the electoral transition. This is only one of the potential uses to which such an institution may be put, however. Political majorities may effectively delegate a range of tasks to a judicial agent that the courts may be able to perform more effectively or reliably than the elected officials can acting directly.

It is well recognized that explicit or implicit "delegation" of political tasks to differently situated institutions and actors can be valuable in a range of political contexts (see generally, Voigt and Salzberger 2002). Legislative party leaders can solve collective action problems and protect the value of party labels (Cox and McCubbins 1993; Kiewiet and McCubbins 1991). Legislative committees can develop expertise and provide the information needed to make good policy (Krehbiel 1991). Central banks and independent judiciaries can allow legislators to credibly commit to policies valued by key constituencies (Landes and Posner 1975; Maxfield 1997). Interest groups can develop cheap information on the performance of bureaucracies or the preferences of the electorate (Hansen 1991; McCubbins and Schwartz 1984). At the same time, it should be recognized that apparent legislative delegations may be better understood as the exploitation of available political resources and legislative weaknesses by other actors, such as executive branch officials, to enhance their own institutional position (Whittington and Carpenter 2003). Thus, we should be sensitive to the interaction between courts exploiting political opportunities and legislative leaders managing political risk.

The courts exercising a power of judicial review may be a vehicle for overcoming political barriers that hamper a governing coalition. There are two preconditions for this possibility to be reasonable. The first is that courts often be ideologically friendly to the governing coalition. Political majorities are unlikely to benefit from supporting courts that are ideologically divergent from them and are unlikely often to be able to work in tandem with them to achieve common political goals. There are reasons to believe that this precondition is often met in the American context, with the selection of individual judges (Dahl 1957), the departure of current judges (Spriggs and Wahlbeck 1995), the expansion of the judiciary as a whole (Barrow, Zuk, and Gryski 1996; De Figueiredo and Tiller 1996), and the structure of court jurisdiction (Gillman 2002) all facilitating the creation of a sympathetic judiciary. This is not to say that presidents and parties are never surprised by their judicial appointments or by judicial decisions, but merely that the Court often shares the constitutional and ideological sensibilities of political leaders.

The second precondition is that judicial review is actually useful to current political majorities. The usefulness to legislators of other judicial powers, such as the power to interpret statutes and enforce the law, is fairly evident. The utility of the power of judicial review to current legislators is less immediately evident, but it is easy to see once we note that judicial review may be used to void statutes passed by previous governing coalitions, thus displacing the current legislative baseline. When governing coalitions are unable or unwilling to displace the legislative baseline themselves, then the courts may usefully do this work for them. Those invested in the status quo have less to gain from judicial review (Graber 2000), and so judicial review is likely to be more useful to some political coalitions than others, depending in part on their substantive agenda and in part on the extent to which they have been able to define the status quo. Nonetheless, as is illustrated in the following, it is unrealistic to assume that only political actors currently out of power stand to benefit from an active judiciary.

We can expect that there will be additional supports for the active exercise of judicial review by an ideologically friendly judiciary to the extent that there are political barriers that hamper the realization of a governing coalition's agenda. In essence, allied elected officials would stand to benefit from an active judiciary if the ability of those elected officials to reach their preferred policy position on their own is limited.

[4] Even those who tend to assume that "successful constitutional judicial review" requires the acceptance of it by "other powerful political actors" nonetheless sometimes portray judicial review as itself undesired, "as an inevitable cost of getting [something else that] they want from courts" (Shapiro 1999, 210).

The resort to judges by displaced elected officials or minority interests is merely a special case of a larger class of cases in which political actors allied with the courts cannot control the legislative baseline. Political leaders who are still part of the governing coalition may nonetheless find their ability to implement their preferred policy hampered by difficulties other than simple electoral defeat. In a federal system, for example, ideological and partisan opponents may control policymaking jurisdictions that are insulated from direct national legislative control. In the context of heterogeneous and cross-pressured political coalitions, political leaders may be unable to mobilize legislative allies behind a given policy that nonetheless is viewed sympathetically by judicial allies.

Political leaders in such a situation will have reason to support or, at minimum, tolerate the active exercise of judicial review. In the American context, the presidency is a particularly useful site for locating such behavior. The Constitution gives the president a powerful role in selecting and speaking to federal judges. As national party leaders, presidents and presidential candidates are both conscious of the fragmented nature of American political parties and sensitive to policy goals that will not be shared by all of the president's putative partisan allies in Congress. We would expect political support for judicial review to make itself apparent in any of four fields of activity: (1) in the selection of "activist" judges, (2) in the encouragement of specific judicial action consistent with the political needs of coalition leaders, (3) in the congenial reception of judicial action after it has been taken, and (4) in the public expression of generalized support for judicial supremacy in the articulation of constitutional commitments.

Although it might sometimes be the case that judges and elected officials act in more-or-less explicit concert to shift the politically appropriate decisions into the judicial arena for resolution, it is also the case that judges might act independently of elected officials but nonetheless in ways that elected officials find congenial to their own interests and are willing and able to accommodate. Although Attorney General Richard Olney and perhaps President Grover Cleveland thought the 1894 federal income tax was politically unwise and socially unjust, they did not necessarily therefore think judicial intervention was appropriate in the case considered in more detail later (Eggert 1974, 101–14). If a majority of the justices and Cleveland-allies in and around the administration had more serious doubts about the constitutionality of the tax, however, the White House would hardly feel aggrieved. We should be equally interested in how judges might exploit the political space open to them to render controversial decisions and in how elected officials might anticipate the utility of future acts of judicial review to their own interests.

It should be emphasized that the possibility of friendly judicial review does not mean that the Court will simply do the bidding of political leaders. Politicians do not know with certainty what the justices will do if presented with a given piece of legislation. Although presidents may hope that the Court will act in a given case, they may well be disappointed. When signing campaign finance reform, President George W. Bush virtually drew a roadmap of the statutory provisions that he hoped the Court would strike down, but a majority of the justices imposed only modest constraints on the congressional authority to regulate political campaigns (Bush 2002, 517; McConnell v. Federal Election Commission 2003). Striking down that statute might have won favor from the president who had signed it, but the Court merely behaved in the politically conventional manner by lending its legitimacy to the law.

