Political Parties in the Judicial Process: A Reexamination of the Role of the Federal Courts as National Policy-Makers*

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Writing in 1968, Richard C. Cortner explicated his now well-regarded "disadvantaged thesis:" groups that

> are temporarily, or even permanently, disadvantaged in terms of their ability to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy...are highly dependent upon the judicial process...If they are to succeed at all in pursuit of their goals they are almost compelled to resort to litigation (p. 287).

Recent scholarship generally confirms Cortner's argument--most groups, or at least those scholars have examined, use litigation because the other branches of government have denied them access (Epstein, Kobylka, and Stewart, 1987; but see Walker and Scheppele, 1986).

As many of us have come to understand this thesis, however, we recognize that its existence presupposes a larger theoretical concept, that the courts are keepers of minority interests against majority oppression. If we believe that disadvantaged groups, those that inherently represent minority interests, turn to litigation, then it is only axiomatic to hypothesize that they do so because they view the courts through a Hamiltonian lens. More formally stated, because disadvantaged groups often use litigation, the courts must represent minority interests. To make this assumption, however, would require us to commit a logical fallacy. We should, of course, demonstrate the validity of the larger concept first.

Have we done so? In the 1960s and 1970s, scholars tried to test Alexander Hamilton's concept that the courts would protect minority interests by examining the Supreme Court's invocation of judicial review to declare federal and state laws unconstitutional. As we discuss in the following pages those inquiries have proved inconclusive. That is, even though the nature of the judicial role forms the essence of many inquiries into the American legal system, we have yet to resolve the basic question of what it is that courts do.[1]

Given the general ambiguity surrounding this line of inquiry, we propose to shift the operational lens by which we have viewed this phenomenon. Rather than using judicial review to measure indirectly the Court's propensity to act as a legitimator/reflector of majority will or as a protector of minority rights, we suggest a new operationalization of this concept: court disposition of cases involving the two major political parties and their third party counterparts.

To facilitate our presentation of this "measure", we have divided this paper into three sections. In the first, we discuss the existing literature, the conclusions that it has reached, and its deficits. In the second, we attempt to demonstrate how our new analytic lens may help to resolve problems inherent in existing work. And, finally, we provide a preliminary picture of the results we obtained

from examining court disposition of cases involving political parties.

I. The Existing Literature

The Judiciary: Keeper of Minority Rights or Legitimizer of Majority Will?

Does the judiciary protect minority rights or legitimize popular will? In Federalist #78, the classic explication of judicial power, Alexander Hamilton argued that the courts must be free from any undue political pressure to suppress majority tyranny (in the form of Congressional actions) against minority rights contained in the Constitution. A major mechanism by which courts could achieve this goal, Hamilton argued, was through judicial review: the power to examine acts of Congress to determine their constitutionality.

Was Hamilton's assertion accurate? That is, do federal courts safeguard minority rights against majority tyranny? Scholarly scrutiny of this question began almost immediately after Alexander Hamilton penned his famous work and continues unabated today.

Over the years, those studying this issue have derived a virtual laundry list of reasons in favor of or against Hamilton's claim. Among those conceptual factors supporting the view that the judiciary protects minority interests are: 1) the constitutional mandate that federal judges maintain their seats virtually for life, implying that they are

immune from ordinary political pressures; 2) the fact that at least the lower rungs of the judiciary must hear disputes meeting traditional legal standards, meaning that courts, unlike the legislative and executive branches, cannot deny access to unpopular groups; 3) that courts possess the power to review acts of the legislative and the executive branches to determine their constitutionality, suggesting that they can and will safeguard minority interests in the face of majority tyranny. Those elements working against the Hamiltonian model include: 1) the politicized nature of the judicial recruitment process, which leads to the selection of individuals who have "engaged in public life" and thus are not only cognizant of majority will, but embody it, as well; 2) the fact that Presidents have had the opportunity to nominate and Congresses to appoint a new Justice every two years, which suggests that the Court's views will never deviate substantially from those in power; and, 3) the relatively small percentage of laws that the Court has declared unconstitutional.

In short, both sides possess reasonably strong arguments supporting their opposing claims. It was not until 1957, however, that any scholar sought empirically to force closure on this longstanding debate. In that year Robert A. Dahl published the results of his study, "Decision-Making in a Democracy: The Role of the Supreme Court as National Policy-maker," which resurfaced ten years later in his widely read Pluralist Democracy in the United

States. In these now seminal works, Dahl examined the Supreme Court's use of judicial review to declare federal laws unconstitutional, arguing that under certain conditions this provided an indirect test of the Court's policy-making ability. That is, if the Court invalidated laws passed by a "determined and persistent law-making majority on major policy" then it acted as a protector of minority rights. Conversely, if the largest proportion of incidences of judicial review occurred against "weak" law making bodies ("transient majorities in Congress," "coalitions weakly united ...[or] no longer in existence"), then judicial review served not a counter-majoritarian function, but a legitimating one(1967; pp. 156-157).[2]

As students of the judicial process well know, Dahl found minimal support for the proposition that the Supreme Court acts as a protector of minority rights. The 94 instances of judicial review, studied by Dahl, generally involved unimportant or "minor" policy or occurred more than four years after Congress passed the law. And, in many instances, future political actions (in the forms of new legislature or constitutional amendments) revived laws the Court struck down.

