The Role of the Court during Critical Election Periods

An Anti-Attitudinal View of Judicial Behavior

By

James Meeker

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Contents

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Abstract: What causes conflict between the federal courts and the national lawmaking majority? An attitudinal view of judicial behavior suggests that ideological and partisan differences between the courts and the government are the sources of conflict, and that this conflict will be greatest during a critical election period. I argue that this is not the case, and suggest that the courts' relationships with other political institutions constrains their ability to make policy.

Chapter 1

The Federal Courts During Critical Election Periods[1]

As Franklin Delano Roosevelt was inaugurated on March 4, 1933, the United States was in the middle of the worst depression it had ever experienced. Millions of Americans were unemployed, with no hope in sight. It would take a radical departure from the *laissez-faire* approach of the Republican administration to ease the economic troubles of the United States, and Roosevelt was prepared to do just that.

In his first hundred days of office, Roosevelt pushed an aggressive social and economic program through Congress, and saw fifteen major policies enacted. On March 9, 1933, just five days after Roosevelt's inauguration, Congress passed the Emergency Banking Act, which introduced measures intended to restore confidence in the nation's banks. Congress followed this on March 20 by passing the Economy Act, which emphasized "sound money, fiscal orthodoxy, and tariff reduction," (Schlesinger 1958, 18) and called for a reduction in both the pensions of veterans and the salaries of government employees. On March 31, Congress authorized the Civilian Conservation Corps, which employed more than 2.5 million men in conservation efforts across the nation (Schlesinger 1958, 339). The following month, on April 19, Congress passed legislation abandoning the international gold standard, to give the government greater control over the economy.

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[1] This thesis is concerned with the United States federal courts. Any references to "the courts" indicate the federal courts. References to "the Court" indicate the United States Supreme Court, unless otherwise specified.

Congress passed three important New Deal acts on May 12, 1933. The first was the Federal Emergency Relief Act, which authorized the federal government to provide $500 million in relief grants to state governments. On the same day, Congress enacted the Agricultural Adjustment Act, which "establish[ed] a national agricultural policy," (Schlesinger 1958, 20) and the Emergency Farm Mortgage Act, which "provid[ed] for the refinancing of farm mortgages" (Schlesinger 1958, 20). On May 18, Congress passed the Tennessee Valley Authority Act, which developed and revitalized the Tennessee Valley (Schlesinger 1958, 20, 324), both by protecting the natural resources of the valley and by producing and distributing electricity at reduced rates.

In early June, Congress passed a Joint Resolution abrogating the gold clause, providing for the "annulment of the clause in all outstanding public and private contracts whereby debt payments were pledged to be made" in gold dollars (Davis 1986, 110). In response to skyrocketing levels of home mortgage foreclosures – at one point reaching more than 1,000 per day (Davis 1986, 101) – Congress passed legislation similar to the earlier Emergency Farm Mortgage Act; the Home Owners' Loan Act of June 13 "provid[ed] for the refinancing of home mortgages" (Schlesinger 1958, 20). On June 16, Congress enacted four major recovery acts: the National Industrial Recovery Act ("providing both for a system of federal supervision and for a $3.5 billion public works program"); the Glass-Steagall Banking Act ("divorcing commercial and investment banking and guaranteeing bank deposits"); the Farm Credit Act ("providing for the reorganization of agricultural credit activities"); and

the Railroad Coordination Act ("setting up a federal Coordinator of Transportation") (Schlesinger 1958, 20).

Throughout the New Deal period, Roosevelt would continue to push his progressive agenda. In 1934, Congress enacted the Railroad Retirement Act, which established a compulsory pension fund for railroad employees. Congress also passed the Bituminous Coal Conservation Act in 1935, creating a commission to impose standards and regulations on the coal industry. Roosevelt's New Deal moved quickly through Congress, but was soon met with strong resistance.

On January 7, 1935, almost two years after the New Deal's tumultuous beginnings, the Supreme Court announced its decision in *Panama Refining Co. v. Ryan* (1935), the first of the New Deal cases to come before it. *Panama Refining Co. v. Ryan* (1935), the 'Hot Oil' case, challenged the validity of the National Industrial Recovery Act ("NIRA"). Section 9(c) of the NIRA authorized the President to regulate and prohibit both the interstate and international transportation of petroleum products. The Court found that the NIRA provided the President with "an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit," and held that such a delegation of Congress' commerce power to the President violated the Constitution (*Panama Refining Co.* v. *Ryan* 1935, 415).

The next blow to the New Deal came on February 18, 1935, when the Supreme Court handed down its ruling in *Perry v. United States* (1935). *Perry* called into question whether the United States could constitutionally abrogate the gold

clause, and so modify the terms of federal bonds that it had issued. The Court held, by a 5-4 decision, that while Congress could abolish the gold clause for private contracts, it could not "alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers" (*Perry* v. *United States* 1935, 351). Although the Court in this case narrowly upheld the validity of the congressional resolution abrogating the gold clause, it limited the scope of the resolution so that it did not apply to government bonds.

On May 6, 1935, the Court struck down the Railroad Retirement Act ("RRA") in *Railroad Retirement Board v. Alton R. Co.* (1935). In *Alton*, the Court ruled that the compulsory pension system imposed by the RRA violated the due process clause of the Fifth Amendment, and was "not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution" (*Railroad Retirement Board* v. *Alton R. Co.* 1935, 362). Chief Justice Charles Evans Hughes, in a dissent joined by Justices Louis Brandeis, Benjamin Cardozo and Harlan Stone, claimed that the Court's ruling in *Alton* was "a departure from sound principles, and place[d] an unwarranted limitation upon the Commerce Clause of the Constitution" (*Railroad Retirement Board* v. *Alton R. Co.* 1935, 375).

On May 27, 1935, a date which came to be known as "Black Monday," the Court struck down two important pieces of New Deal legislation with its rulings in *A.L.A. Schecter Poultry Corp.* v. *United States* (1935) and *Louisville Bank* v. *Radford* (1935). In *Radford*, the Court held that the Frazier-Lemke Act, which restructured mortgage agreements to provide relief from farm foreclosures, violated the Fifth

Amendment prohibition against seizing property without providing just compensation.

In *Schecter*, the Court held that the National Industrial Recovery Act, in addition to being an improper delegation of congressional power, was outside of the regulatory powers of Congress under the Commerce Clause of the Constitution. President Roosevelt was extremely critical of the Court's decision, saying at a May 31, 1935 press conference that "the implications of this decision are much more important than almost certainly any decision of my lifetime or yours, more important than any decision probably since the Dred Scott case," and that the nation had "been relegated to the horse-and-buggy definition of interstate commerce" (Roosevelt [1938] 1966, 205, 221).

In this attack on the Court's ruling in *Schecter*, Roosevelt's comments mirrored those of President Theodore Roosevelt, who in 1908 wrote, "The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions" (Cardozo [1921] 1991, 171).

The Court's resistance to New Deal legislation continued throughout 1935 and 1936. In *U.S.* v. *Butler* (1936) and *Rickert Rice Mills* v. *Fontenot* (1936), the Court struck down portions of the Agricultural Adjustment Act, ruling that the

establishment of processing taxes on agricultural products fell outside of the taxing powers of Congress.

Justice Stone, in a dissent joined by justices Brandeis and Cardozo, called the Court's ruling a "tortured construction of the Constitution," and protested that "Courts are not the only agency of government that must be assumed to have capacity to govern" (*U.S.* v. *Butler* 1936, 87). President Roosevelt also expressed his outrage at the Court's decision, writing that the "objective of the Court's purpose was to make reasonableness in passing legislation a matter to be settled not by the views of the elected Senate and House of Representatives and not by the views of an elected President but rather by the private, social philosophy of a majority of nine appointed members of the Supreme Court itself" (Roosevelt 1952, 167). It appeared to the dissenters on the Court, and to many supporters of the New Deal relief efforts, that the conservative members of the Court were illegitimately basing their rulings on their own policy preferences and philosophies, rather than on any legal or constitutional grounds.

The Court's resistance to New Deal legislation was not limited to federal legislation. In *Morehead* v. *Tipaldo* (1936), the Court invalidated a New York law establishing a minimum wage for women. In a scathing dissent, which was joined by justices Brandeis and Cardozo, Justice Stone wrote that, "[i]t is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may

curtail individual freedom in the public interest" (*Morehead* v. *Tipaldo* 1936, 633). Stone's dissent further argued that

> It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs, than it has adopted, in the name of liberty, the system of theology which we may happen to approve (*Morehead* v. *Tipaldo* 1936, 636).

Justice Stone would later write of the Court's *Tipaldo* ruling, in a letter to his sister, "Our latest exploit was a holding by a divided vote that there was no power in a state to regulate minimum wages for women. Since the Court last week said that this could not be done by the national government as the matter was local, and now it said that it cannot be done by local governments even though it is local, we seem to have tied Uncle Sam up in a hard knot" (Maidment 1991, 14).

The struggle between the Roosevelt and the Supreme Court was the most visible demonstration of conservative courts impeding the New Deal legislation, but it was not alone. When Roosevelt assumed the presidency, the overwhelming majority of federal judges were conservatives; only 28 percent were Democrats (Adamany 1973, 837). While the Supreme Court was actively invalidating the acts of the Democratic New Deal coalition, "more than 100 judges issued injunctions against the operation of New Deal legislation or agencies" (Adamany 1973, 837). It is clear that Roosevelt and the Democratic Congress encountered opposition at all levels of the federal judiciary.