At other times, the justices might well act on their own constitutional understandings even when those understandings are not shared by political leaders or when their expression is not desired. The political logic for such instances of unfriendly and unwelcome judicial review will have to be rather different from those described here. If the obstruction is relatively minor, as when the Court struck down Theodore Roosevelt's Employers' Liability Act as being drafted too broadly while indicating that the law's aims were constitutionally legitimate, then the Court's accumulated political capital might encourage leaders to simply yield to or work around the Court's rules (Employers' Liability Cases 1907; Pickerill 2004). If the obstruction is more serious, as when the Hughes Court blocked major components of the New Deal or when the early Warren Court extended the constitutional protections of suspected Communists, then the political reaction might be more severe and the strength of the Court's diffuse support might be tested. Not all episodes of judicial review take the collaborative form described here. The possibility of friendly judicial review, however, gives political leaders reason not only to tolerate the Court when it behaves in politically difficult ways but also to actively support the Court and help build a reservoir of public goodwill when it behaves in politically useful ways (Whittington Forthcoming).

I consider here three common barriers to successful action on ideological agenda items for political coalitions in American politics: federalism, entrenched interests, and coalitional heterogeneity. It should be noted that particular instances of judicial review may often involve more than one political logic. An instance of judicial review may well involve state action, for example, even when the structural obstacle of federalism is not the central political dynamic involved in the case. In each case, the central logic of the obstacle and how the exercise of judicial review may be useful for overcoming it is sketched out. In each instance, the Court is able to do what national political leaders are either constitutionally incapable of doing or politically unwilling to do themselves, and in doing so the Court runs with rather than against the interests of powerful political officials. An empirical illustration of this dynamic at work in significant episodes in American history is then provided. These cases are clearly not sufficient to indicate how much of the Supreme Court's exercise of judicial review can be explained in these terms, but they are sufficient to suggest that this dynamic has been a notable component of

the political support for judicial review in the United States and has been relevant to substantively important episodes of activism by the Court, thus expanding our conceptual toolkit for understanding the politics of judicial review.

OVERCOMING FEDERALISM

Historically, the federal context has been an important one, perhaps the most important one, for generating support for the power of judicial review from other national government officials.[5] The Supreme Court has won the approval of national officials by imposing their shared constitutional agenda on recalcitrant state actors who hamper national political goals. Over the course of its history, the states have occupied more of the Court's constitutional attention than has the federal government, and the states have been the primary target of the power of judicial review. The Supreme Court has struck down state and local policies in well over 1,100 cases, but has rejected federal policies in just over 150 cases. Many of the most controversial political issues that have come before the Court have done so through cases involving the states. Despite the more recent celebration of the Court's review of Congress in *Marbury v. Madison*, the Court largely built its power of judicial review in the early decades of the U.S. government by acting against the states. Although the Court made few efforts to impose restrictions on the national government until after the Civil War, it struck down an average of six state statutes per decade in the early and mid-nineteenth century. In doing so, the Court found political advantage in upholding national supremacy, resolving interstate disputes, and securing the constitutional understandings favored by national political officials when those national officials could not act directly.

The fragmented American political system provides ample opportunities for national electoral minorities to nonetheless exercise political power. Particularly notable is the American federal structure, which allows ideological outliers and members of the out-party to consolidate and exercise governmental power over limited geographic jurisdictions. The independence of state and local governments from the national government is a source of ferment and resistance within the constitutional regime that national political officials might seek to establish. It was this very difficulty that led many advocates of constitutional reform in the 1780s to seek a stronger national government with a more effective capacity for disciplining subnational political actors (Banning 1995, 43–75; Rakove 1996, 51–53). Although delegates at the constitutional convention were unwilling to give Congress a direct, discretionary veto over state laws, they did draft the supremacy clause making explicit that the Constitution trumped contrary state laws and implying the possibility of national judicial review of state actions.

James Madison was particularly moved, as many were, by the prospect of internecine violence and the promise of the judiciary as a way of securing union and preserving the peace (Deudney 1995; Hendrickson 2003). In the *Federalist*, Madison (1961, 245, 246) held up the Supreme Court "as the tribunal which is ultimately to decide" the limits of state and federal power. Every effort would be made to ensure the Court's impartiality and independence in resolving such issues, but regardless "some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact." Decades later, Madison continued to affirm those early views despite the Court's doctrinal missteps. At least in those cases "not of that extreme character" the Court was "the authority constitutionally provided for deciding controversies concerning the boundaries of right and power" (Madison 1910, 9: 342–43). The alternative to such a "peaceful and effectual" system, he warned, was likely to be "the sword" (Madison 1910, 9: 348).

In this regard, John Marshall very much shared Madison's beliefs on the special role of the Supreme Court within the constitutional system. In his *McCulloch* decision in 1819, the Chief Justice observed that the controversy over Maryland's effort to use its taxing power to discourage the operation of the Bank of the United States within its borders pitted "a sovereign state" against the "legislature of the Union" and involved the "most interesting and vital parts" of the Constitution affecting the "great operations of the government." The issue, Marshall intoned, must be decided and must be "decided peacefully." If that peaceful settlement were to occur, "by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty" (McCulloch v. Maryland 1819, 400, 401). As the U.S. Attorney General requested in his arguments before the Court, the justices struck down the Maryland law. Marshall (1969, 212, 208) later elaborated in a pseudonymous defense of his opinion, for judges alone is "their paramount interest . . . public prosperity." Indeed, "if we were now making, instead of a controversy, a constitution, where else could this important duty of deciding questions which grow out of the constitution, and the laws of the union, be safely and wisely placed." The Court was not the first to interpret the Constitution's relevance to the Bank of the United States, but Marshall insisted that it should be the last. Although some Jeffersonians were unhappy with some of the language in Marshall's opinion, it echoed prominent voices among the National Republicans who dominated national politics after the War of 1812 and both former-president James Madison and the sitting administration of James Monroe quickly endorsed the decision and encouraged general compliance (Graber 1998, 256–57; Warren 1926, 1: 507–12). Though often remembered now as a deferential decision upholding congressional authority, in the context of the time *McCulloch* was decidedly activist, but the activism was directed against the states on behalf of the

[5] By explicitly laying aside judicial review of state legislation, Dahl (1957) made the Court seem far more passive than it has in fact been (Casper 1976). As discussed here, incorporating federalism into the political story of judicial review helps show how an active Court is still consistent with a politically responsive Court.

constitutional commitments of the national coalition (Whittington 2001a).