Based on these findings, Dahl reached a number of important conclusions about the nature of the Supreme Court and its role in the political process. First, he noted that politics in the United States is "dominated by relatively cohesive alliances that endure for long periods of

time...Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably part of the dominant national alliance" (1967, p. 167). Dahl's data certainly seemed to support such an observation: the early New Deal was the only period during which the Supreme Court exercised judicial review in exception to his overall findings.

Second, "the Supreme Court is not...simply an agent of" the dominant national alliance. Rather, it plays an "essential" role in the political power structure, conferring legitimacy on it and on "the basic patterns of behavior required for the operation of democracy." It is this power to legitimate existing regimes that causes the Court to fall into a "Catch-22" situation vis-a-vis its role as a protector of minority rights: the only way that the Court can confer legitimacy is to accept "the policies of the law-making majority." But, when it does so (i.e. upholding legislation), then it "fails to protect minorities from control or regulation by national minorities." In short, the Court cannot simultaneously play the roles of legitimator of majority interests and protector of minority interests (1967, pp. 167-168).

Thirty years have elapsed since publication of "Decision-Making in a Democracy:..." Yet, scholars of the American political process continue to recognize this work as one of the most influential explications of the role of

the judiciary since Hamilton set forth his design. Why? For one, Dahl's findings crisply countered conventional scholarly wisdom--for far too long, in his thinking, we conceptualized the Court as a keeper of minority interests. We held on to this view, Dahl argued, because it justified the Court's power to strike down federal laws, an essentially counter-majoritarian function. But now we were forced to face some hard facts: Rather than serving as a vehicle by which to protect minority rights, "judicial review" is invoked by the Court to legitimate successful, existing regimes. Second, most subsequent work in this area has sought to reevaluate correlates of Dahl's discourse. That is, his work has served as a springboard (or, in some instances, a straw man) from which all later work departed.

Studies antedating Dahl, in the main, have been of three sorts: complete reevaluations of his findings; examinations of the Court's role as a legitimator, which Dahl thought to be the Court's main function and one of the few ways by which to justify judicial review; and, analyses of Court behavior during "critical" times, the only periods during which the Court utilized judicial review in a non-legitimizing capacity, according to Dahl. As we shall see, however, none of these studies has provided conclusive evidence; rather they have served the function, albeit significant, of forestalling closure over the debate of judicial policy-making.

Published almost twenty years after "Decision-Making in a Democracy:...", Jonathan D. Casper's "The Supreme Court and National Policy Making" is one of the few all-encompassing attempts to repudiate Dahl. Simply, Casper argued that "Dahl's account is not adequate for understanding the role of the Supreme Court in policy-making" (1976, p. 50). Why? First, Dahl's work preceded the Warren Court, a Court that

> by general reputation at least, was quite different from most of its predecessors. Indeed one associates with it precisely the characteristics that Dahl found lacking in the Supreme Court--activism and influence in national policy making and protection of fundamental rights of minorities against tyrannical or indifferent majorities (p.52).

When Casper added the 28 Warren Court cases, declaring 32 federal laws unconstitutional, he found that the results, "while not wholly conclusive, [did] not tend to support Dahl's thesis." Hence, Dahl's conclusions may have been timebound.

Second, Casper argued that Dahl's exclusive focus on "invalid" federal laws ignored "a good deal of what the Court in fact contributes to national policy-making" such as statutory construction of federal, state, and local laws. Finally, he noted that Dahl failed to "place sufficient emphasis" on that rather small percentage of cases "in which the Court succeeded in delaying public policies for periods of up to 25 years (1976, p. 61.).[3] In sum, the net cast by Dahl, according to Casper, was insufficient to capture the

essence of the Court's decisions, which often reflect minority interests.

In a 1973 article, published in the Wisconsin Law Review, David Adamany too questioned Dahl's findings, but not to the extent of Casper. Rather, Adamany attempted to determine the accuracy of Dahl's (and Charles Black's, 1960)[4] justification for use of judicial review--that it is the basic way courts confer legitimacy upon successful ruling regimes.

Adamany set up several tests to determine whether the Court can legitimize the public policies of existing, successful regimes. First, borrowing from Murphy and Tanenhaus (1968), he noted three prerequisites for judicial legitimization: the public must be aware of Court decisions, it must accept the concept of judicial review, and it must regard the Court as "carrying out its responsibility in an impartial and competent manner" (see Murphy and Tanenhaus, 1968, p. 357). Public opinion data, however, support none of these conclusions; in fact, these data "devastate claims of the Supreme Court's legitimacy-conferring capacity. Not only is the Court's work invisible and its popular support modest, but its standing rests on the public's identification and party affiliation of the President" (Adamany, 1973, p.815). Hence, the President actually confers legitimacy on the Court and not vice versa as Dahl argued!

If the public ignores the role of the Court, what about elites? Adamany again found no support for Dahl's conclusion. Rather, he argued that "the Court's standing with elites...stems from the same sources as the standing of the other branches... the Court, while commanding respect because it is part of the political system, is not the source of, or even a major factor in the legitimacy to that system" (1973, p. 819).

Casper's and Adamany's analyses clearly repudiated Dahl's general and specific findings. Examinations of the relationship between periods of American politics and the Court's use of judicial review, however, have lent credence to Dahl's argument that the Court reflects majority will during "normal" periods to legitimize regimes, but that it asserts "counter-majoritarian functions" during "transitional" periods because it will be composed of "holdovers" from the old regime (Funston, 1975, p. 796; see also Mendelsohn, 1959).