The Court's invalidation of New Deal legislation – in the first four years of Roosevelt's presidency, the Court struck down twelve congressional acts (Baker 1967, 111) – as well as hostility to Roosevelt's New Deal policies in the lower federal courts, precipitated a judicial crisis. In response to the Court's rulings, Roosevelt proposed his infamous "court packing" plan, under which the President would be able to appoint a new justice to the Supreme Court for every justice over 70 years of age who refused to retire. In announcing his proposal, Roosevelt did not shy from attacking the Court that had so significantly weakened his New Deal legislation, saying that "the Courts...have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions" (Roosevelt [1941] 1966, 123). Roosevelt continued to criticize the Court's decisions, declaring, "In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body," and that the "Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress – a super-legislature, as one of the justices has called it – reading into the Constitution words and implications which are not there, and which were never intended to be there" (Roosevelt [1941] 1966, 125, 126).

Roosevelt's court packing proposal was opposed by both supporters and opponents of the New Deal, and it never received congressional approval. The sharp conflict between the conservative Supreme Court and the Democratic New Deal coalition was resolved only after the Court's decision in *West Coast Hotel v. Parrish*

(1937), in which Justice Owen Roberts' "switch in time" led the Court to rule in favor of a Washington statute fixing a minimum wage for women. This signified the end of the Court's battle against the New Deal. Roosevelt's victory was assured shortly thereafter, on May 18, 1937, upon the retirement of conservative Justice Willis Van Devanter.

A sharp and prolonged conflict between the federal courts and the national lawmaking majority, such as that seen during the New Deal, is an infrequent and unusual event in American politics. What causes the courts to resist the legislation of the majority party? When will we see this resistance occur? In what ways will this resistance manifest itself?

The attitudinal theory of judicial behavior – the theory that judges make their decisions based on their ideological values and policy preferences – suggests that the federal courts will actively impede the policies and legislation of lawmaking majorities whose policy preferences are ideologically incongruent with those of the courts. The courts are more likely to exhibit this countermajoritarian behavior following a critical election – elections in which there is a shift in the dominant national lawmaking coalition – when the courts find themselves ideologically opposed to the policy preferences of the new majority (Adamany 1973, 1991; Funston 1975; Gates 1987, 1989). The resistance by the courts to the policies and legislation of the new majority can be expected both with regard to the federal government (Adamany 1973, 1991; Funston 1975) and the state governments (Adamany 1991; Gates 1987, 1989).

In this thesis, I will argue that the courts do not play a significant countermajoritarian role; other than anecdotal evidence, there is little to support the theory that the courts will resist the policies of ideologically incongruent national majorities. Examining interactions between the courts and the federal and state governments, I will show that the partisan affiliations of the courts do not significantly affect whether the court will support or oppose the governments' positions.

In chapter 2, I will provide a review of the relevant literature. This review will focus on three debates: the nature and effects of critical elections in American government; whether the behavior of the courts is motivated by attitudinal or institutional factors; and how the courts respond to critical elections. I will argue that the literature suggests institutional factors influence and constrain the Court's decision making, and restrict the ability of the Court to pursue a countermajoritarian agenda during critical election periods.

In chapter 3, I will examine the relationship between the federal courts and the federal lawmaking majority. I will test whether the success rate of the federal government and federal administrative agencies before the Supreme Court is affected by partisan considerations. In addition to this, I will investigate Supreme Court cases in which the Court invalidated federal statutes, to determine whether the Court is more likely to invalidate statutes passed by an ideologically incongruent party.

In chapter 4, I will turn to the relationship between the federal courts and state governments. By examining Supreme Court invalidations of state statutes, I will test

whether the Court more frequently invalidates statutes passed by an ideologically incongruent party. I will also consider decisions of the federal appellate courts in which state statutes or acts are involved and the state is a party, to determine whether the success rate of the states is affected by the partisan identification of the Court.

Chapter 5 will present a possible institutional explanation for the conflict seen during the New Deal period, my conclusions, and suggestions for future research.

Chapter 2

Theories of Critical Elections and Judicial Behavior

Critical Elections

Critical elections are elections in which there is there is a substantial change in the dominant national lawmaking coalition. V. O. Key sets forth an account of critical elections, "in which the voters are...unusually deeply concerned, in which the extent of electoral involvement is relatively quite high, and in which the decisive results of the voting reveal a sharp alteration of the pre-existing cleavage within the electorate" (Key 1955, 4). According to Key (1955), critical elections represent a shift in the pre-existing cleavages within the electorate. Frequently, during critical elections we can observe an increased congruence between partisan identity and the social and economic divisions within society (Key 1955). As the significant issues that divide the electorate shift, social and economic groups will form new coalitions that reflect the changing issues. There are, however, some critical elections in which a party gains "new support, in about the same degree, from all sorts of economic and social classes" (Key 1955, 12). This was seen in the election of 1896, where the increase in electoral support towards the Republican Party cannot be attributed to a change in issues or party platforms, but was in large part a reaction to the financial crisis and economic policies under the Democratic government (Key 1955). A final, essential component of critical elections is that they usher in a long term shift in the

dominant lawmaking coalition; according to Key (1955, 4), "the realignment made manifest in the voting in [critical] elections seems to persist for several succeeding elections."

According to Key (1959), critical election periods are an exception in American politics, rather than the norm. Normal politics are characterized by what Key (1959, 198) calls "secular realignment," a gradual transition in the electorate that shows "a more or less continuous creation of new loyalties and decay of old." Key (1959, 208) suggests that many of the "major shifts in partisan balance over the history of the party system" may be the result of gradual secular realignment. A consequence of Key's notion of secular realignments is that if a change in the partisan control of government can occur gradually over time, instead of depending on a quick shift in issues or events, we may see the emerging national coalition come into power at the state and local levels before it becomes the national lawmaking majority. As I will explain below, this will be significant in evaluating the relationship between the courts and the national lawmaking coalition.

Although Key (1955, 1959) argues that critical elections are the result of widespread partisan changes in the electorate, Brady (1985) argues that this is not the case. Brady (1985, 29) examines realignments that occurred during the Civil War and the 1890s, and argues that they "were more the result of structural factors than of massive electoral shifts." Realignments can occur without a widespread partisan change in the electorate as the result of regional shifts, where a partisan change in key regions is sufficient to switch the party of the national majority coalition (Brady

1985). We can also observe realignments without massive electoral shifts where relatively small across-the-board vote shifts to one party cause major seat shifts in the Congress (Brady 1985). Brady (1985, 48) concludes that in the Civil War and 1890s realignments, "relatively minor shifts of voters to the Republicans in the North resulted in long periods of Republican dominance of government."

Critical elections create conditions in which the new legislative majority can enact significant policy changes. Brady (1978) examines the critical elections of 1896 and 1932, and argues that following critical elections, partisan majorities in Congress can enact large clusters of policy change. Brady (1978, 99) argues that "major shifts in public policy are most likely to occur during periods when the parties and the candidates take divergent issue positions and the electorate sends to Washington a new congressional majority party and a president of the same party." One reason for this is that critical elections change the constituency bases of the congressional parties in such a way that the usual party-constituency cross-pressures are reduced, and also because critical elections "rearrange the committees of the House so that the party leadership is able to...organiz[e] coherent majorities for legislative programs" (Brady 1978, 81).

Another reason for clusters of policy change may be that members of Congress vote along partisan lines more frequently following a critical election. This view is supported by Clubb and Traugott (1977), who find that party voting in Congress increases during realignment periods. Brady and Lynn (1973) also find that in switched-seat congressional districts, freshmen congressmen provide strong

support for the policy preferences of their party. Switched-seat congressmen show a higher level of party support than representatives from non-switched districts (Brady and Lynn 1973). Brady and Lynn (1973) find that this is particularly true with regard to major policy changes.

Critical election periods are marked by a shift in the national lawmaking coalition, an increase in party voting in Congress, and large clusters of policy change. However, it is not clear whether critical elections are a result of massive electoral shifts (as Key (1955, 1959) argues) or smaller electoral shifts and structural factors (as Brady (1985) argues). For the purposes of this thesis, I consider an election to be a critical election if there is a shift in the national lawmaking coalition resulting in unified government under control of the new majority, following a period of unified government under the control of another party. By unified government, I mean a condition in which the President and both chambers of Congress belong to the same party. The 1932 election is considered a critical election, because it resulted in unified Democratic government following a period of united Republican government. That the government immediately preceding the 1932 election was divided government is not relevant; what is important is that the 1932 election was the first time there had been a unified Democratic government following the unified Republican government of 1930.

For the federal government, I consider a critical election period to be the four years immediately following a critical election. Between 1925 and 1998, there have been three critical election periods that meet these criteria. The first encompasses the

years 1933-1936. This is the New Deal critical election period, in which the Democrats became the national lawmaking majority. The second critical election period consists of the years 1953-1956, following the election of President Eisenhower and a Republican Congress in 1952. Following the elections of 1960, the Democrats again gained unified control of the federal government; the third critical election period consists of the years 1961-1964. While it does not meet the above criteria for critical elections, I consider the years 1993-1996 to be a fourth critical election period. In the 1992 elections, the Democrats regained unified control of government for the first time in twelve years. Although there had not been a period of unified Republican government during those years, the Republicans controlled the presidency for all twelve years, and the Senate for six years.