William Wirt, Monroe's respected attorney general, was an active force in building support for the Court during this period. Writing to President Monroe, Wirt dismissed the "few exasperated portions of our people" who, responding to "local irritations," favored "narrowing the sphere of action of that Court and subduing its energies." The "far greater number . . . wish to see it in the free and independent exercise of it constitutional powers, as the best means of preserving the Constitution itself." Indeed, Wirt judged that it "is now seen on every hand, that the functions to be performed by the Supreme Court of the United States are among the most difficult and perilous which are to be performed under the Constitution" (Kennedy 1850, 2:134). Arguing before the Court itself in 1824, the attorney general called on the Court to "interpose your friendly hand" and strike down New York's steamship monopoly. "It is the high province of this Court to interpose its benign and mediatorial influence" to "extirpate the seeds of anarchy" and stave off "civil war." So important was the Court in interposing the national will against the states that the constitutional framers would have deserved their "wreath of immortality" if they had done "nothing else than to establish this guardian tribunal, to harmonize the jarring elements of our system" (Gibbons v. Ogden 1824, 229). The Court acceded to the administration's request.

Even after the threat of intergovernmental violence receded, national officials have been no less concerned with curbing constitutional dissenters among the states. In concert with Republicans and conservative Democrats in Congress and the White House, the Court moved aggressively in the late nineteenth century, for example, to strike down state "legislative barriers ["to the consolidation of the national market"] almost as fast they were erected" (Bensel 2000, 324; see also, Kutler 1968). When the national "corporations uniformly fell back on their constitutional guaranties. . . . [and] sought shelter behind the Constitution of the United States" from the ravages of various locally influential farmers' movements, the Court, after some initial hesitation, stood ready to extend constitutional protection to them (Adams 1875, 413). By the final decades of the nineteenth century, "the legislatures of the States . . . [had been made] subject to the superintendence of the judiciary" as the Court elaborated the economic liberties it found in the Constitution and the Fourteenth Amendment and talk of the "centralizing tendencies in the Supreme Court" was commonplace (Anonymous 1890, 521; Powers 1890, 389).

Although reformist elements made few inroads in the national government during the Gilded Age, they were able to set policy in a number of states. Conservatives called for the courts to intervene to stop the menace. In the preface of his celebrated treatise on the limits of the constitutional authority of the states, the young constitutional law professor Christopher Tiedeman (1886, viii) called for "a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentation of social reformers" who might regulate railroads, impair creditors, or burden out-of-state businesses. This view was echoed across the country by the increasingly organized and vocal legal profession and often found influence in the White House. Even as Populists were ramping up their criticisms of the Court and the power of judicial review, Republican President Benjamin Harrison suggested a centennial celebration of the Supreme Court. The 1890 event, presided over by former President Grover Cleveland and sponsored by the New York Bar Association, featured Justice Stephen Field (1890, 367), who had been selected by his colleagues to deliver the message, emphasizing the "imperative duty of the court to enforce with a firm hand every guarantee of the constitution." A few years later, the American Bar Association organized a nationwide centennial celebration of the appointment of Chief Justice John Marshall to the Court, which became an occasion to celebrate the power of the courts to interpret and enforce the Constitution, the American innovation that threw off "the doctrines and theories engendered by the French Revolution—the supreme and uncontrollable right of the people to govern" (Dillon 1903, 1: xviii).

The Court has often used the power of judicial review to bring the states into line with the nationally dominant constitutional vision. In his comprehensive analysis of state statutes and constitutional provisions invalidated by the Supreme Court from the Jacksonian era through 1964, John Gates (1987, 260) found that the Court was particularly likely to act against "states whose partisan character is different from the dominant majority on the Court or from regions which evidence ideological incongruence between the state and national party organizations." In the late nineteenth and early twentieth centuries, judicial review by a conservative Court was primarily exercised against "regions where populism [and later progressivism] had made strong inroads" (Gates 1992, 67). In the mid-twentieth century, invalidated state laws emerged mostly from Republican states and the ideologically isolated South. As Michael Klarman (1996) and Lucas Powe (2000) have detailed, the Warren Court primarily targeted those states and interests who were resistant to national cultural and political trends. Political losers at the national level can often pursue their constitutional and policy proclivities in various state governments, but throughout its history the Supreme Court, with the encouragement of national leaders, has stood ready to "expand the scope of conflict" by pulling those policies back into the national arena for ultimate resolution (Schattschneider 1975).

OVERCOMING ENTRENCHED INTERESTS

The American political system is fragmented horizontally within governments as well as vertically between layers of government. This fragmentation—across branches, across legislative chambers, and within legislative chambers—frequently obstructs those seeking to alter the status quo. Majority parties in the United States can rarely exercise the kind of policymaking

power exerted by governing coalitions in unitary, majoritarian political systems. Entrenched interests can often frustrate reform and can benefit from a powerful status-quo bias of American lawmaking. Coalition leaders who might prefer to embark on an ambitious programmatic agenda may only achieve partial success in the legislature. Just as presidents sometimes turn to their unilateral powers to make policy initiatives in order to circumvent legislative obstructions, so the courts can be a useful alternative vehicle for reform even for those who are part of the majority coalition. Clearly this happens in the statutory realm (Frymer 2003; Melnick 1994), but it can happen in the constitutional realm as well. In what Michael Klarman (1997) characterizes as "majoritarian judicial review," the judiciary can assist members of the political majority in dislodging entrenched political actors and interests. The same gridlock that hampers positive action by elected officials, however, also constrains their responsiveness to judicial decisions, facilitating judicial action that can count on the backing of well-placed elected officials.

The famed legislative apportionment decision of 1962 is an example of the Court cutting through the "political thicket" (Colegrove v. Green 1946, 556). Chief Justice Earl Warren (1977, 306) later regarded *Baker v. Carr* as "the most important case of my tenure on the Court." As governor of California, Warren (310) had contributed to the preservation of malapportioned and gerrymandered legislative districts, which he later admitted "was frankly a matter of political expediency." "But I saw the situation in a different light on the Court. There, you have a different responsibility." From that perspective, he came to believe that he "was just wrong as Governor" (Schwartz, 411). The Court's willingness to intervene in the field was an abrupt departure from the traditional understanding of apportionment being a legislative and deeply political prerogative, but it was a departure that was being urged on the Court by programmatic liberals in and around the White House. Often portrayed as an instance of the Court simply acting on behalf of popular majorities, legislative reapportionment was the specific project of liberal Democrats who had long chaffed at the legislative obstacle posed by entrenched conservatives.