Operationalizing "transitional periods" as those in which realignments of the electorate occurred, Richard Funston essentially validated Dahl's and Dooley's thesis that the Court "follows the election returns." Simply stated, he found a far higher incidence of Supreme Court declaration of laws unconstitutional during critical periods, leading him to conclude that: "Professors Dahl and Charles Black have been largely correct in emphasizing the Court's function as a legitimating agency. The traditional

concept of the Court as the champion of minority rights against majority demands is largely incorrect" (1975, pp. 808-09).

Although Bradley Canon and S. Sidney Ulmer later questioned the procedures Funston used,[5] claiming that "the best interpretation that can be put on [Funston's] data [in light of their reevaluation] is that, overall, there is no significant difference between the Court's counter majoritarian behavior in the lag periods and that in non-critical years" (1976, p. 1218), recent work has suggested that use of judicial review may run in definable periods. In conducting a diachronic investigation of the cases in which the Court "invalidated a state or federal legislative enactment in a particular year from 1800 through 1973", Gregory A. Caldeira and Donald J. McCrone found that the Court's "activism" runs in cycles (1982, p. 109). "Political, social, and economic change," as Funston's analysis suggests, may initiate the cycle, but once begun, it takes on a "life of its own."

Hence, Robert Dahl's 1957 work triggered a wave of studies, which we have summarized in Appendix A, on the nature of the judicial function. This prodigious output of scholarship, a great deal of which has appeared in our most prestigious journals, is not surprising. The questions raised by Dahl get at the heart of all inquiries into the American legal system. But today we must ask ourselves another crucial question: Based on these analyses, what

conclusions can we reach about the nature of the judiciary? More succinctly, let us return to the essential query Dahl raised: Is the Court a protector of minority rights against majority tyranny? If the answer to this is "no", then what role does the Court play? Legitimator? Destabilizer?

A mere perusal of the research listed in Appendix A leads us to the dismissal conclusion that we simply cannot address these questions with any great certainty. And, in fact, this brings us back to the issue we posed earlier: we can make no assumptions about the far smaller issue, use of the courts by disadvantaged groups, because we do not understand fully the nature of judicial policy-making.

The Previous Research: What Went Wrong?

It is easy to suggest that existing work has not helped us to address fundamental questions concerning the federal judiciary; it is far harder to critique the literature in such a way that we can pinpoint its deficits. Having analyzed the work displayed in Appendix A with an eye toward noting the commonalities (and, perhaps common pitfalls), we see three. First, most to some extent reflect the era in which the author has written. This is not to suggest that these works are time-bound; in fact, the majority have looked at this phenomenon longitudinally, a rarity in judicial research (see Ulmer, 1986, on this point). Rather, the authors bring to their work a perspective, mirroring the Court's current activities. Writing in 1957, Dahl argued at

the onset of his effort that "some exceedingly serious difficulties exist" with interpreting the role of the Court as a protector of minority rights. Given that era, an era in which the Court tended to ignore individual rights, it was only natural that Dahl operated under such an assumption. Conversely, it would have been inane for Casper, working in the wake of the Warren Court "revolution," to argue that the Court merely legitimized majority will.

Second, with but few exceptions (see Dolbeare, 1967; Johnson and Canon, 1984, pp. 237-240), all work in this area has focused exclusively on the U.S. Supreme Court. Surely the Court represents the focal point of the American Legal System, but did not Hamilton believe that it would be the entire federal judiciary, working in concert, that would protect minority interests? To be sure, in Federalist #78 Hamilton wrote of "the judicial magistracy," "the judiciary," "the courts of justice," and "judicial offices;" not once did he mention a Supreme Court, even though that was the only Court mentioned in the Constitution. Any test of Hamilton's explication, then, must carefully operationalize his views, which clearly focused on the entire judiciary and not merely its apex.

Finally, with but few exceptions,[6] all empirical investigations use the same dependent variable: the Supreme Court's invocation of judicial review. Although this clearly taps Hamilton's concept of the court's role as a

protector of minority interests, almost all scholars recognize that it provides only an indirect measure. As the progenitor of this field of study, himself, noted: "It is not easy to determine whether a law-making majority actually coincides with the preferences of a majority of American adults...In the absence of relatively direct information, we are thrown back on indirect tests..." (1967, p. 155).[7]

II. Remedying Existing Problems: A Shift in our Conceptual Lens.

We can easily remedy problems one and two noted above: we must approach research in this area in an objective way (a rather easy task given the state of existing knowledge and of the judiciary) and we must focus our inquiry on the entire federal judiciary. The operationalization of the dependent concept, the nature of the judiciary, presents a far more difficult issue. In short, how can we better operationalize the concept of the judicial function or role, a concept which takes on one of two values: the courts as protectors of minority rights against majority tyranny or as legitimators/reflectors of majority will.

We suggest a complete change in the operational lens we have thus far utilized to view this phenomenon. Rather than use the indirect measure of Congressional or even state enactment of legislation to operationalize majority will, why not a more precise one, one that more closely approximates the concept: court disposition of cases in

which the two majority parties and the independent, third parties have been involved.

Such cases present a unique solution to the problems suggested above for a number of reasons. First, almost since their inception in the United States, political parties have been involved in litigation. In some instances, parties have been forced to litigate to attain political rights; in other cases, they have simply "responded" to legal challenges. In short, political party litigation allows us to take a longitudinal look at the legal system, an important undertaking if we are to assess general charges of subjectivity and time-boundness in past research. Second, political parties have been involved in a substantial amount of litigation, participating in hundreds of court cases at all levels of the federal judiciary.