With regard to the state governments, I consider a critical election period to be the four years immediately preceding and the four years immediately following a federal critical election. This is designed to reflect both Key's (1959) account of a slowly transitioning partisan balance and Brady's (1985) argument that regional realignments may occur prior to a shift in the national lawmaking coalition. Between 1925 and 1998, I have identified four realignment periods that fit the criteria for a state critical election period. The first state critical alignment period consists of the four years before and the four years after the 1932 elections, from 1929-1936. The second state critical alignment period consists of the four years preceding and the four years following the 1952 elections, from 1949-1956. This is immediately followed by the third state critical election period, encompassing the years 1957-1964,

surrounding the 1960 elections in which the Democrats regained control of the government. The fourth state critical election period between 1925 and 1998 consists of the years 1997-1998, which are part of the four year period before the 2000 elections, in which Republicans gained unified control of the federal government for the first time since 1954. Finally, as with the federal critical election periods, I include as an additional state critical election period the years surrounding the 1992 elections, from 1989-1996.

Judicial Behavior during Critical Election Periods: An Attitudinal Perspective

According to Robert Dahl (1957), the Supreme Court functions not just as a legal institution, but also as a national policy maker. Contrary to the popular view that the Court protects minority rights against the tyranny of majority rule, Dahl (1957, 285) argues that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States." The Supreme Court is generally "part of the dominant national alliance," and in cases where the Court resists the lawmaking majority, it is most likely to be successful only if "its action conforms to and reinforces...norms held by the political leadership" that are "sufficiently powerful to prevent any successful attack on the legitimacy powers of the Court" (Dahl 1957, 293-294). The political ideology of the Court is typically congruent with that of the lawmaking majority. This is due, in large part, to the role of the lawmaking majority in selecting justices to

the Court; judicial nominees are selected by the President, and confirmed by the Senate.

The lawmaking majority considers the political ideology of judicial nominees during the appointment process (Ackerman 1988; Beck and Hershey 2001). Even an extremely well qualified candidate for a judicial appointment may be rejected on the basis of his or her political ideology. An often-cited example of this is the failed nomination of Robert Bork to the Supreme Court; despite his qualifications, the Senate rejected Bork because of his conservative views (Ackerman 1988; Beck and Hershey 2001).

Judicial nominees are overwhelmingly of the President's party. No president from Grover Cleveland to Bill Clinton made fewer than 81 percent of judicial appointments to federal district and appellate courts from his own party, and more than a third of those presidents made more than 95 percent of their judicial appointments from within their own party (Beck and Hershey 2001, 294). The average level of appointments made from within the president's party during the twentieth century was greater than 90 percent (Beck and Hershey 2001, 294). Between 1869 and 1992, 94.3 percent of all justices appointed to the lower federal courts were appointed by a president of the same party (Zuk, Gryski and Barrow 1993, 447).

Even when the President and the Senate are ideologically incongruent, the vast majority of judicial appointees belong to the party of the president. Although they never served in conjunction with an ideologically congruent Senate, presidents

Richard Nixon and George Bush were able to make 92.8 and 88.6 percent of their judicial appointments from their own parties, respectively (Beck and Hershey 2001, 294). The rate of same-party judicial appointments rises even more when the President and the Senate belong to the same party, increasing by nearly 5 percent (Zuk, Gryski and Barrow 1993, 448).

The high levels of same-party judicial appointments cause substantial changes in the proportion of judges that are ideologically congruent with the lawmaking majority. In the twentieth century, only President Richard Nixon was unable to achieve majority control of the federal judiciary; however, even Nixon was able to increase the proportion of Republican judges by nearly 20 percent (Zuk, Gryski and Barrow 1993, 450). When the Senate and the President belong to the same party, they have a greater ability to transform the courts. According to Zuk, Gryski and Barrow (1993, 450), "the 15 administrations that placed 60% or more same party judges on the courts were aided by unified control of the Senate in 39 or 42 (93%) Congresses." When Franklin Roosevelt left office, 67.4 percent of federal judges were Democrats, a remarkable increase from the 22.2 percent proportion of Democratic judges seated when Roosevelt first took office (Zuk, Gryski and Barrow 1993, 450). A similar transformation can be seen during the presidency of Eisenhower. Only 23.7 percent of federal judges were Republican at the beginning of Eisenhower's presidency, but by the time he left office, Republicans held 50.3 percent of judicial seats, an increase of 26.6 percent (Zuk, Gryski and Barrow 1993, 450).

The result of such a high level of same-party judicial appointments to the federal courts is that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States" (Dahl 1957, 285). However, following a critical election, the new lawmaking majority will find itself confronted with ideologically incongruent federal courts, largely appointed by the previous administration. As Adamany (1973, 821) remarks, "[a] new political coalition usually inherits a Court fully staffed by the opposition party." This partisan conflict between the courts and the lawmaking majority will continue until the new majority coalition is able to make its own same-party judicial appointments, transforming the judiciary so that once again the policy views dominant in the courts are in line with those of the lawmaking majority.

Judicial Behavior during Critical Election Periods

How will the courts behave following a critical election, when they are ideologically incongruent with the new lawmaking majority? According to Adamany (1973, 1991), after a critical election, the Supreme Court will play a countermajoritarian role, and actively resist the legislation and policy making of the new majority coalition. Adamany (1991) argues that the modern Court seldom exercises judicial restraint, and that the judges base their decisions on partisan and ideological grounds. Adamany (1991) echoes Dahl (1957), arguing that the Supreme Court functions as a policymaking body. The Court selects the cases it hears based

on the policy outcomes it desires, and its decisions are based on the justices' ideological values; as Adamany (1991, 11) claims, Supreme Court "justices generally decide cases in accordance with their own policy views." Adamany (1991) further argues that institutional mechanisms intended to serve as a check on the Court's power, such as the ability of Congress to change the size of the judiciary or alter the Court's jurisdiction, are largely ineffective and are rarely used. Because the Court's decisions are based on its ideology and policy preferences, and because there are no effective checks on the Court's power, Adamany (1991, 21) argues that "the Court may well stand against the policies of the new lawmaking majority," although he acknowledges that the evidence of Supreme Court resistance to federal laws during critical election periods is more anecdotal than numerical.

Adamany's account of court behavior following critical elections is supported by the studies of Funston (1975), who argues that the Court is more likely to hold recently enacted federal legislation to be unconstitutional during a critical election period, and Gates (1987, 1989), who argues that the Court is more likely to invalidate statutes and policies in states whose partisan majorities differ from the majority on the Court.

Funston (1975) compares voter preference, as an indicator of the majority will, with the behavior of the Court to show that while the Court generally follows the dominant political coalition, during realignment periods it plays a greater countermajoritarian role. Funston (1975, 806) finds that "during realignment periods the Court is more than two and one-half times as likely to declare recently enacted

legislation unconstitutional than other legislation." This shows that the Court strikes down legislation enacted by the new lawmaking majority far more frequently than other legislation.

Funston's (1975) study, while attempting to provide numerical evidence for the Court's countermajoritarian behavior, suffers from serious flaws. Of particular note is that the realignment periods used by Funston (1975) include years before the emerging majority took power. For example, Funston (1975) discusses Supreme Court decisions handed down in 1894 and 1895 as evidence that the Supreme Court played a countermajoritarian role in the 1896 critical election. This has been attacked by both Beck (1976) and Canon and Ulmer (1976).

Beck (1976) argues that Funston's (1975) study is unable to determine how electoral realignments affect the activities of the Supreme Court. This is because Funston's (1975) study includes as realignment periods those years in which "the 'emerging majority' had not yet become a legislative majority" (Beck 1976, 931). Beck (1976, 931) suggests that the focus should instead be on periods after a new legislative majority has taken power, but before the new majority is "able to alter the basic composition" of the Court.

Canon and Ulmer (1976) also criticize Funston's (1975) identification of critical election periods, but the bulk of their criticism is directed towards what appears to be a more serious problem. According to Canon and Ulmer (1976), an overwhelming majority of the instances of invalidated federal acts during critical election periods occurred during the New Deal years of 1933-1936. Canon and

Ulmer (1976) find that 14 of the 18 instances (nearly 78 percent) of invalidated federal statutes during critical election periods occurred between 1933 and 1936. The proportion of New Deal cases to non-New Deal cases is even higher when the invalidation of congressional acts within four years of enactment are considered, with 12 of 14 instances (almost 86 percent) of such behavior occurring between 1933 and 1936 (Canon and Ulmer 1976). When Canon and Ulmer (1976, 1217) control for the New Deal critical election period as an anomaly, they conclude that "there is simply no systematic rise and fall of Supreme Court countermajoritarian behavior in conjunction with critical elections." Given the findings of Beck (1976) and Canon and Ulmer (1976), it appears that Funston's (1975) study is critically flawed, and fails to provide numerical evidence that the Court invalidates federal legislation more frequently following a critical election.

Despite anecdotal claims of conflict between the Court and the new lawmaking majority, it does not appear that there is numerical evidence that the Court plays a countermajoritarian role with regard to federal legislation after a critical election. However, Gates (1987, 1989) argues that there is evidence of countermajoritarian behavior by the Court with regard to state acts and legislation. Gates (1987) examines the behavior of the Court with regard to the invalidation of state statutes and constitutional provisions, and argues that the Court is more likely to invalidate statutes and policies in states whose partisan majorities differ from the majority on the Court. When the Court invalidates policies in states whose partisan majorities do not differ from the majority on the Court, it is likely that there is an

"ideological incongruence between the state and national party organizations" (Gates 1987, 260).