Others on the Court shared Warren's sense of the momentous significance of the case, but for quite different reasons. A bitter dissenter in the case, Frankfurter thought the decision was "bound to stimulate litigation by doctrinaire 'liberals' and the politically ambitious" that could only damage the Court in the long run (Schwartz 1983, 413). His ally John Marshall Harlan agreed and appealed to the swing justices not to open the door to such cases in which partisan politics and interest were so much on the surface. "Today," he noted, "state reapportionment is being espoused by a Democratic administration; the next time it may be supported (or opposed) by a Republican administration. Can it be that it will be only the cynics who may say that the outcome of a particular case was influenced by the political backgrounds or ideologies of the then members of the Court . . . ?" (Schwartz, 414). But Congress, Warren countered, had already pushed the justices into serving as "the referee" in state elections (Schwartz, 416). Justice Tom Clark had initially planned to write dissent in the case, emphasizing that nonjudicial remedies were available to address the malapportioned districts in Tennessee that were immediately at issue. After conducting the research for his opinion, however, Clark had to report to Frankfurter that he had changed his mind and would be joining the majority, "I am sorry to say that I cannot find any practical course that the people could take in bringing this about except through the Federal courts" (Schwartz, 423). Solicitor General Archibald Cox had emphasized the same point in his oral arguments as a friend of the Court, "Either there is a remedy in the Federal court or there is no remedy at all" (Special to *The New York Times* 1961, 25), and it figured prominently in the formal opinions of the justices (Baker v. Carr 1962, 248, 258–59).

The Court's willingness to extend constitutional principles to cover legislative apportionment was welcomed by liberals, who had long favored reapportionment as a means for reaching other programmatic goals but they had been stymied in the political process. The New Deal had pulled urban voters firmly into the Democratic coalition, and the malapportionment of the era overwhelmingly favored more conservative rural voters over more liberal urban voters. After Roosevelt's initial landslide victory, the *Nation* crowed, "For seventy-five years the Republicans have dominated the Northern and Eastern States through rottenborough provisions in the State constitutions. . . . [but now] the day of retribution has come" (Welsh 1932, 523). But the day had not yet come, and a decade later it could only complain, "[T]he present gerrymandering of state districts amounts to supporters of the New Deal being denied equal voice with its opponents" (Neuberger 1941, 127).

Both the constitutional principle and the political consequences of judicial intervention were in line with the liberal regime. In the last years of the Eisenhower administration, Anthony Lewis (1958, 1059) of *The New York Times* had prominently pointed to the federal courts as the only institution politically capable of correcting "this growing evil of inequitably apportioned legislative districts," given the "virtually insurmountable, built-in obstacles to legislative action," and he exhorted the judges to take the lead. "A vacuum exists in our political system; the federal courts have the power and the duty to fill this vacuum." Taking a cue from the Supreme Court's boldness in *Brown*, federal district judge Frank McLaughlin, a Truman appointee and former New Deal congressman, declared that legislative inaction on reapportionment in Hawaii had gone on for too long; "The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a main-spring of representative government is impaired" (Dyer v. Abe 1956, 226). While still a senator preparing for his presidential run, John F. Kennedy (1958, 37,

38) had published a magazine article calling legislative apportionment "deliberately rigged" and "shamefully ignored"; the only result of "this basic political discrimination," he argued, was the "frustration of progress." By then, the *Nation* could see the possibility of a "civil-liberties battle" over legislative apportionment being fought in the courts, and liberal interest groups such as the AFL-CIO, American Civil Liberties Union, and Americans for Democratic Action were early participants in apportionment litigation (Cortner 1970; Fleming 1959, 26). Even as friends of the Kennedy administration such as James MacGregor Burns (1963, 1) bemoaned the "old cycle of deadlock and drift" that killed "most of Mr. Kennedy's bold proposals," the *Nation* pointed to malapportionment as the linchpin of the conservative coalition's legislative power and encouraged the courts to pull it out (Lindsay 1962, 208). Doing so was expected not only to aid Democrats over Republicans but also pointedly to strengthen the hand of liberal Democrats at the expense of conservative Democrats.

The Kennedy electoral campaign concentrated on the urban vote, and once in the White House, the administration for the first time encouraged the Court to intervene in legislative apportionment in the case of *Baker v. Carr* and voiced its support after that favorable decision was announced. The Kennedy's had forced the reluctant Archibald Cox to argue the case before the Court. Upon release of the Court's decision, Attorney General Robert Kennedy immediately hailed it as a "landmark in the development of representative government" and observed that "the democratic process has been distorted," requiring an "effective judicial remedy" (Special to *The New York Times* 1962, 1). Publicly, the president endorsed the Court's decision and reminded the American people that the administration had in fact encouraged it. "Quite obviously," John Kennedy (1963, 274) asserted, "the right to fair representation and to have each vote counted equally is, it seems to me, basic to the successful operation of a democracy." It had been "impossible for the people involved to secure adequate relief through the normal political processes." Although it was the "responsibility of the political groups to respond to the need," when no relief was forthcoming "then of course it seemed to the Administration that the judicial branch must meet a responsibility." Privately, he elaborated to former Secretary of State Dean Acheson, "the legislatures would never reform themselves and that he did not see how we were going to make any progress unless the Court intervened" (Schwartz 1983, 425). Administration officials subsequently claimed credit for winning the result in *Baker*, and the Kennedy Justice Department remained active in subsequent reapportionment litigation (Sowell 1992, 383–84). Two years later, in another reapportionment case, Harlan complained, "these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act" (Reynolds v. Sims 1964, 624). For sympathetic political leaders, this view might have been current, but it was hardly politically mistaken. From the White House down, liberals turned to the Court in order to displace entrenched conservative legislators who could not be defeated by other means, and they contributed to the political and intellectual climate that would lend support and legitimacy to the Court taking that unprecedented step.