Finally, and most important, the litigants involved represent clear indicators of majority versus minority preference. Viewed through this theoretical lens, the Democratic and Republican parties represent majoritarian interests, while all third parties, by definition, represent minority views. Hence, court preference of one set over the other would provide a direct indicator of the judiciary's disposition. Stated more simply for now, if we find that courts generally side with political parties representing the majority of American citizens over those acting on behalf of minorities, then Dahl's conclusions would be confirmed. That is, courts would act as legitimators not

only of the existing regimes, but of public preference, as well. The converse would lend credence to the opposing school of thought, suggesting that courts protect minority views.

Hypotheses and Measurement

By examining court disposition of cases involving political parties we can accurately address the following larger questions, remaining unanswered by existing accounts: 1) What is the general nature of the judicial role--protector of minority rights or legitimator/reflector of majority will? and 2) Does the courts' role reflect trends within American political history? Restated in terms of our operationalization, the questions become 1) Do courts favor the claims of one kind of political party over another? and 2) If so, why?

Using Dahl's results as a benchmark, we can generate a number of expectations or hypotheses.

H1. If courts reflect popular will, then they will generally favor claims of majority parties at significantly greater rates than those of minority parties.

> H1a. If courts reflect popular will, then their decisions will be related to periods of public support for the various political parties.

The dependent concept we suggest in these hypotheses is the policy role of the courts, which we operationalize as their relative propensities to support the claims of the various parties. Hence, our first task was to identify court disposition in all cases in which political parties or

their members or representatives were involved as sponsors or litigants.[8] Although we eschewed conventional sampling techniques, we certainly recognized that it would be difficult to conduct a manual search through all the federal reporter systems to find party cases. So, instead, we used LEXIS (a legal information retrieval system) entering in turn the name of each political party listed in CQs Guide to U.S. Elections, and recording the Supreme, Appellate, and District Court citations.

Although the benefits of this approach far outweighed those of the alternative (i.e. manual labor), several problems emerged. First, the amount of "data" available in LEXIS varies by the levels of the federal judicial system: it contains all U.S. Supreme Court opinions, Circuit Court opinions from the late 1930s on, and district court opinions from the late 1940s on.[9] Hence our dataset will be totally complete only from the 1940s to date.

Second, LEXIS does not discriminate among purposes of citation searches in ways that would be most useful to us. That is, when a user enters a name, such as the Communist Party, it lists every opinion that mentions that name, even though it may have no relevance (e.g. used in dicta, cited a previous case). What this forced us to do was to make a list of all the cites associated with a party and then look up each opinion to determine the usability of the case.[10] For example, if we entered "Party A" into LEXIS, it informed us that N cases mention that entity. After checking each

opinion with the respective reporter systems, however, we found that only $^{X}/N$ cases fit our requirements that the party (or a member or representative) be the litigant or sponsor. The rest (N-X) may have simply cited a case in which Party A participated, used Party A as an example, and so on. After eliminating these, we then coded the court's disposition in each: for the party, against the party, or "mixed" (see Appendix B for a sample codebook).[11] These decisions served as our dependent variable.

Political parties constitute the measure of societal "will," our independent concept. Such interests can take on one of two values: majority or minority, which correspond to the two kinds of political parties. During the period under investigation here, we considered the Republican and Democratic parties as the major parties; all others as minor.[12] Hence, to test Hypothesis 1, we will simply examine the relationship between court disposition of cases involving the minor versus major parties.

Hypothesis 1a we will scrutinize by comparing public support for the various parties with court disposition. Again, court disposition of party cases serves as our dependent variable. We used electoral votes to operationalize cycles of public support, our independent variable. That is, we determined whether or not one or more third party received more than two electoral votes during a given presidential election. If so, we scored the following

year and those through the next election as indicating support for minor parties.

In sum, as Dahl's work suggests, the courts should act as reflectors of public will; one of the few exceptions to this role occurs, in Funston's words, during "critical" periods or in Mendelsohn's terms, during "periods of unusual weakness in our party system." Transforming this to fit our operational lens -- political parties -- we can state simply then that courts should evince a greater propensity to support the two major political parties, except during "critical periods," when the system is destablized and public support ebbs. We measure that, for now, via electoral support (see note 12).

H2: If courts legitimate the activities of existing regimes, then their decisions will significantly favor those parties in power.

Here, we defined "power" as the array of parties in the other branches of government. If one party controlled the Presidency and one or both Houses of Congress, we coded that party as "in power." We also devised a "split government" category, accounting for those years during which one party controlled Congress and the other, the Presidency.

Based on the literature, we expect to find the courts more prone to support the "in power" parties. During "split government" years, we should find the federal bench more favorably inclined to third party litigation.

H3: If the courts reflect popular will or legitimate existing regimes then they will be less likely to support minor political parties on major policy issues.

Bearing in mind that Dahl and his successors distinguished major from minor laws, we too felt the need to subdivide case substance. Initially, we identified nine issue areas in which the parties participated.[13] After perusing the data, however, we found that few overlapping categories existed for the major and minor parties. That is, they did not participate in the same kinds of cases; for example, the major parties were involved in many "patronage" cases, whereas no minor party litigated in that area. Conversely, "ballot access" issues occupied a great deal of the efforts of minor parties, but not of their counterparts.

After reviewing the relevant literature on political parties _per se_, we came to the conclusion, admittedly _post hoc_, that "major" policy issues varied by party. Hence, we devised two separate major/minor issue variables for the two kinds of parties. For the major parties, significant issues included electoral matters (involving election and campaign issues other than ballot access) and internal party matters (involving issues of party business). All others we categorized as insignificant (see Note 13). For the minor parties, significant issues included ballot access (challenges to procedures used to get on the ballot), electoral matters, and internal security (challenges to or prosecutions under laws passed to secure internal security).[14]

We expect to find minor parties losing significantly more major cases than minor cases and more major cases than the Democratic and Republican parties.