Gates' (1987) study is suspect, however, because of the time periods he selects for his analysis. Gates (1987) conducts his analysis using three time periods. The first time period encompasses the years 1861-1878. The second time period consists of the years 1879-1910. The last time period consists of the years 1911-1945. A significant problem with these periods is that they encompass too great a time span to be used for the analysis of Court behavior during critical elections. Two of the three time periods used by Gates (1987) contain multiple critical elections. The period from 1879-1910 includes both the election of 1892, which ushered in the first unified Democratic government since the Civil War, and the election of 1896, in which Republicans regained control of the government. The 1911-1945 period includes three critical elections: the election of 1912, in which the Democrats gained control of Congress and the Presidency following an extended period of Republican rule; the election of 1920, when the Republicans regained control of a unified federal government; and the election of 1932, in which Roosevelt and the Democratic New Deal coalition came into power. This makes it difficult to provide an accurate account of the Court's behavior – if the Court rules against a Democratic state in 1925, should this ruling be considered a response to the Democratic majority that had recently controlled the federal government, to the Republican government currently in power, or to the emerging Democratic coalition that will soon come into power?

A second, and potentially greater problem for Gates (1987) is that the party of the Court itself is inconsistent within individual time periods. At the beginning of the first time period identified by Gates (1987), consisting of the years 1861-1878, the Republican government led by Lincoln had just come into power. Every one of the Supreme Court justices in 1861 was a Democrat, appointed by a Democratic administration (Epstein et al. 1996). The Democrats retained a majority on the Court until 1868, when the death of Justice James Wayne left the Court evenly divided, with four Democratic and four Republican justices. The Court would remain divided until 1870, when Republican justice Joseph Bradley was appointed to the bench. The majority of the Supreme Court justices were Republican through 1878, the end of Gates' (1987) first time period.

The partisan control of the Court was consistent throughout Gates' (1987) second time period; from 1879 until 1910, the majority of the Supreme Court Justices were Republican. Gates' (1987) third time period, consisting of the years 1911-1945, again contains a shift in the partisan composition of the Court. The Court was Republican from 1911 until 1937,[2] when Democratic justice Hugo Black was appointed to replace conservative Republican justice Willis Van Devanter. From 1937 until 1945, the majority of the Supreme Court justices were Democrats.

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[2] According to Epstein et al. (1996, 321), "Louis Brandeis registered as a Republican and officially remained so at the time of his nomination. Many scholars, however, classify him as a Democrat because he underwent a significant change in political identification in his later adult years and openly supported some Democratic candidates." Throughout this thesis, I classify Justice Brandeis as a Democrat. However, even if Justice Brandeis is classified as a Republican, the Court shifted to Democratic control in 1938, when Democratic justice Stanley Reed was appointed to replace Republican justice George Sutherland. Regardless of whether Justice Brandeis is classified as Democrat or Republican, there is a shift from a Republican to a Democratic majority on the Supreme Court within the 1911-1945 time period identified by Gates (1987).

This will be a significant problem for Gates (1987). If the party of the Court is inconsistent within a time period, then it will not be possible to assess whether the Court's invalidations of state policies are due to partisan differences between the Court and the states. This, combined with the inclusion of multiple critical elections within a single time period, casts serious doubts upon Gates' (1987) conclusion that the Court is more likely to invalidate the statutes and acts of states when the states are ideologically incongruent with the Court following critical elections.

It appears that the studies of Funston (1975) and Gates (1987) provide scant support for Adamany's (1973, 1991) argument that, following a critical election, the Court will play an active countermajoritarian role and impede the lawmaking of the new majority. So what, then, is the basis for Adamany's claims?

An Attitudinal Model of Judicial Decision Making

Adamany (1973, 12) argues that "policy making on the Supreme Court is a reflection of the ideological preferences of the justices, that such attitudes are formed before justices are appointed to the Court, and that justices are highly consistent in casting ideologically oriented votes." In the words of Supreme Court Justice Benjamin Cardozo ([1921] 1991, 13), "We [judges] may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." This represents an attitudinal view of judicial decision making, in which

the decisions of the courts are determined by their ideological and policy preferences, rather than by legal or institutional considerations.

The attitudinal model of judicial behavior is supported by Nagel (1961), Goldman (1966) Segal and Cover (1989), Segal et al. (1995) and Spaeth (1995). Nagel (1961) examines the decisions of both federal and state supreme court justices, and argues that Democratic judges are more likely than Republican judges to issue liberal decisions. While the relationship between a judge's party affiliation and decisions is stronger in the case of judges who are elected to the bench, it is still significant in the case of judges who are appointed (Nagel 1961).

Goldman (1966) examines both non-unanimous decisions of the federal appeals courts and unanimous appeals court decisions that overrule district court holdings; this selection represents cases in which there are more than one reasonable way to interpret the law. In these cases, Goldman (1966, 382) finds that "party is the principal characteristic associated with voting behavior" when there are multiple reasonable interpretations of the law. Goldman's (1966) design may be somewhat flawed, however. It ignores the possibility that a court may be unanimous in its decision even when there is a reasonable alternative, and it fails to consider why such a unanimous decision might be made. It also fails to consider the possibility that a court may be divided even where there is only one reasonable decision. Because of this, Goldman's (1966) conclusion may be exaggerated. It appears that Goldman's (1966) study fails to show that where there is more than one reasonable interpretation of law, party determines the judicial decision. Instead, it seems to show that where

there is division in an appellate court decision, or between the appellate and district courts, the division occurs along party lines. However, even this weaker conclusion provides some support for an attitudinal view of judicial behavior.

Segal and Cover (1989) examine the Supreme Court from 1953 through 1988, and argue that there is a strong correlation between the justices' ideological values at the time of appointment and their later voting patterns in civil rights cases. Segal and Cover (1989) generate an assessment of the justices' ideological values based on newspaper editorials published prior to the justices' appointments to the bench. By comparing these values with the votes of the justices after their appointments, Segal and Cover (1989) find that the values of the justices correspond to their votes. Segal et al. (1995) pursue a similar strategy, using editorials to determine the judicial attitudes of the members of the Court during the Roosevelt administration, and comparing those attitudes with the justices' votes in cases dealing with economic regulation. Segal et al. (1995) find that there is a strong correlation between judicial attitudes and the votes of the justices in economic matters, although the correlation is not as strong as in the study by Segal and Cover (1989).

Finally, Spaeth (1995) argues that the Court cannot rely on objective legal criteria in making its decisions; ultimately, the Court must provide a judicial interpretation of the law. In addition to this, the Court must determine which cases and matters of law it will consider. Spaeth (1995) argues that these decisions will be made based on the justices' policy preferences.

The works of Nagel (1961), Goldman (1966) Segal and Cover (1989), Segal et al. (1995) and Spaeth (1995) indicate that the justices base their decisions on partisan and ideological grounds. Why, then, do we not observe more numerical evidence of countermajoritarian behavior by the courts following a critical election, when the courts and the national legislative majority will be ideologically incongruent?

Constraints on the Federal Judiciary

The lack of evidence of countermajoritarian behavior by the courts during critical election periods may be due to inadequacies of the attitudinal model. The attitudinal model is based solely on the ideological and policy preferences of the judiciary, without considering institutional constraints and competing preferences. These factors may prevent the courts from making decisions based solely on their policy preferences.

The Norms of Sua Sponte and Stare Decisis: Self-Imposed Judicial Constraints

The Constitution sets forth few instructions for the operations of the federal courts. The Court has, over time, imposed rules upon itself to set forth conditions under which the it may make decisions. According to Epstein, Segal and Johnson (1996), the decisions of the Court are restricted by the norm of *sua sponte*, the doctrine that the Court will only decide issues brought before it. The Court's ability to exercise its policy preferences are limited by the issues raised by the parties before

it; if the Court follows the doctrine of *sua sponte*, it cannot simply interject its policy preferences into its decisions.

Adamany (1991) disputes this view, and argues that the Court's broad discretion in selecting cases for judicial review enables the Court to choose cases that raise the policy issues in which the Court has an interest. The Supreme Court has a broad pool of cases from which it makes its certiorari decisions. According to Adamany (1991, 9), "with more than 5,000 cases pending annually, the Supreme Court can almost always find a case to raise any policy issue that the justices wish to decide."

While this may be true of case selection regarding non-governmental entities, Cohen and Spitzer (2000) argue that the U.S. Solicitor General engages in strategic decisions on behalf of the federal government, limiting the cases from which the Court may choose. If the Court follows the doctrine of *sua sponte*, as Epstein, Segal and Johnson (1996) argue, the Court will be constrained in its decisions concerning the federal government. Even when the Court is ideologically opposed to the national lawmaking majority, it will not always be presented with the appropriate vehicle for converting its policy preferences to judicial doctrine. The relationship between the Solicitor General and the Court will be discussed in greater depth below.

In addition to the norm of *sua sponte*, Knight and Epstein (1996) argue that *stare decisis*, the doctrine that the Court should follow established precedent, is a norm that constrains the policy making of the Court, even if it is not the primary reason for judicial decisions. According to Knight and Epstein (1996, 1032),

"justices might be motivated by their own preferences over what the law should be, but they are constrained in efforts to establish their preferences by a norm favoring respect for *stare decisis*."

The view that *stare decisis* plays a role in judicial decision making is disputed by Dahl (1957) and Segal and Spaeth (1996). Dahl (1957) argues that the cases before the Court are of such complexity and ambiguity that the Court is free to decide based on its ideological preferences. According to Dahl (1957, 280), the Court most often deals with cases "where competent students of constitutional law, including the learned justices of the Supreme Court themselves, disagree; where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedent may be found on both sides; and where experts differ in predicting the consequences of the various alternatives." Even where the justices seek the guidance of firm rules and established precedent, they may be disappointed. Justice Cardozo wrote of his judicial experience,

> I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience...As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable (Cardozo [1921] 1991, 166-167).