OVERCOMING FRACTIOUS COALITIONS

American political parties are often fractious coalitions, and party unity may come at the price of substantial policy compromise. For the leaders of factions within the governing party, judicial review may offer the means for continuing the intracoalitional disagreement and potentially for undoing the compromises that had to be made in the political and legislative arenas. The backstop of friendly judicial review may smooth the legislative relations of the members of fractious political coalitions while providing some measure of additional security for the central commitments of party leaders and presidents. Judicial invalidation of even recent federal law will not necessarily be unwelcome by political leaders.

One of the more controversial exercises of judicial review in the nineteenth century—the invalidation of the federal income tax in 1895—fits this description. When Republicans controlled the federal government during the Civil War, they adopted many of the economic policies of their Whig predecessors, including the protective tariff. The protective tariff soon became a key plank in the Republican platform, and the Republicans kept duties on imported goods high whenever they held power until their conversion to free trade after the Second World War. The Democrats had been equally committed to free trade since the Jackson presidency, and when Grover Cleveland regained the White House for the Democrats, he railed against the protective tariff as injurious to consumers and an example of government corruption. When the federal government finally fell under unified Democratic control after the 1892 elections, Cleveland made tariff reform the centerpiece of his second term of office.

In the midst of economic depression and growing budget deficits, lowering tariffs was a tough sell. Nonetheless, Cleveland staked the future of the party on it and was personally active in designing the reform and pushing it through Congress. House Ways and Means Committee Chairman William Wilson, working closely with the president, immediately began negotiating tariff reform at the opening of the Fifty-third Congress. Despite presidential support and party ideology, however, many newly elected Democratic congressmen from manufacturing districts were loath to reduce import duties, while still others worried that significant tariff reform would not be consistent with a balanced budget without the addition of some other tax. To calm these latter concerns, Cleveland had endorsed the inclusion of a temporary "small tax upon incomes

derived from certain corporate investments" that could be lifted as soon as the fiscal climate improved, but the administration had earlier rejected efforts to include a personal income tax in the tariff bill (Richardson 1908, 9:460; Summers 1953, 152–86). This was not enough to win a majority, and the Republicans and Populists combined to deny the Democrats a functioning quorum. The Populists and Populist-leaning Democrats in the House were pivotal to the passage of any significant tariff reform, but the price of their cooperation was the inclusion of their income tax measure in the tariff bill. Over Wilson's objections, the Democratic caucus took the deal as the only way to salvage the president's program. Despite delaying motions of New York Democrats, who declared that "we stand here with the patron saints of Democracy, the apostles who have laid down the law of the party for 100 years... [and] declared internal taxation abominable," the majority of the Democrats in the House joined with the Populists to bundle the two measures and pass the whole (*The New York Times* 1894, 6). The situation was even worse in the Senate, where even more compromises had to be made on duty rates to keep a majority together.

President Cleveland was hardly satisfied with the results of the legislative negotiations. Despite his own misgivings, he was convinced that the bill "is so interwoven with Democratic pledges and Democratic success that our abandonment of the cause of the principles upon which it rests means party perfidy and party dishonor" (Cleveland 1933, 355). Although the amended bill fell well short of what they had wanted, Cleveland (357) rationalized to Wilson, "You know how much I deprecated the incorporation in the proposed bill of the income tax feature. In matters of this kind, however, which do not violate a fixed and recognized Democratic doctrine, we are willing to defer to the judgment of a majority of our Democratic brethren. I think there is general agreement that this is party duty," a duty that was all the more pressing when it was recognized that "a quick and certain return of prosperity waits upon a wise adjustment" to the tariff. Even though the president had strained to ensure the passage of the bill into law, he could not bring himself to sign such inadequate legislation. The Tariff Act of 1894 became law without the president's signature just a few months before the midterm election, but it was not enough to prevent the Democrats from being routed in both chambers of Congress. Months before the Republican majorities assembled in the Fifty-fourth Congress, however, the Supreme Court struck down the income tax provisions of the Tariff Act. When the Republicans regained the White House two years later, tariff rates were again adjusted upwards.

The income tax was harshly denounced as a purely sectional and class measure, and indeed it was. Nebraska Representative William Jennings Bryan, the emerging leader of the populist wing of the Democratic Party, was a primary sponsor of the amendments, and its support came almost exclusively from legislators from the South and West. The 2% tax on all personal income over $4,000 was a significant symbolic shift from the traditional sources of federal revenue and was expected to fall primarily on the residents of only four states (New York, New Jersey, Pennsylvania, and Massachusetts). Two of these states (New York and New Jersey) happened to also be important swing states in Gilded Age presidential elections, and New York in particular was essential to Democratic Electoral College calculations. It was the centrality of New York that led to reformist New York Governor Grover Cleveland's own Democratic presidential nomination in 1884, 1888, and 1892 and the integration of the Mugwumps (a breakaway group of Republican professionals and businessmen centered in New York) into the Cleveland coalition (James 2000, 42–56). Democratic New York Senator David Hill warned his populist colleagues, "The times are changing; the courts are changing, and I believe that this tax will be declared unconstitutional. At least I hope so" (*Congressional Record* 1894, 6637). The business community in New York was apoplectic over the income tax. Although some in the New York City press labeled it a Cleveland tax, his allies defended the president as an opponent of the tax and a victim of the populists (*The New York Times* 1896, 4).

Immediately upon its passage, a group of New York businessmen sponsored a collusive suit between a company and a stockholder to put the constitutionality of the income tax before the Court. The administration dutifully defended the constitutionality of the tax, calling on the Court to respect Federalist-era precedent and the appropriate sphere of legislative discretion over the proper exercise of the taxing power (Pollack v. Farmers' Loan and Trust 1895a, 502, 513). But the Court first struck down the tax on income from real estate and state and local bonds, and a month later a narrow majority struck down the rest. Cleveland-appointed Chief Justice Melville Fuller wrote both opinions striking down the provisions as violating basic constitutional efforts "to prevent an attack upon accumulated property by mere force of numbers" (Pollack v. Farmers' Loan and Trust 1895a, 583). Among the dissenters, Republican John Marshall Harlan was offended not least by the Court's willingness to undo the legislative compromise while leaving the tariff reduction still standing; "every one knows, the act never would have passed" without the income tax provisions (Pollack v. Farmers' Loan and Trust 1895b, 684).