H4: If courts reflect public will or legitimate existing regimes, then they will support neither type of party when challenged by the public or the government.

Although this expectation does not flow directly from Dahl's research, we suspect, based on previous research (see Puro, 1971; Segal, 1984), that the litigant opposing a particular party may affect the court's ultimate resolution. Let us suppose that a minor party is challenging the federal government's, or even a major party's practices, then the "opposing" litigant should make no difference in the expected outcome: unless the suit occurs during a critical period, then the minor party should lose. But, what if it is the federal government challenging a major party activity? Based on Dahl's work and that by others looking specifically at the generally high success rates of the federal government, we would suspect that it would ultimately prevail over any challenger. The same should hold for suits brought by the public.[15]

III. Analysis and Discussion

Examination of the Hypotheses

Tables 1 through 4 depict the relationships suggested in the hypotheses above for the U.S. Supreme Court and the Courts of Appeals.[16]

(Tables 1-4 about here)

Let us turn first to Table 1, which illustrates the basic relationship between court disposition and parties. As we can clearly see, the summary statistics suggest that no significant associations exist between court decisions and party type. The actual Ns and percentages certainly support what the summary statistics reveal -- the Supreme Court supported minor parties in 58.7% of their cases (N=121) and in 43.5% of their majority counterparts' efforts (N=23). The Courts of Appeals ruled favorably for third parties 39.8 percent of the time (N=369) and 46.7 percent for major parties (N=137). Hence without further controls, a clear-cut relationship between parties and the courts fails to emerge.

The table does, however, reveal two rather interesting relationships. First, minor parties have been far more active in the upper rungs of the federal court system than their counterparts (more than 5x the number of Supreme Court and almost 3x as many Court of Appeals cases). Such a finding again reinforces part of Cortner's thesis: disadvantaged groups do use litigation more than their advantaged counterparts. The courts, however, do not seem to differentiate on the basis of "status."

Second, the data reveal interesting differences between the Supreme Court and the Courts of Appeals. We see this on two dimensions. One, although not significantly different in its treatment, the Supreme Court decided the majority of its third party cases favorably and the majority of its

major party cases unfavorably. The Courts of Appeals acted in almost the opposite manner, deciding the majority of their cases against minor parties. Two, almost a twenty percentage point gap exists between the two kinds of courts on their respective treatment of third parties.

Hence, a mixed picture emerges from Table 1. Although the courts, individually, do not significantly favor one kind of party over the other, the lower appellate courts, at least in relation to the High Court, behave in the manner suggested by Dahl.

Table 1a corresponds to H1a, suggesting that the courts would be more prone to support third parties when they perceive greater public support for them (i.e. destabilized periods). Once again, the data do not tend to support our expectation. If anything the reverse relationship appeals to hold: the courts were more favorably disposed toward major parties during periods of lesser electoral support than during years when they remained unchallenged (37.5 percent versus 57.1 percent at the Supreme Court level and 43 percent versus 51.7 percent at the circuit court stage).

Given the small Ns, particularly of Supreme Court cases, we cannot reach any definitive conclusions. Obviously, little support exists for H1a, yet the problem may lie with our measure of majority preference, electoral vote, rather than the concept, itself. It could be, for example, that the courts are acting as legitimators of the public by reinforcing the will of the vast majority of the

people during weak periods within the two-party system. As we dis- cuss later, this is one of several measures upon which we must improve. We must, in short, develop a more valid measure of critical or destabilized periods.

Table 2 explores H2, which suggests that courts should be favorably disposed to the party "in power." Given the small number of cases in which the two major parties were involved, particularly at the Supreme Court level, we can reach few definitive conclusions. Again, however, differences in disposition between the two types of courts seem to emerge. The Supreme Court tended to support the claims of the in-power regime. During years when the Democrats controlled the Presidency or one or both Houses of Congress, they won 42.9% of their cases; when their opponents were in power that figure fell to 14.3 percent -- a substantial difference given that they litigated the same number of cases during both times.

Although we cannot reach definitive conclusions about Court treatment of the Republican Party (they were only involved in 6 cases), Table 2 does suggest that the Court dealt with minority parties in a relatively even-handed manner. It supported their claims in relatively equal percentages regardless of which party controlled government.

The Courts of Appeals' decisions present a very different picture. For one thing, they favored the claims of the Democratic party over its Republican rival under all three circumstances -- Democratic and Republican regimes and

split governments. The Supreme Court, with but one exception, evinced precisely the opposite behavior. Two, the circuit courts were less favorably disposed to both major parties when they were in power. They ruled in favor of Republican party claims in 38.9 percent of the cases generally, but in only 28.6 percent when it was the in power party. Likewise, they supported the Democrats in 48.8 percent of their total cases, but in just 36.6 percent when they were the ruling regime. The only point of commonality between these two tiers of the judiciary, then, was their treatment of minor parties. Court support for these claims remained relatively stable under all three regime circumstances.

In general, though, the data reveal substantial differences between the two levels of courts. Why? Again, we believe that measurement problems may exist. It is entirely reasonable to suspect that the Courts of Appeals may not respond to national stimuli (Congress, the President), but rather to party politics with their geographical boundaries. Hence, we must refine this measure to account for differences among the circuits, an endeavor we will undertake in a future effort.