Segal and Spaeth (1996) argue that precedent plays at most a small role in determining judicial outcomes. Segal and Spaeth (1996) find that Supreme Court justices are not constrained by precedents with which they disagree; these precedents

do not have an influence on judicial decision making. Established precedents are trumpeted by justices who agree with them, and routinely ignored by those who do not.

While justices who disagree with established precedent may not defer to it when making decisions, for practical reasons the Court may be compelled to maintain a consistent system of judicial rules and doctrines. McNollgast (1995) argues that the Court will attempt to keep its doctrines consistent to maximize lower court support for the Supreme Court's general policies; this will be discussed below.

It appears that the doctrines of *sua sponte* and *stare decisis* have little value other than to validate and legitimize the Court's decisions; they do not seem to provide effective constraints on the behavior of the Court. However, both issue selection and judicial consistency appear to be affected by the other political institutions with which the Court must interact.

The Court as a Political Institution: The Lower Courts

Shapiro (1964) argues that the Court should not be viewed as an isolated figure in American politics, but rather as a political agent that must coexist and interact with other political entities. Attitudinal studies that focus on the preferences of the justices without considering the role of the Court as a political agency fail to take into account factors that are critical for understanding the Court's behavior. According to Shapiro (1964, 38-39), attitudinal studies "can tell us little of the

relationships between the Court and other government agencies." According to Shapiro (1964), these relationships shape the actions and decisions of the Court.

One important relationship, according to Shapiro (1964), is the relationship between the Supreme Court and the lower courts. Shapiro (1964, 24-25) argues that the lower courts depend on the Supreme Court for guidance, while the Supreme Court "depends on the lower courts for the administration of its policies." This view is supported by Murphy (1959), who argues that the Supreme Court sets general policies, but that the application of those policies lies with the lower courts. Because of this, the Court "must take into account the reaction of inferior judges, and lower courts must attempt to divine the counter-reaction of the Supreme Court" (Murphy 1959, 1031). Shapiro (1964) argues that, in order for the principal-agent relationship to succeed, the Court must provide clear, consistent, and uniform standards for the lower courts to apply to individual cases. This position is supported by Songer, Segal and Cameron (1994), who argue that while the lower courts are generally faithful agents that are constrained by Supreme Court doctrine, in ambiguous situations lower court justices are likely to shirk, and promote their own policy preferences. If the Court frequently changed its decisions based on ideological grounds, the lower courts would be less likely to cooperate with the general policies the Court sets; consistency in Court policies is not just desirable, "it is politically essential" (Shapiro 1964, 25).

McNollgast (1995) argues that Supreme Court doctrine is affected by the preferences of the lower judiciary. When the Supreme Court is confronted with uncooperative lower courts, and is forced to deal with high levels of noncompliance,

it "will expand the range of lower court decisions that it finds acceptable" (McNollgast 1995, 1634). The goal of the Court is to balance its ideal decisions with lower court compliance; it seeks to minimize agency losses (McNollgast 1995). The Court is not free to make its decisions based solely on the ideological preferences of the justices. It must also consider whether its decisions are likely to be followed by the lower judiciary, or if it is more likely that its preferences will meet substantial noncompliance (McNollgast 1995).

The Court as a Political Institution: The Elected Branches

Congress and the President are able to use the principal-agent relationship between the Supreme Court and the lower judiciary to influence judicial doctrine (McNollgast 1995). Because the Supreme Court depends on the lower judiciary to apply its rules and doctrines, the elected branches can cause a change in Supreme Court doctrine by expanding the lower judiciary (McNollgast 1995). When the lawmaking majority faces unfavorable judicial doctrines, it can appoint lower court judges that are ideologically congruent with the elected branches. The lawmaking majority is more likely to expand the lower judiciary when the president and Congress are ideologically congruent; all Supreme Court expansions, and 84 percent of federal appeals court expansions occurred when Congress and the President belonged to the same party (De Figueiredo and Tiller 1996). According to De Figueiredo and Tiller (1996, 435), "the net effect of expanding during political

alignment is to speed up changes in the political balance of the judiciary in favor of the current Congress." To prevent noncompliance in the lower courts when this occurs, the Supreme Court will be compelled to shift its doctrines in a direction favorable to the lawmaking majority (McNollgast 1995).

The elected branches are also able to alter judicial doctrine by passing legislation that affects the types and numbers of cases that the Court will hear (McNollgast 1995). By enacting legislation that affects federal regulations and civil litigation, the lawmaking majority can increase the time and effort it takes for the Courts to hear cases (McNollgast 1995). And by passing laws that increase the total number of cases dealt with in the lower judiciary, the lawmaking majority will decrease the ability of the Supreme Court to oversee lower court decisions, encouraging the Court to adopt broader judicial doctrines (McNollgast 1995).

The Court as a Political Institution: The Solicitor General

The federal government has substantial advantages in its interactions with the Supreme Court, in large part because of the role of the Solicitor General. The Solicitor General is the attorney responsible for representing the positions of the United States before the Supreme Court. The Solicitor General is the most frequent litigant appearing before the Court; between 1959 and 1989, the Solicitor General's office participated in nearly half of all the cases decided on the merits by the Supreme Court (Salokar, 1995).

The frequency of the Solicitor General's appearances before the Court provides the United States with a significant advantage. McGuire (1995) argues that repeat players, those lawyers who appear before the Court on multiple occasions, enjoy greater than average success. According to McGuire (1995), repeat players are more likely to be seen by the Court as providing credible information. Because of this, the Court is more likely to favorably view repeat players' arguments (McGuire 1995). This is particularly true of the Solicitor General. The Court frequently seeks the position and advice of the Solicitor General in cases to which the United States is not a party; according to Salokar (1992, 5), "several dozen times each term, the Supreme Court invites the Solicitor General to file an amicus brief stating the government's position or interpretation of a case."

Perhaps a more important advantage that the government enjoys is due to the role of the Solicitor General as a gatekeeper for the Supreme Court. The Solicitor General screens all proposed petitions for certiorari on behalf of the federal government; the petitions cannot be submitted to the Supreme Court without the approval of the Solicitor General (Salokar 1992, 1995). Only a small percentage of the proposed petitions are approved; during the 1984 Court term, the United States lost over 700 cases in the federal appellate courts, but the Solicitor General authorized only 43 appeals to the Supreme Court (Salokar 1995).

By approving such a small percentage of appeals, the Solicitor General is able to select those cases most favorable to the government's position, which translates into a higher success rate before the Court (Salokar 1995). According to Cohen and

Matthew (2000, 395), "the strategic behavior of government litigators routinely alters the set of cases from which the Supreme Court gets to choose." The Solicitor General "will not appeal cases where it fears an adverse decision," because the cost to the government of losing in the Supreme Court is greater than the cost of letting stand an adverse lower court ruling (Cohen and Matthew 2000, 421). When the Court loses a case in an appellate court, the ruling only affects government in the judicial circuit in which the ruling was issued; the government can ignore the decision in the other circuits. A loss in the Supreme Court affects the government in all of the lower courts.

Because of the Solicitor General's strategic selection of cases, the "docket will overall appear more favorable to the government than the Court would want" (Cohen and Matthew 2000, 421). Since the Court is limited in the cases it can elect to hear, it is constrained in its ability to make policy. Where the Court and the federal government are ideologically incongruent, the Court may not have a vehicle with which to oppose the policies of the lawmaking majority.

Conclusions

During a critical election period, the courts will find themselves ideologically incongruent with the new lawmaking majority. If the attitudinal model of judicial behavior is correct, we should expect to see the courts play a countermajoritarian role during these critical election periods. However, there is little or no evidence to

support this. Instead, it appears that institutional factors influence and constrain the Court's decision making, and restrict the ability of the Court to pursue a countermajoritarian agenda.

Chapter 3

The Courts and the Federal Government

In this chapter, I will show that partisan conflict between the Supreme Court and the federal government does not play a significant role in the outcomes of judicial decision making. I will first examine the success rate of the federal government in petitions for certiorari, and argue that while partisan conflict between the Court and the federal government initially appears to significantly reduce the government's success rate, this effect is due to the extremely low rates of government success during the New Deal period. When I control for the New Deal as an anomaly, it becomes clear that the success rate of the government in its petitions for certiorari is not significantly affected by an ideological incongruence between the Court and the federal government. I then turn to the success rate of the federal government in Supreme Court decisions where the Court makes a ruling on the merits of the case, and show that partisan conflict between the Court and the government significantly affects neither the success rate of the government as a primary party nor the success rate of the government as a participant in cases before the Court. Next, I examine Court decisions holding a federal statute or act to be unconstitutional, and argue that partisan conflict between the Court and the government does not appear to affect the number of federal statutes or acts invalidated by the Court. Finally, I will discuss the success rate of federal agencies before the Court, and argue that again partisan

conflict between the Court and the government does not appear to have a significant effect on the outcome of the Court's decisions.

Federal Government Success in Petitions for Certiorari

If the attitudinal model of judicial behavior correctly explains judicial behavior, we should expect to see a correlation between the presence of partisan conflict between the Court and the government and the success rate of petitions for certiorari where the government is a party. If the Court and the government are ideologically congruent, we should see a higher than average success rate of the government as a petitioner for certiorari, and a lower than average success rate of petitions for certiorari in which the government is the respondent. This is because the Courts should be more willing to reverse lower court decisions that are unfavorable to the government, and less willing to hear appeals of lower court decisions that favor the government. When there is a partisan conflict between the government and the Court, we should expect the opposite: the Court should be less inclined to grant petitions for certiorari where the government is the petitioner, and more inclined to grant petitions for certiorari where the government is the respondent.