The decision set off great rejoicing in some quarters, as *The New York Times* (1895b, 4) crowed that, although "enacted by a Democratic Congress," the tax was "not Democratic in theory or policy, and... the method of constitutional interpretation that has guided the Supreme Court in destroying them is one of the fundamental doctrines of the Democratic Party. The rendering of this opinion is an event of the utmost importance to that party." The decision also set off enormous criticism of the Court, led by Bryan who routed the Cleveland forces to capture the Democratic nomination the next year, but the president refrained from adding to the din and his loyalists in a breakaway party convention denounced Bryan for his attacks on judiciary (Stephenson 1999, 107–28). When income-tax dissenter Howell Jackson died just months after

the decision, Cleveland replaced him with conservative New York corporate attorney Rufus Peckham, whose nomination the president first cleared through Senator Hill. Of course, if Bryan had won the elections of 1896 the conservative-leaning Court might well have faced some difficulties. As it was, however, both conservative Democrats and the Republicans welcomed the Court's intervention and supported its increasing willingness to exercise the power of judicial review. As the Court prepared for reargument on the income tax, the Cleveland-allied *New York Times* (1895a, 4) expressed the sentiment of the ultimate victors when it editorialized that striking down the tax should be understood less as "magnifying the function of the Supreme Court" than as "resuming a function that had been to some extent abandoned, and with unfortunate, with really deplorable, results."

A century later, President Bill Clinton was similarly forced to swallow a disagreeable amendment in order to get a significant legislative package through Congress, and the subsequent exercise of judicial review can likewise be understood to have been friendly to the sitting administration. In February 1996, the president finally signed the Telecommunications Act, the most important telecommunications reform since the New Deal and an administration priority from the beginning of Clinton's term of office. Clinton (1997, 186) marked the occasion by traveling to the Library of Congress on Capitol Hill to sign a law that he promised would unleash the "free flow of information." He praised its potential "to build our economy . . . , to bring educational technology into every classroom, and to help families exercise control over how media influences their children" (Clinton, 127). The last was in recognition of the legislation's requirement of the "V-chip," the administration's favored technological fix to sex and violence on television. The president did not mention another high-profile element of the law, the Communications Decency Act, which the Justice Department would soon be defending in court.

The Communications Decency Act (CDA) was a last-minute amendment on the floor of the Senate to the telecommunications reform bill. Democratic Senator James Exon of Nebraska had originally introduced the measure in February 1995 to extend "the standards of decency which have protected telephone users to new telecommunication devices" (*Congressional Record* 1995, 3203). As the Senate neared final deliberations on the telecommunications bill, Exon and Republican Senator Daniel Coats offered a revised version of the CDA as an amendment. With lurid photos downloaded off the Internet available on his desk for his colleagues to view, Exon quickly won a lopsided vote to include the CDA in the reform bill. The Department of Justice and the Clinton administration had repeatedly voiced their opposition to the measure, judging it both unworkable and unconstitutional, but as Senator Orrin Hatch complained of the Senate vote, "It's kind of a game, to see who can be the most against pornography and obscenity . . . It's a political exercise" and the administration was unable to prevent its addition to the bill (*Andrews* 1995, D6). The House of Representatives had already passed the reform bill with the administration's preferred indecency provision calling for the Justice Department to study the issue, and Speaker Newt Gingrich had denounced the Exon proposal as unconstitutional. After Senate passage, however, the Clinton administration relented, concluding, according to a senior administration official, "No way are you going to get yourself in a position where the president isn't willing to go as far as a Democratic senator in restricting child pornography on the Internet" in an election year (Weisberg 1996). It was initially hoped that the Senate's amendment would be excised in the privacy of the conference committee, but in a surprise victory for social conservatives the conference narrowly voted to adopt the Senate's language (Bryant and Plotnikoff 1996). At the same time, however, the conference did entrust enforcement to the Department of Justice (rather than the Federal Communications Commission) and provide for expedited judicial review of its indecency provisions. The president announced that he would not allow the inclusion of the CDA to hold up telecommunications reform, and with political attention now focused on it the Justice Department pledged to defend the measure "so long as we can assert a reasonable defense consistent with Supreme Court rulings in this area" (Schwartz 1996, A8).

The courts agreed with what the Justice Department told Congress rather than with what it said in its legal briefs. After a special three-judge panel struck down the CDA as unconstitutional in the summer of 1996, Clinton (1997, 906) affirmed that "I remain convinced, as I was when I signed the bill, that our Constitution allows us to help parents by enforcing this act," but said that the Justice Department would be responsible for a decision as to whether to appeal and trumpeted the administration's support for filtering software to block "objectionable materials." The administration quickly concluded that it would be politically costly not to appeal, however, and the Supreme Court struck down the provision in *Reno v. American Civil Liberties Union* (1997), severing it from the Telecommunications Act. The White House issued a statement reemphasizing its commitment to protecting children from inappropriate material and announcing plans for a conference to study blocking technology similar to the V-chip (Clinton 1998, 829). Exon lamented the Court's decision from his retirement in Nebraska, while his local paper hailed his "good try" (Knapp 1997; *Omaha World Herald* 1997).

OVERCOMING CROSS-PRESSURED POLITICAL COALITIONS

There are some issues that politicians cannot easily handle. For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly

sometimes manage deeply divided or cross-pressured coalitions. When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves. As Mark Graber (1993) has detailed in cases such as slavery and abortion, elected officials may prefer judicial resolution of disruptive political issues to direct legislative action, especially when the courts are believed to be sympathetic to the politician's own substantive preferences but even when the attitude of the courts is uncertain or unfavorable (see also, Lovell 2003). Even when politicians do not invite judicial intervention, strategically minded courts will take into account not only the policy preferences of well-positioned policymakers but also the willingness of those potential policymakers to act if doing so means that they must assume responsibility for policy outcomes. For cross-pressured politicians and coalition leaders, shifting blame for controversial decisions to the Court and obscuring their own relationship to those decisions may preserve electoral support and coalition unity without threatening active judicial review (Arnold 1990; Fiorina 1986; Weaver 1986). The conditions for the exercise of judicial review may be relatively favorable when judicial invalidations of legislative policy can be managed to the electoral benefit of most legislators. In the cases considered previously, fractious coalitions produced legislation that presidents and party leaders deplored but were unwilling to block. Divisions within the governing coalition can also prevent legislative action that political leaders want taken, as illustrated in the following case.