Table 3 explores the hypothesis suggesting that the courts would be less likely to support minor parties on issues of major policy. As Table 3 indicates, however, the courts do not differentiate between the different policy types at least via the minor parties: both types of courts

supported them in nearly equal proportions on major and minor issues.

Again, though, the results for the major parties are less clear. The Supreme Court exhibited the very behavior toward the major parties that we anticipated it would toward the minor parties. On issues of major policy, the Court ruled favorably for the Democratic or Republican Party in only 33.3 percent of the cases, a score that jumps to 62.5 percent for minor issues. Conversely, the Courts of Appeals behaved as we had anticipated: they were slightly more favorable to major parties on issues of major policy than on minor issues.

Hence, we cannot reach any definitive conclusions about the relationship among court disposition, the role courts play, and policy type. Again we fear that measurement problems of two sorts may be clouding our analysis. One, we may need to rethink the way that we have defined major and minor policies. Two, it is entirely possible that policy type is an important indicator of court disposition, but that other, interacting variables may be masking its effect. One that readily comes to mind is regime, that is, are the courts more favorably disposed toward "in power" parties on issues of major policy? In future efforts, we plan to consider this and other possible relationships among the variables.

Table 4 examines the last specified relationship, suggesting that parties, but minor ones in particular, will

fare poorly against government or public opposition. Here the data present an exceedingly interesting picture, one which again underscores differences between the two levels of courts. The Supreme Court was far more favorably disposed to both types of parties when they faced state government challenges. Although our hypothesis does not differentiate between levels of government, an emerging body of literature on litigation supports this finding. Overall, states fare poorly in Supreme Court litigation and, as such, their opponents, in this case parties, reap the benefits (see Ulmer, 1986a; O'Connor and Epstein, 1987).

Interestingly, though, the relationship between the federal government and the parties does not reflect our expectations. Although the Court was less favorable toward major parties when the federal government opposed their efforts, it remained supportive of third parties under the same condition. Once more this finding may reflect a factor greater than mere opposition: the interaction between in-power parties and opposition. That is, perhaps the federal government generally is challenging or is challenged by the other, out-of-power party.

The Courts of Appeals diverged from the High Court in two ways. First, negligible differences exist between appellate court treatment of the major parties when they face opposition from the state or federal government. Second, while the Supreme Court tended to be less supportive of both parties when they faced challenges from the public,

the Courts of Appeals acted conversely, generally most supportive of both parties under that condition.

Conclusion

The primary goal of this effort was to introduce a new operational lens by which to assess the nature of the role of the federal judiciary in the American political process. We have attempted to argue that court disposition (and not exclusively that of the Supreme Court) of cases involving the major and minor political parties provides a more accurate way to approach this longstanding debate.

A secondary concern was to analyze the data we have thus far collected in light of the existing literature. Based on this preliminary examination we can reach but one reasonably strong conclusion: The Supreme Court and Courts of Appeals behave differently. This is hardly a shocking conclusion to scholars of the judicial process, but it does serve to underscore one of our initial arguments: to understand fully the policy-making role of the judiciary we must examine it in its entirety and not just its apex.

To accomplish this goal, we realize that our efforts must be aimed toward building comprehensive multivariate models, which consider all of the explanations for and interpretations of the courts' roles suggested by the literature. The preliminary analysis we offered here again has helped us to meet that objective. We now realize that we must rectify several major problems, particularly those

involving measurement, before we can create more comprehensive models.

Notes

1. The "disadvantaged" hypothesis is just one example of a proposition flowing from the assumption that courts protect minority rights. The nature of the courts' role, of course, forms the cornerstone of many other lines of inquiry, such as litigant status analyses (see Pritchett, 1954; Snyder, 1956; Ulmer, 1978, 1981).

2. We cite to Dahl's 1967 "reprint" of the 1957 article because he notes there that although this was "adapted," "The data in the tables...has been recomputed to bring them up to date and in some cases to correct errors in the original tables." (p. 154)

3. Casper also took issue with Dahl's coding rules, claiming that they make evaluation of the Court's recent work in the decisiveness dimension...difficult." (1976, p. 53)

4. Dahl and Black reached similar conclusions about the use of judicial review. As Black noted: "The Court's central legitimizing function occurs when it validates actions of popular branches, but validation can only be meaningful if the justices possess the power to strike down acts..." (1960, pp. 49-50, from Adamany, 1973, p. 797).

5. Canon and Ulmer found a number of problems in Funston's article, including 1) that he miscounted/misclassified cases 2) that the New Deal period disproportionately contributed to the "incidences of counter majoritarian behavior," and 3) that Funston should have examined "lag periods - _and the lag periods only_," which they defined "as that period between the time the new coalition assumes control of the elective branches of government and the time its President appoints a sufficient number of justices to control the Supreme Court's decision (1976, pp. 1215-1218).

6. One recent exception is a 1980 article wherein the authors substitute Supreme Court cases in which the federal government participated for judicial review (Handberg and Hill). We find several major problems with using such as measure of Congressional will, which in turn serves as a surrogate for majority will. Most obvious is the fact that the Solicitor General's office, which handles most federal litigation before the Court, is a highly successful litigator and not necessarily because it represents "the public." Rather, as Puro (1971) and others (see Segal, 1984) have noted, the Solicitor General is an institutionalized player in the litigation game.

7. Writing in 1957, Dahl was a bit less sure of his measure of majority will. There, he went into some detail on other possible, but unobtainable, measures such as public opinion data.