I will test this theory for the years 1925 through 1983. Data for the success rate of petitions for certiorari in which the government is a party were obtained from the reports of the Solicitor General, published each year in the *Annual Report of the Attorney General of the United States* (U.S. Department of Justice 1925-1984). For

the party of the Court, I use the party with which the majority of the justices identify, based on their partisan identification at the time of appointment. This information was obtained from Epstein et al. (1996). For the party of the government, I use the party in control of Congress and the presidency under unified government; if there is divided government, I do not assign the government a partisan identification.

An initial test seems to support the hypothesis that partisan conflict influences judicial outcomes in certiorari petitions where the government is a petitioner. See Table 3.1.

Table 3.1
Regression Results: Success Rate of Petitions for Certiorari with Government as Petitioner, 1925-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	11.64	2.32	0.024
Divided Government	-28.47	-2.24	0.029

Notes: Regression with robust standard errors.

The regression tested the success rate of petitions for certiorari with the government as the petitioner, with partisan congruence between the Court and government as the main independent variable. In this test, I had as control variables the party of the President, whether the government was divided, and a lag variable. The test shows that both partisan congruence and divided government are significant

at the .05 level of significance. When the Court and government belong to the same party, the Court is 11.6 percent more likely to grant the government's request for certiorari than when the Court and government belong to opposing parties. When the government is divided, the Court is 28.5 percent less likely to grant the government's certiorari petitions.

Table 3.2 again shows the success rate of petitions for certiorari with the government as the petitioner, with partisan congruence between the Court and government as the main independent variable, but includes a control for critical election periods. As we would expect from the attitudinal hypothesis, there is a negative correlation between critical elections and the success rate of the government's certiorari petitions; however, this does not reach the .05 level of significance. With critical election periods as a control variable, partisan congruence and divided government are both still significant. With the control for critical election periods, the Court is 9.1 percent more likely to grant certiorari petitions by a same-party federal government than it is when the government is a different party. Divided government decreases the chances the government's petition for certiorari will be granted by 24.5 percent.

This appears to support the first part of the attitudinal hypothesis, that the Court is more likely to grant petitions for certiorari filed by the government when the government and the Court belong to the same party. However, when I control for the possibility of the New Deal as an anomaly, by omitting the years before 1937 from my tests, I arrive at different results. Without the New Deal period, it seems that

partisan considerations do not significantly affect the government's success as petitioner for certiorari. In addition to this, when the years prior to 1937 are omitted from my analysis, the role of divided government in determining judicial outcome is no longer significant. Controlling for critical elections periods does not change these observations, and the critical election period itself is not significant in determining whether certiorari is granted. See Tables 3.3 – 3.4.

Table 3.2
Regression Results: Success Rate of Petitions for Certiorari with Government as Petitioner and Control for Critical Election Periods, 1925-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	9.14	2.05	0.045
Divided Government	-24.48	-2.08	0.042
Critical Election Period	-7.13	-1.73	0.089

Notes: Regression with robust standard errors.

Table 3.3
Regression Results: Success Rate of Petitions for Certiorari with Government as Petitioner, 1937-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	5.70	1.05	0.298
Divided Government	-8.64	-0.57	0.569

Table 3.4
Regression Results: Success Rate of Petitions for Certiorari with Government as Petitioner and Control for Critical Election Periods, 1937-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	5.76	1.06	0.295
Divided Government	-10.90	-.71	0.479
Critical Election Period	-4.15	-.90	0.371

The data support the position that the New Deal period was an anomaly, as suggested by Canon and Ulmer (1976). When the New Deal period is removed from my analysis, it appears the first part of the attitudinal hypothesis, that the Court will more frequently grant certiorari to an ideologically congruent government, is false.

The data also do not appear to support the second part of the attitudinal hypothesis, that the Court will be more likely to grant petitions for certiorari filed by

the government when there is a partisan conflict between the Court and the federal government. See Table 3.5. The correlation between the success rate of the government and an ideological congruence between the Court and government is still positive, indicating that the Court actually grants more petitions for certiorari when the government belongs the same party, but it does not come close to approaching the .05 level of significance. The data further show that divided government is not a significant factor in the Court's decision to grant certiorari where the government is the respondent.

Table 3.5
Regression Results: Success Rate of Petitions for Certiorari with Government as Respondent, 1925-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	0.55	0.49	0.627
Divided Government	-4.90	-1.31	0.195

Notes: Regression with robust standard errors.

When I examine the success rates of petitions for certiorari in which the government is the respondent, controlling for critical election periods, I again find that partisan conflict between the government and the Court is not significant.

Partisan differences between the Court and the federal government do not appear to affect the Court's decision to grant certiorari in cases where the government is the respondent. See Table 3.6.

In Tables 3.7 and 3.8, I again control for possibility that the New Deal was an anomaly by excluding years prior to 1937 from my tests. Both tests, one controlling for critical election periods, and one not controlling for these periods, indicate a strong correlation between the partisan congruence and the judicial decision to grant certiorari in cases where the government is the respondent. However, the correlation is contrary to what the attitudinal hypothesis predicted. When the Courts and the government belong to the same party, the proportion of certiorari requests granted by the Court in which the government is the respondent increases by 6.25 percent. Controlling for critical election periods does not change this result. These tests also show divided government to be significant. When I do not control for critical election periods, divided government results in the Court accepting 19.1 percent fewer petitions for certiorari in which the government is the respondent. Controlling for critical election periods indicates that the Court accepts 18.9 percent fewer petitions for certiorari in which the government is the respondent, when the government is divided. The critical election period itself is not significant.

Table 3.6
Regression Results: Success Rate of Petitions for Certiorari with Government as Respondent and Control for Critical Election Periods, 1925-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	0.82	0.73	0.467
Divided Government	-5.42	-1.47	0.148
Critical Election Period	-0.57	0.54	0.589

Notes: Regression with robust standard errors.

Table 3.7
Regression Results: Success Rate of Petitions for Certiorari with Government as Respondent, 1937-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	6.25	2.60	0.013
Divided Government	-19.10	-2.86	0.007

Table 3.8
Regression Results: Success Rate of Petitions for Certiorari with Government as Respondent and Control for Critical Election Periods, 1937-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	6.25	2.57	0.014
Divided Government	-18.90	-2.76	0.009
Critical Election Period	0.36	0.18	0.861

The data do not support the attitudinal hypothesis, that the Court is more likely to grant the government's petitions for certiorari when the Court and the government are ideologically congruent, and that the Court is more likely to grant petitions for certiorari in which the government is the respondent when the Court and the government are ideologically incongruent. Initial tests indicate that the government's petitions are more likely to be granted by an ideologically congruent Court; however, these results are flawed because of the disproportionate influence of the New Deal period. When the New Deal period is removed from my analysis, the partisan conflict does not significantly influence the Court's decision to grant the government's certiorari petitions. When I control for the New Deal period as an anomaly in my test of certiorari petitions with the government as the respondent, I find that the Court is more likely to grant such petitions when the Court and government belong to the same party, which is not what we should expect under the attitudinal model of judicial behavior.

Federal Government Success in Supreme Court Cases Decided on the Merits

Now that I have examined the success of the government with regard to petitions for certiorari, I will investigate how the government fares in cases decided on the merits by the Court. The attitudinal model of judicial behavior suggests that when the government and the Court are ideologically congruent, the government will enjoy a higher than average success rate. When there is a partisan conflict between the Court and the government, the government will enjoy a less than average success rate.

I will test this hypothesis by examining the success rate of the federal government in cases where the government is the primary party to the case (i.e., those cases where the United States is the only party for its side, or the first named party in cases where there are multiple parties involved in the litigation). I will examine this success rate for the years 1946 through 1994. I will also investigate the success rate of the government in all cases in which the government is a participant, even where the government is not the primary party involved in the litigation. I will examine the success rate of these cases for the years 1943 through 1983. Data for the success rates of the federal government in cases where the government is the primary party were obtained from Epstein et al. (1996). Data for the success rates of the federal government in all cases where the government is a participant were obtained from the reports of the Solicitor General, published each year in the *Annual Report of the Attorney General of the United States* (U.S. Department of Justice 1925-1984). The

parties of the Court and the government are the same as were used in my discussion of certiorari petitions.

Without controlling for critical election periods, partisan conflicts between the Court and the government are not a significant factor in determining the success rate of the government in cases where the government is the primary party. See Table 3.9. As control variables, I included the party of the President, the party in control of the Senate, the party in control of the House of Representatives, and whether the President and Senate belonged to the same party. None of these variables approached the .05 level of significance.

Introducing a control for critical election periods does not change the insignificance of the role of partisan conflicts between the Court and the government in determining the success of the government, although the critical election period itself appears significant. See Table 3.10. The success rate of the government drops by 9.3 percent during critical election periods, although this cannot be attributed to partisan incongruence.

Table 3.9
Regression Results: Success Rate of Government in Cases Decided on the Merits, where the Government is the Primary Party, 1946-1994

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	0.09	0.02	0.987

Table 3.10
Regression Results: Success Rate of Government in Cases Decided on the Merits, where the Government is the Primary Party and with Control for Critical Election Periods, 1946-1994

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	0.16	0.03	0.974
Critical Election Period	-9.34	-2.28	0.028

There is not a significant correlation between partisan congruence and the success rate of the federal government as a primary party in cases heard by the Court. The only variable that had a significant effect on the success of the federal government as a party to a case is a critical election period. When I examine the success of the federal government in all cases in which the government participates, however, even the critical election period is not significant.