This complicated dynamic can be illustrated through the consideration of Democratic strategies for dealing with the Court and racial civil rights in the 1950s. For Democrats, civil rights fell along the central fault line of their existing legislative and electoral coalition, dividing White Southern Democrats from more liberal Northern Democrats. Both Black voters in the North and White voters in the South were increasingly regarded as potentially pivotal in determining the control of the White House, but they put conflicting demands on presidential candidates. The Court as a policymaker was a potential strategic resource for overcoming a fragmented coalition and achieving policy outcomes greatly desired by some constituents. At the same time, the independence of the judiciary from explicit political control allowed politicians to distance themselves from judicial actions greatly disliked by other constituents, allowing politicians to roll with the judicial punches rather than having to retaliate against them.

For liberals during the Roosevelt and Truman administrations, racial civil rights suffered from a gridlock problem arising from within the Democrats' own electoral coalition. Decades of political neglect and the Great Depression tore the Black vote loose from the party of Lincoln. As Blacks continued to migrate north and became an important part of the voting constituency of Northern Democrats, Black civil rights became an increasingly salient issue for Northern liberals and national party leaders. Nonetheless, the pivotal role of Southern Democrats in the New Deal legislative and electoral coalition stymied progress on the issue. By 1940, the Roosevelt administration had recognized the importance of the Black vote in the North, but rebuffed the NAACP so as not to risk higher priority agenda items (McMahon 2003; White 1948, 169–70). Hubert Humphrey rose to national prominence in the 1940s stumping for a "real, liberal Democratic Party" that would take action on Black civil rights and excommunicate Southern conservatives (Delton 2002, 120). Meanwhile, Truman was famously advised that the "Northern negro voter today holds the balance of power in Presidential elections" and that it was "inconceivable" that the South would revolt no matter how far to the left the administration leaned (Rowe 1995, 36, 30). In the election year of 1948, Truman (1964, 122) fruitlessly explained to Congress that the duty to secure civil rights "is shared by all three branches of the Government" and took some unilateral actions of his own. This proved to be enough to provoke Strom Thurmond's "Dixiecrat" revolt, which eventually stole 39 electoral votes from Truman in the general election. Though Truman won a surprising victory in 1948, the Dixiecrat scare hung over the Democratic Party for more than a decade.

In its second term, the Truman administration itself took a different tack on civil rights. Though "black activists and their white liberal allies from the programmatic wing of the Democratic party . . . were determined to press their cause even at the risk of disrupting the unity of the national party," others were centrally concerned with coalition maintenance (Sundquist 1983, 354). "Programmatic" advances would have to be accomplished through safer means. In public Truman largely dropped the issue, but his aides shifted resources into the Justice Department and sketched out a litigation strategy that would "offset the legislative defeats" (Berman 1970, 166). In its last years in office the administration filed briefs urging the Court to overthrow Jim Crow, and when stumping in Harlem for the 1952 Democratic ticket Truman (1968, 798) highlighted the actions that the administration had urged the Supreme Court to take.

Truman's Democratic successors were determined to downplay the civil rights issue. In 1952, Adlai Stevenson emerged as "the man most likely to hold together the liberal-labor-Southern coalition that Franklin D. Roosevelt built," though Black Democratic convention delegates walked off the floor when Alabama Senator John Sparkman was selected as the vice-presidential candidate (Reston 1952, 1). After *Brown* raised the stakes on civil rights, Stevenson remained insistent in 1956 that "where principle and unity conflicted in this matter, he was bound to stand by unity." Though he pledged that he would "act in the knowledge that law and order is the Executive's responsibility" and that it was "the sworn responsibility of the President of the nation to carry out the law of the land" as declared by the Court, he worked to keep the party from explicitly endorsing the *Brown* decision (Martin 1977, 302, 317). Stevenson's advisors initially assured him that the Court in *Brown* had ended civil rights as a political issue, but later changed their minds

and raised the specter of another Dixiecrat revolt but of "considerably greater magnitude" (Gillon 1987, 97; Martin 1979, 125). Pulled by both sides, Stevenson wailed in frustration during the 1956 primaries, "I had hoped the action of the Court and the notable record of compliance . . . would remove this issue from the political arena" and complained that the Eisenhower administration was not doing enough to make the issue go away faster (Martin 1977, 266).

In 1960, the Kennedy brothers likewise feared that becoming entangled in the civil rights issues would cost the party more votes than it would gain (Frymer 1999). Though approving the inclusion of a civil rights plank in the party platform, the Kennedy administration was determined not to "endorse a frontal assault against the segregation system" and when action was necessary "kept the president in the background, and stressed the need to uphold the law, rather than the moral right of blacks to use desegregated facilities" (Matusow 1984, 64, 74). The Justice Department advised citizens that civil rights were "individual," "private," and "personal" and to be pursued in court with their own attorneys (Marshall 1964, 50). Only when national and international public opinion turned decisively against Southern violence in 1963 did the president embrace civil rights as a "moral issue . . . as clear as the American Constitution" (Kennedy 1964, 469).

Although national party leaders ducked the issue, other Democratic politicians were free to play to their own local constituencies. In the aftermath of the *Brown* decision, Hubert Humphrey of Minnesota rushed to praise the Court for taking "another step in the forward march of democracy," while Dennis Chavez of New Mexico proclaimed that it "meets with my entire thinking and approval" (Albright 1954, 2). Northern congressional Democrats feared that in the wake of *Brown* "Republicans will move in on their once vast minority following" and found stronger appeals on the civil rights issue electorally essential (Albright 1956, E1). While party activists such as Joseph Rauh of Americans for Democratic Action proclaimed that the "Supreme Court has pointed the way for the future," the 1956 convention under Stevenson's watchful eye only recognized in the very last plank of its platform that "the Supreme Court of the United States as one of the three Constitutional and coordinate branches of the Federal Government [was] superior to and separate from any political party" and its decisions were "part of the law of the land" (Martin 1979, 150).