8. This definition became a bit "sticky" with cases involving the Communist Party. In many instances, a party member, and not the party itself, was the "named" litigant such as in Dennis v. United States, 341 U.S. 494 (1951). We included this case and all others in which a court's opinion identified a litigant by his party affiliation. We excluded cases in which political parties participated solely as amicus curiae.

9. LEXIS is a data source used mainly by law students and lawyers desiring information on the most recent cases. Hence, its creators worked in reverse chronological order, entering the newest cases first. It is entirely possible, then, that eventually all cases will be entered. In any event, we plan to collect the data for the remaining years at some later date.

10. We could have reviewed each case on the LEXIS terminal, but this would have been extremely costly.

11. We eliminated from the analysis any cases resulting in "mixed" opinions -- those in which no clear cut determination (either for or against the party) emerged.

12. Rather than merely dichotomizing political parties as major (the Republican and Democratic parties) and minor (independent, third parties), we coded each separately (see Appendix B). Such a scheme will give us greater flexibility in future analyses as it is more sensitive to the overall concept stated in H1a. That is, at certain points in history some minor parties and even the major parties have been more or less reflective of societal interests. Hence, by avoiding an aggregated coding scheme, eventually we will examine more carefully issues of "majority will." For example, were the courts more or less favorable to the Community Party in 1936 when Earl Browder received 0.17% of the presidential vote?

13. Again, we wanted to avoid dichotomizing or aggregating content in such a way that we would be unable to study case nuances at a later date. Hence, we coded each case into one of nine issue categories: Ballot Access (cases in which a party challenged procedures used to get onto the ballot); Other Electoral Matters (cases involving election and campaign issues other than access such as fraudulent vote-counting procedures, campaign financing and disclosures); Internal Party Matters (cases involving issues of party business such as delegate selection prodedures and party members); Internal Security (cases involving party

challenges to or prosecutions under laws passed to secure internal safety including criminal syndicalism laws, registration acts, labor affidavits, and loyalty oaths); Deportation/Immigration (cases involving challenges to or prosecutions under laws regulating immigration such as the deportation of individuals belonging to "subversive" parties); Reapportionment (cases involving party challenges to legislative redistricting); Patronage (party cases challenging the actions of another party with regard to hiring, promotions, and firing non-subversives); Hatch Act cases; Fairness/Equal Time Doctrines (party cases challenging the media's allocation of time to another political entity).

14. The major issue categories for both types of parties share two common characteristics noted in the literature as particularly important to political parties (and interest groups): all deal with concepts of maintenance or survival. That is the reason, for example, why we included internal security cases under the heading of major issues for minor parties. Those cases presented challenges to the heart of so-called subversive parties -- their ability to survive and continue their activities within the United States.

15. "The public" included the following litigants: voters, employers, the media, party members, and unions.

16. Our analysis includes Supreme Court cases from 1900-1985 and Courts of Appeals cases from 1938-1985. The Supreme Court decided 14 cases between 1900-1938. For purposes of analysis here we chose to include those cases, fully recognizing that strict comparisons between the two court levels would not be possible. We are in the process of coding the District Court cases.

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TABLE 1
COURT DISPOSITION OF CASES INVOLVING POLITICAL PARTIES

	The Supreme Court	Party	
		Major	Minor
DECISION	For Party	43.5% (10)[a]	58.7% (71)
	Against Party	56.5% (13)	41.3% (50)
	Totals	100% (23)	100% (121)

Chi Square = N.S.
Lambda = .05

	Courts of Appeals	Party	
		Major	Minor
DECISION	For Party	46.7% (64)	39.8% (147)
	Against Party	53.3% (73)	60.2% (222)
	Totals	100% (137)	100% (369)

Chi Square = N.S.
Lambda = 0

[a]Ns are in parenthesis

TABLE 1a
COURT DISPOSITION OF CASES INVOLVING POLITICAL PARTIES
DURING "DESTABILIZED" ELECTORAL YEARS

	Decision/Party	
	For Major Party % (N=)	For Minor Party % (N=)
Supreme Court		
Minor party received less than two electoral votes[a]	37.5% (16)	63.8% (80)
Minor party received more than two electoral votes[b]	57.1% (7)	48.8% (41)
Baseline (overall success rates)	43.5% (23)	58.7% (121)
Courts of Appeals		
Minor party received less than two electoral votes[a]	43% (79)	39.6% (240)
Minor party received more than two electoral votes[b]	51.7% (58)	40.3% (129)
Baseline (overall success rates)	46.7% (137)	39.8% (369)

[a] Includes years: 1913-1916, 1925-1928, 1949-1952, 1961-1965, 1969-1972, 1981-1984 (see also note 16).

[b] Includes years: 1900-1912, 1917-1924, 1929-1948, 1953-1960, 1966-1968, 1973-1980, 1985.

TABLE 2
COURT DISPOSITION OF CASES INVOLVING POLITICAL PARTIES
DURING VARIOUS REGIMES*

	Decision/party		
	For Republican party % (N=)	For Democratic party % (N=)	For minor party % (N=)
Supreme Court			
Republican control[a]	66.7 (3)	14.3 (7)	60 (15)
Democratic control[b]	50 (2)	42.9 (7)	62 (50)
Split government[c]	0 (1)	50 (2)	55.4 (56)
Baseline (overall success rates)	66.7 (6)	31.6(16)	58.7 (121)
Court of Appeals			
Republican control[a]	28.6 (14)	57.9 (19)	39.3 (89)
Democratic control[b]	33.3 (9)	36.6 (41)	40.8 (142)
Split government[c]	53.8 (13)	65 (20)	39.1 (138)
Baseline (overall success rates)	38.9 (36)	48.8 (80)	39.8 (369)

*Ns and %s do not correspond with Tables 1 and 1a because we eliminated certain categories of cases (i.e. when both majority parties sponsored the litigation).