In testing the success rate of the government in all cases in which the government participated, I included as control variables the party of the president, and whether the government was divided. Neither of these control variables was significant, with or without an additional control for critical election periods. For the cases in which the government was a participant, there is not a significant correlation between partisan congruence and the success rate of the government. The critical election period is also insignificant. See Tables 3.11 and 3.12.

Table 3.11
Regression Results: Success Rate of Government in Cases Decided on the Merits, where the Government is a Participant, 1943-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	-2.11	-0.82	0.416

Table 3.12
Regression Results: Success Rate of Government in Cases Decided on the Merits, where the Government is a Participant and with Control for Critical Election Periods, 1943-1983

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	-2.00	-0.74	0.462
Critical Election Period	-0.95	-0.31	0.762

The data do not support the attitudinal hypothesis that the government will be less successful in cases decided on the merits when the government and the Courts are ideologically incongruent. Although critical election periods significantly lower the success rate of the government as a party, they have no significance with regard to the success rate of the government in all cases in which the government participates.

Supreme Court Invalidations of Federal Statutes

According to the attitudinal model of judicial behavior, the Supreme Court is more likely to invalidate federal legislation when its members are ideologically incongruent with the national legislative majority. The attitudinal hypothesis suggests that when the Court and national legislative majority belong to the same party, we should see a decrease in the number of federal statutes invalidated. Conversely, when the Court and national legislative majority belong to different parties, we should see an increase in the number of federal statutes invalidated. To test this, I will analyze the number of cases in which the Supreme Court invalidated federal statutes from 1925 through 1998.

To identify cases in which the Supreme Court invalidated federal statutes, I relied on *The Constitution of the United States: Analysis and Interpretation* (Library of Congress 1978) and its 2000 supplement (Library of Congress 2000).

To test the attitudinal hypothesis, I use partisan congruence as the main independent variable, and control for the parties of the Court and the government. I also include the number of state statutes invalidated as a contagion variable. The data do not support the attitudinal hypothesis; partisan congruence between the Court and the government does not have a significant effect on the number of times the Court will invalidate federal statutes. The party of the Court is also insignificant; however, the party of the government and the contagion variable are significant. See Table 3.13. With a control for a critical election period, the only change in significance is

that the party of the government is no longer significant. The critical election period itself has no significance. See Table 3.14.

When a control for the New Deal as an anomaly is introduced, partisan congruence between the Court and federal government remains insignificant. See Table 3.15. The only control variable that is significant is the contagion variable, suggesting that the Court is sometimes "in a mood" to invalidate statutes; however, the coefficient of the contagion variable suggests that any such effect would be small.

Table 3.13
Regression Results: Number of Federal Statutes Invalidated by the Courts, 1925-1998

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	-0.50	-1.40	0.165
Democratic Court	-0.48	-1.47	0.147
Democratic Government	0.76	2.03	0.047
Invalidated State Acts	0.07	2.79	0.007

Table 3.14
Regression Results: Number of Federal Statutes Invalidated by the Courts with Control for Critical Election Periods, 1925-1998

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	-0.34	-0.89	0.375
Democratic Court	-0.48	-1.47	0.147
Democratic Government	0.64	1.65	0.104
Invalidated State Acts	0.07	2.85	0.006
Critical Election Period	0.47	1.08	0.285

Table 3.15
Regression Results: Number of Federal Statutes Invalidated by the Courts, 1937-1998

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	0.56	0.80	0.429
Democratic Court	-0.60	-1.37	0.176
Democratic Government	-0.28	-0.33	0.740
Invalidated State Acts	0.07	2.75	0.008

Table 3.16
Regression Results: Number of Federal Statutes Invalidated by the Courts with Control for Critical Election Periods, 1937-1998

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	0.56	0.79	0.431
Democratic Court	-0.59	-1.36	0.180
Democratic Government	-0.28	-0.33	0.743
Invalidated State Acts	0.07	2.73	0.008
Critical Election Period	0.05	0.13	0.896

The data do not support the attitudinal hypothesis that the Court will invalidate more federal statutes when the Court and the government are ideologically incongruent. The distribution of invalidated cases confirms this. Of the 113 federal statutes invalidated by the Supreme Court between 1925 and 1998, only 35.4 percent had been passed by an ideologically incongruent federal government. If we consider only the years after 1936, to account for the New Deal anomaly, only 30.1 percent of the 93 federal statutes invalidated by the Court had been passed by an ideologically incongruent government. It appears, then, that the attitudinal hypothesis regarding invalidations of federal statutes by the Supreme Court is false.

Federal Agencies and the Supreme Court

Finally, I will examine the success rate of federal agencies in the Supreme Court for the years 1946 through 1994, for cases in which a federal agency or the head of a federal agency is listed as a party to a case. The success rates of federal agencies in the Supreme Court by year were obtained from Epstein, et al. (1996).

According to the attitudinal hypothesis, we should expect the success rate of federal agencies in the Supreme Court to be lower than average when the federal government and the Court are ideologically incongruent. Conversely, we should expect the success rate of federal agencies to be higher than average when the government and the Court belong to the same party.

In testing this hypothesis, partisan congruence between the Court and the government was the main independent variable. As control variables, I introduced the party of the President, the party of the Senate, the party of the House of Representatives, and whether the President and the Senate were united. See Table 3.17.

The results of this test show that partisan congruence between the Court and the government does not significantly affect the success of federal agencies. The only significant control variables were the parties of the President and Senate. The party of the House of Representatives was insignificant, as was partisan unity between the President and the Senate. The success rate of the federal agencies increases by 16.5

percent when a Democratic president is in power, but decreases 22.5 percent under a Democratic Senate.

Table 3.17
Regression Results: Success Rate of Federal Agencies in the Supreme Court, 1946-1994

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	-0.57	-0.13	0.894
Democratic President	16.51	2.75	0.009
Democratic Senate	-22.54	-2.73	0.009
Democratic House of Representatives	15.03	1.40	0.168
President and Senate Same Party	-10.53	-1.69	0.098

Notes: Regression with robust standard errors.

When a control for critical election periods is introduced, the parties of the President and the Senate remain the only variables that significantly affect the success rate of federal agencies. The critical election period itself is not significant. See Table 3.18. It appears that here, too, the attitudinal hypothesis is unsuccessful.

Table 3.18
Regression Results: Success Rate of Federal Agencies in the Supreme Court with Control for Critical Election Period, 1946-1994

Independent Variables	Coefficient	t	P>|t|
Partisan Congruence	-0.67	-0.17	0.863
Democratic President	14.98	2.48	0.017
Democratic Senate	-19.54	-2.26	0.029
Democratic House of Representatives	10.59	0.96	0.345
President and Senate Same Party	-7.82	-1.22	0.229
Critical Election Period	-4.81	-1.29	0.203

Notes: Regression with robust standard errors.

Conclusions

The tests indicate that the attitudinal model fails to adequately explain Supreme Court behavior with regard to the federal government. Partisan congruence has no significant influence on judicial decision making in cases where the government is a party to a case before the Court; in cases where the government participates in a case before the Court; in the number of federal statutes invalidated by the Court; in the success rate of federal agencies before the Court; or in the granting

of petitions for certiorari where the government is the petitioner. Partisan congruence does influence judicial decisions with regard to petitions for certiorari where the government is the respondent, but not in the manner the attitudinal model would predict. The Court is more likely to grant certiorari in cases where the government is the respondent if the Court and the government belong to the same party.

Critical election periods also did not seem to significantly affect outcomes in cases involving the federal government. Although there was a significant decrease during critical election periods in the success rate of the government in cases where the government was the primary party, critical election periods were insignificant as a determinant of government success when all the Supreme Court cases in which the government participates are considered. Critical elections periods are insignificant in determining the outcome of certiorari petitions for all years after 1937. Critical election periods also play an insignificant role in the success rates of federal agencies before the Supreme Court and in the number of federal statutes that the Court invalidates.

Because neither partisan congruence between the government and the judiciary nor critical election periods has a significant affect on judicial decision making, it seems the attitudinal model falls short of explaining judicial behavior with regard to the federal government.

Chapter 4

The Courts and the States

In this chapter, I will show that partisan conflict between the Supreme Court and the state governments does not play a substantial role in the outcomes of judicial decision making. First, I will examine the distribution of cases in which the Supreme Court invalidated state statutes or constitutional provisions, and argue that it is inconsistent with an attitudinal model of judicial behavior. I will also investigate the relationship between the federal appellate courts and the states, and argue that partisan considerations are do not significantly affect the decisions of the appellate courts in cases that involve state statutes and to which the states are parties.

Supreme Court Invalidations of State Statutes

According to an attitudinal view of judicial decision making, the Supreme Court will base its decisions on ideological and partisan grounds. Because of this, we should expect to see the Court issue decisions invalidating state statutes more often than average when the states are ideologically incongruent with the Court, and less frequently when the states share the Court's ideological and partisan preferences. In addition to this, we should see the Court exhibiting countermajoritarian behavior towards the states more frequently immediately before a critical election, when the new national lawmaking coalition is emerging, and immediately after a critical

election, when the new national lawmaking coalition has assumed power. However, the distribution of Supreme Court decisions invalidating state statutes or constitutional provisions does not support this view.

Table 4.1 shows the distribution of Supreme Court decisions in which the Court invalidated a state statute. Overall, only 34.4 percent of cases in which the Court invalidates state statutes involve states that are ideologically incongruent with the Supreme Court. This proportion is slightly higher than the 29.7 percent of cases in which the Court invalidates statutes of ideologically congruent states. However, it is almost identical to the 34.5 percent of cases in which the Court invalidates statutes of states that have divided government, and cannot be identified as either ideologically congruent or incongruent with the Court. During critical elections, when an attitudinal hypothesis of judicial behavior predicts an increase in countermajoritarian behavior, the proportion of judicial decisions in which the Court invalidates statutes of ideologically incongruent states decreases to 34.1 percent.