The reaction of Southern politicians was, of course, intense, including most famously the "Southern Manifesto" signed by most federal legislators from the Southern states (but the Speaker of the House and the Senate Majority Leader, both of Texas, were not asked to sign). Even so, the Manifesto limited itself to encouraging only "all lawful means to bring about a reversal of the decision," a restraint that both Stevenson and President Dwight Eisenhower praised. What the *Washington Post* called Southern "moderates," also notably national Democratic leaders heavily cross-pressured by their local constituencies, carefully shifted the blame for the federal government's new stance on civil rights while refraining from subverting judicial review as such. Russell Long emphasized, "Although I completely disagree with the decision, my oath of office requires me to accept it as law. Every citizen is likewise bound by his oath of allegiance to his country" (Albright 1954, 2). Liberal Tennessee senator and presidential hopeful Estes Kefauver, under pressure from segregationists, explained to home state voters that his hands were tied by the Court, "There is not one thing that a member of the United States Senate can do about that decision—and anyone who tells you that he's going to do something about it is just trying to mislead you for votes" (Special to *The New York Times* 1954, 60). Richard Russell, also a Democratic presidential aspirant, went further and tried, in the *Post*'s estimation, "to pin responsibility for the decision directly on the Republican administration," complaining that "the Supreme Court is becoming the political arm of the executive branch." Eisenhower's attorney general, Russell surmised, was intervening with "pressure groups" while the Court "supinely transposes the words of the briefs filed by the Attorney General and adopts the philosophy of the brief as its decision" (Albright 1954, 2).

CONCLUSION

A politically sustainable judicial activism can be understood as a vehicle of regime enforcement. The idea of judicial review as regime enforcement has increasingly been developed in the literature in the context of "judicial entrenchment," or the continued enforcement by an electorally insulated judiciary of the constitutional and policy commitments of a dominant political coalition against new political majorities after the original coalition has suffered electoral defeat (Gillman 2002; Hirschl 2004). From a narrow Dahlian perspective, the active exercise of judicial review is evidence of an unruly Court hostile to the interests of the lawmakers currently in power. The "obstruction" of electoral defeat provides the most obvious context in which a political coalition might find its ability to exert its will frustrated and therefore might turn to the courts as an alternative policymaking venue. At least in the American context, however, there are other obstructions to policy hegemony as well. Political leaders may find their ability to define the policy status quo limited well before electoral defeat. In a fractured political environment such as that of the United States, national political leaders will have incentives to support the exercise of judicial review by an ideologically sympathetic judiciary even while those political leaders are still in power. The actions of a "collaborative" Court might converge with the interests of current political leaders (Tushnet Forthcoming). Most notably, the autonomy of state governments in a federal system, entrenched interests, and fragmented political coalitions may all lead political leaders to invite and/or benefit from judicial activism that can overcome such political obstructions and enforce central ideological commitments against recalcitrant officials.

Judicial review disrupts the policy status quo. The standard assumption within normative constitutional theory and a great deal of empirical literature that the

"countermajoritarian" exercise of judicial review will be viewed with disfavor by current political leaders assumes that the status quo being disrupted reflects the policy preferences of those leaders and thus that the Court is acting in a fashion that is hostile to current majorities. There are instances of judicial review in which this assumption is clearly justified. The Supreme Court's repudiation of the early New Deal is a classic example and the very exemplar of Dahl's (1957) obstructionist, "lagging" Court.

There are other episodes of judicial review that do not fit this model and do not occur in such a context. Fragmented institutions limit the hegemony of governing coalitions, and as a result limit the ability of political leaders to insure by political means that the status quo reflects their preferences. Some governmental units may be relatively autonomous and capable of setting policy that conflicts with the preferences of such coalitions. A political system with many veto points may insulate policies from electoral change, hampering the ability of current political leaders to bring policy into line. Governing coalitions suffer from a lack of ideological purity, and as a result limit the ability of coalition leaders to act politically on all the policy preferences held by important elements of its membership. Some pivotal legislators or voting blocs may have to be accommodated even at the price of policy priorities or party principles. Momentary electoral pressures may overwhelm longer term ideological commitments, leading elected officials to "shirk" their principles in order to retain office. An ideologically friendly judiciary insulated from such competing pressures may be willing and able to act where elected officials temporize. In doing so, judges may well earn plaudits, or at least deference, from the political leaders whose hands were otherwise tied. Over the course of its history, the U.S. Supreme Court has won political support for judicial review not by acting against current governing coalitions but by working within those coalitions.

Political scientists have been skeptical of the significance of truly countermajoritarian judicial review, which would seem unlikely to find political support in a democratic political system. The "friendly" judicial activism described here may be politically sustainable in ways that classical countermajoritarian judicial activism is not. Unlike countermajoritarian judicial review, friendly judicial review would not necessarily be subverted through a political appointments process that creates a sympathetic bench, nor would it necessarily be subject to the myriad legislative instruments available to sanction a wayward Court. Indeed, such political instruments for influencing the Court may be employed so as to build or strengthen a friendly Court and make judicial review more, rather than less, likely as the regime wears on. Stymied by a gridlocked Congress, for example, the Reagan administration laid plans for making jurisprudential gains through the courts (Johnsen 2003). Its plans came partially to fruition a decade later when, for example, a more conservative Court set down limits on the powers of Congress to achieve liberal aims through federal action (Keck 2004; Whittington 2001c).

Whereas a Supreme Court that flies in the face of powerful supermajorities may well find its wings clipped, a Court that acts in implicit concert with sympathetic party or factional leaders may be protected from legislative sanction by the very veto points that make judicial review useful to a political coalition in the first place (Whittington 2003). Indeed, such a Court provides incentives to elected officials to seek to build the kind of diffuse support for the Court in the general public that public opinion scholars have emphasized as important to judicial legitimacy. It has been suggested that the Court's authority to interpret the Constitution may be particularly vulnerable when faced with what Stephen Skowronek (1993) has called a "reconstructive president," a president with expansive political authority dealing with an electorally lagging Court (Whittington 2001b). If so, then the Court's authority may be at its peak when it is operating in partnership with Skowronek's "affiliated" leader, who must manage an established but fractious political coalition while advancing the contested ideological commitments of the political regime. An enterprising Supreme Court may be able to "interpose its friendly hand" to assist the political task of such an affiliated leader while exercising its independent power of judicial review.

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