[a]The Republican party controlled the Presidency or one or both Houses during the following years: 1899-1913, 1921-1933, 1953-1955, 1981-1985.

[b]The Democratic party controlled the Presidency or one or both Houses during the following years: 1913-1919, 1933-1947, 1949-1953, 1961-1969, 1977-1981.

[c]One party controlled the Presidency while the other controlled the Congress during the following years: 1919-1921, 1947-1949, 1955-1961, 1969-1977.

TABLE 3
COURT DISPOSITION OF CASES INVOLVING ISSUE TYPES
LITIGATED BY POLITICAL PARTIES

	Decision/party	
	For major party[a] % (N=)	For minor party[b] % (N=)
Supreme Court		
major issue [a,b]	33.5% (15)	59.1% (93)
minor issue	62.5% (8)	57.1% (28)
baseline (overall success)	43.5 % (23)	58.7% (121)
Court of Appeals		
major issue [a,b]	50.8% (59)	41.9% (229)
minor issue	43.6% ((78)	36.4% (140)
baseline (overall success)	46.7% (137)	39.8% (369)

[a]For major parties, major issues are electoral matters and internal party affairs.
[b]For minor parties, major issues are ballot access, electoral matters, and internal security.

TABLE 4
COURT DISPOSITION OF CASES INVOLVING POLITICAL PARTIES
AND THEIR LEGAL OPPOSITION

Opponent to party	Decision/party	
	For major party % (N=)	For minor party % (N=)
Supreme Court		
Federal government	20 % (5)	58.1% (74)
State government	80 % (5)	60.5% (43)
Public	28.6% (7)	50 % (4)
Court of Appeals		
Federal government	29.1% (31)	38.9% (283)
State government	37.9% (29)	43.8% (48)
Public	71.1% (38)	40.5% (37)

APPENDIX A
REVIEW OF RELEVANT LITERATURE*

Author (Year)	Research Question/ Issue	Independent Variables	Dependent Variables
Dahl (1957)	Does the Court protect minority interests?	1. the nature of the "law-making majority 2. lag periods	Federal laws declared unconstitutional by the Supreme Court
Mendelsohn (1959)	Same	1. "periods of unusual weakness in our party system" 2. recruitment	Same
Schmidhauser (1969)	Same	1. party affiliation 2. age and era of appointment 3. other socioeconomic characteristics	1. Court relative support of slavery 2. congressional commerce power 3. expansion of private corporate power
Nagel (1969)	Same	1. party difference between Congress and the Court 2. nature of party in national government 3. Justices' party affiliations	Same as Dahl
Adamany (1973)	Is the Court a legit-imator/reflector of successful regimes/ majority will?	variety of measures including public opinion and historical analyses	various including judicial review
Funston (1975)	Is the Court more likely to act against existing regimes dur-ing "critical" periods?	electoral realignments	Same as Dahl
Casper (1976)	Same as Dahl	Same as Dahl	1. same as Dahl 2. statutory construct-ion by the Supreme Court of state, local, and federal laws
Cannon & Ulmer (1976)	Same as Funston	1. same as Funston 2. lag periods	Same as Funston
Handberg & Hill (1980)	Same as Dahl	1. "political discontinuity" 2. periods in which "the political universe has changed while the Court's membership has not"	U S. government litigation
Caldeira & McCrone (1982)	Examination of Court's "activism" over time	1. time 2. events	1. same as Dahl 2. invalidation by Court of state legislation

*Adapted from Schmidhauser, 1984

APPENDIX B
CODING SCHEME FOR PARTY DATA

Variable Labels	Value Labels
Highest Case Cite (Supreme Court, Courts of Appeals)	
Political party*	"Major" parties Democratic (national and state/local) Republican (national and state/local) Popular Democratic (Puerto Rico) New Progressive (Puerto Rico) More than one major party on the same side of a dispute "Minor" parties American, American Independent, American Labor, Citizens, Communist, Communist-Labor, Conservative, Freedom, La Raza Unida, Liberal, Libertarian, National Democratic, National Socialist (Nazi), National States Rights, Progressive, Progressive-Labor, Socialist, Socialist Labor, Socialist Worker, U. S. Labor More than one minor party on the same side of a dispute
Opposition to party	Federal government, state government, majority party (coded separately), minor party (coded separately), voters, employers, media, party member, union
Issue	Ballot access, electoral matters, internal party affairs, internal security, First Amendment, deportation/immigration, reapportionment, patronage, Hatch Act, fairness/equal time
Year decided by Supreme Court (if Supreme Court case)	
Supreme Court Decision	for party, against party, mixed
Court of Appeals (Case 1) location	(Circuit Number)
Year decided by Court of Appeals (Case 1)	
Court of Appeals decision (Case 1)	
(repeat if court heard case more than once)	
Court of Appeals (Case 2) location**	
Year decided by Court of Appeals (Case 2)	
Court of Appeals decision (Case 2)	
(repeat as necessary)	

*Value labels reflect parties involved in U.S. Supreme Court or appellate court litigation. This is <u>not</u> an inclusive list (see note 11).

**Used when the Supreme Court consolidated two or more cases.