Table 4.2 controls for the New Deal period as an anomaly, and considers only cases in which the Court invalidates state statutes or constitutional provisions for the years 1937 through 1998. With these years omitted, the overall proportion of decisions in which the Court invalidates a statute of ideologically incongruent states falls to 31 percent. During critical election periods, this proportion decreases to just 23.2 percent. Critical election periods also exhibit a large increase in the proportion of decisions invalidating statutes from ideologically congruent states, which rises to 41.2 percent.

Table 4.1
Distribution of Supreme Court Decisions Invalidating State Statutes, 1925-1998

	Non-Critical Election	Critical Election	Total
Court and State Different Party	175	93	268
Court and State Same Party	133	98	231
State Divided Government	187	82	269
State Party Unknown	11	0	11
Total	506	273	779

Table 4.2
Distribution of Supreme Court Decisions Invalidating State Statutes, 1937-1998

	Non-Critical Election	Critical Election	Total
Court and State Different Party	151	45	196
Court and State Same Party	108	80	188
State Divided Government	169	69	238
State Party Unknown	11	0	11
Total	439	194	633

These observations do not provide conclusive evidence that the Court's decision making with regard to the states are unaffected by partisan considerations. However, they do appear inconsistent with the attitudinal model of judicial behavior. These observations seem particularly troublesome to the attitudinal hypothesis that during critical election periods we should expect to see a greater proportion of cases invalidating statutes of ideologically incongruent states; according to the case distribution, this simply does not occur.

Federal Appellate Courts and the States

If the attitudinal model of judicial behavior is correct, we should expect to see partisan conflict play a significant role not just in the decisions of the Supreme Court, but in the federal appellate courts as well. According to an attitudinal hypothesis, the decisions of the federal appellate courts favor states that are ideologically congruent with the courts, and disfavor states that are ideologically incongruent.

I will test this hypothesis, examining appellate court decisions in which a state statute or constitutional provision is a central issue to the case, and to which a state is a party. The cases included in my analysis are limited to those in which the court of appeal either affirms or reverses a lower court decision. Cases in which the court of appeal reverses a lower court decision include cases in which the court reverses and vacates the lower court decisions, and cases in which the court reverses and remands the case back to the lower court. These cases were identified and selected from

Songer's (1998) *United States Courts of Appeals Database*. Where the state is the appellant, I consider the state to be victorious when the appellate court reverses the lower court decision. Where the state is the respondent, I consider the state to be victorious when the court affirms the lower court decision. Using probit analysis, I will test the attitudinal hypothesis, examining cases in which a state is the appellant, cases in which the state is the respondent, and for all cases in which the state is a party.

The role of partisan congruence in the success of states as appellants before the courts of appeals is insignificant. See Table 4.3. Table 4.4 introduces critical elections periods and partisan congruence between the appellate court and the United States Supreme Court as control variables, but neither of these variables significantly affects the outcome of cases in which the states are appellants.

Table 4.3
Probit Estimates: State Success as Appellant, 1925-1988

Independent Variables	Coefficient	z	P>|z|
Partisan Congruence	0.01	0.04	0.971

Table 4.4
Probit Estimates: State Success as Appellant with Control for Critical Election Periods, 1925-1988

Independent Variables	Coefficient	z	P>|z|
Partisan Congruence	-0.23	-0.78	0.434
Critical Election Period	-0.42	-1.26	0.207
Appellate Court Congruence With Supreme Court	0.42	1.26	0.207

Tables 4.3 and 4.4 indicate that partisan considerations do not play a significant role in appellate court cases in which the states are appellants; Tables 4.5 and 4.6 show that this is also the case where the states are respondents. Partisan congruence between the appellate court and the states, critical election periods, and partisan congruence between the appellate court and the U.S. Supreme Court all fail to achieve a .05 level of significance.

Table 4.5
Probit Estimates: State Success as Respondent, 1925-1988

Independent Variables	Coefficient	z	P>|z|
Partisan Congruence	0.20	1.14	0.253

Table 4.6
Probit Estimates: State Success as Respondent with Control for Critical Election Periods, 1925-1988

Independent Variables	Coefficient	z	P>|z|
Partisan Congruence	0.19	1.01	0.314
Critical Election Period	0.21	0.99	0.320
Appellate Court Congruence With Supreme Court	0.14	0.81	0.419

Since partisan considerations play an insignificant role both in cases where the states are appellants and in cases where the states are respondents, it is not surprising that partisan congruence is insignificant in the overall success of states in the circuit courts. Tables 4.7 and 4.8 show that partisan congruence between the appellate court and the states, critical election periods, and partisan congruence between the appellate

court and the U.S. Supreme Court are all insignificant factors in circuit court judicial decision making.

Table 4.7
Probit Estimates: Overall State Success, 1925-1988

Independent Variables	Coefficient	z	P>|z|
Partisan Congruence	0.12	0.86	0.390

Table 4.8
Probit Estimates: Overall State Success, 1925-1988

Independent Variables	Coefficient	z	P>|z|
Partisan Congruence	0.11	0.73	0.467
Critical Election Period	0.02	0.14	0.892
Appellate Court Congruence With Supreme Court	0.05	0.32	0.746

Conclusions

Appeals court decisions in which the states are parties are not influenced to a significant extent by partisan considerations. In addition to this, Supreme Court

decisions in which the Court invalidates state laws appears inconsistent with an attitudinal view of judicial behavior. While further study is needed in this area, it seems that an alternate view of federal court decision making with regard to the states is needed.

Chapter 5

Conclusions

In the first chapter, I examined the relationship between the Supreme Court and the New Deal administration, and questioned the causes of conflict between the federal courts and the national lawmaking majority. The attitudinal model of judicial behavior suggests that such conflicts occur when the national majority and the courts are divided by ideological differences. According to the attitudinal model, courts base their decisions on their policy preferences. When the preferences of the court are out of line with those of the national lawmaking majority, conflict is inevitable.

In this thesis, I have shown that despite anecdotal evidence supporting an attitudinal view, the evidence does not support such behavior in cases involving the federal and state governments. In particular, the data do not support the attitudinal view of court behavior following critical elections. This reflects, to some extent, the positions of Shapiro (1964) and McNollgast (1995), who argue that the courts must be viewed as political institutions, whose decisions depend on their interactions with other political actors.

How can a view of the court as a political institution explain the conflict between the government and the New Deal era Court? It may be explained by the incompetence of Solicitor General James Biggs, the Solicitor General at the beginning of the New Deal. According to Waxman (2000),

> Roosevelt's first Solicitor General, James Biggs, was uniquely unsuited to the challenge. By the end of Biggs' first Term, Justice Stone had commented that "Biggs was not fit to argue a cow case before a justice of the peace, unless the cow was fatally sick." The Justices informally sent word to Roosevelt that Biggs should not be permitted to argue any case the United States hoped to win... By the time a more capable successor took office, the New Deal was in deep legal trouble.

If the Solicitor General, the attorney responsible for litigating on behalf of the United States, was unable to take advantage of his status as a repeat player before the Court and as a strategic decision maker, it should not come as a surprise that the success rate of the federal government in the Supreme Court decreased dramatically during the New Deal era. The New Deal simply did not have a worthy champion to defend it against legal challenges.

The conflict between the New Deal and the courts may also be explained by the nature of the legislation passed during this period. Swisher (1969) suggests that in its haste to resolve the nation's economic crisis, the government paid little attention to the legal soundness of its legislation. When the government looked for test cases to defend New Deal legislation in the courts, it was hard pressed to find one without "legal defects or embarrassing points which threw doubts on the wisdom of using it" (Swisher 1969, 5). This reflected "the effects of haste in drafting legislation, executive orders, and codes, and in working out procedures" (Swisher 1969, 5).

The combination of inadequate legal representation by the Solicitor General and hastily drafted legislation may well have resulted in the government's losses before the Supreme Court. Whatever the cause, it is clear that the conflict between the courts and the New Deal government was the exception, rather than the norm in

judicial decision making. Partisan congruence between the courts and the government does not play a significant role in determining whether the government will be successful before the courts.

Future research in this area should focus on the relationships between the courts and other political actors in the federal and state governments. In addition to this, future research would be well served to use a more accurate measure of ideological preference than this thesis employed. For the purposes of this thesis, I did not distinguish between ideological preferences and partisan identity. This ignores the local and regional differences in the meaning of party identifications that are ubiquitous in our federal system of government. I interchanged partisan identity and ideological preferences because I did not have a better measure of ideological preferences; despite my best efforts, partisan identity remains a rough approximation of ideological preferences.

A more accurate standard should also be employed to determine whether a court decision favors or disfavors the government. As Shapiro (1964) points out, the formulation of judicial doctrine is more relevant than who won the case in determining who the case favors. The Court may rule against the government, but at the same time establish a judicial rule that will favor the government in future cases (Shapiro 1964). Conversely, the Court may issue a ruling in favor of the government, but substantially limit the actions of the government through the creation of new judicial rules and doctrines (Shapiro 1964).

Despite the relatively rough measures used in this thesis, it seems clear that partisan identity has little to do with the Court's decisions when other governmental actors are involved. Having shown what is not significant in judicial decision making, I eagerly await future studies that will shed more light on what does influence judicial behavior.

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