On the Treatment of Political Parties in the U.S. Supreme Court, 1900–1986

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This article contemplates the role the U.S. Supreme Court has played in the maintenance of the American two-party system. Specifically, we ask whether the Court has worked to constrain minor parties or to facilitate their efforts to become meaningful political entities.

Our examination of litigation involving political parties depicts a Court that has remained "neutral" toward minor and major parties; indeed, we found some evidence of a positive relationship between minor parties and Court decisions, but only after we controlled for three other variables: cycles of American politics, case issues, and Court eras. These and other findings lead us to a number of conclusions about the role the Court plays in the American political system.

Despite decades of debate over the role of the U.S. Supreme Court as a national policymaker (i.e., legitimator of majority rule or protector of minority rights), any political or historical account of the quest of minority rights in American politics would be difficult to imagine without mention of the Court. An analysis of the struggle for racial equality, for instance, would not necessarily begin or end with Supreme Court decisions. But would it not be incomplete without some examination of the Court's role, both as a constrainer (*Plessy v. Ferguson* 1896) and as a facilitator (*Brown v. Board of Education* 1954)?

Academics, in fact, widely agree the Court possesses the requisite institutional capacity to act as a protector of divergent minorities. Indeed, the Court's relative propensity to do so often provides at least a partial explanation for the ability of such interests to attain their objectives. What we contemplate here is this: Given the Court's demonstrated ability to constrain or advance minority interests, has it played a *supporting role* in the mainte-

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nance of the American political party system?[1] More specifically, has the Court worked to constrain minor parties, thus providing support for a two-party system? Or, has it acted to "protect" minor parties, thus acting to "open up" the system?

These represent significant queries for several reasons. For one, although several scholars have sought to detail the relationship between the Court and political parties, they have done so descriptively (Starr 1940; Kester 1974; UCLA Law Review 1975; Hadley 1979; McCleskey 1984; Moeller 1987). Such analyses have added to our understanding of "parties in court"; yet, because of their focus on specific court decisions or particular political parties, they reached varying and, often, contradictory conclusions about the nature of that relationship. It is, therefore, an intriguing and important enterprise for us to come to understand the way our least political branch of government has treated our most political entities.

Second, our narrower focus on political parties may allow us to paint a broader picture of the Court's role in society. That is, scholars have long sought to delineate whether the Court largely acts as an agent of the ruling regime or as a keeper of minority rights. Because the dichotomy existing between political parties—major versus all others—reflects these diverse and opposing societal interests, an exploration of their litigation and of their treatment by the Court may help us understand that role in more explicit terms.

To address these questions we divided this article into two parts. In the first, we consider two bodies of literature having some bearing on our research. One involves the debate over the Court's role: Is the Court more likely to act on behalf of minority than majority interests? The second involves this: Can we apply that literature to the litigation of political parties? These discussions lead us to fashion two propositions concerning Court treatment of political parties: (1) minor parties should out-litigate major parties in the U.S. Supreme Court; (2) they, too, should out-perform major political parties in that arena.

In the second section, we test those expectations by comparing the Court's reaction to the claims of major and minor political parties since 1900. Our findings lend support to our first proposition: minor parties resort to the judiciary more than major parties. The data, however, do not confirm our second expectation as the Court does not differentiate between major and minor parties. In the remainder of this article, then, we attempt to explain

[1] Note our emphasis on the word "supporting." Because the Court lacks certain enforcement mechanisms and because of the "rules of the legal game," its decisions can be only a partial explanation for social change. For instance, even though *Brown* was a major breakthrough in the area of civil rights, virtually no scholar has argued that it alone led directly to massive societal changes. Those only came about after passage of the Civil Rights and Voting Rights Acts (see Rosenberg 1985).

this finding by exploring the relative importance of three variables: cycles of American politics, case issues, and Court eras. This exploration reveals a great deal about the relationship between political parties and the Supreme Court, and why that relationship differs from the one the Court maintains with interest groups.

The Role of the Court in National Policy Making

Triggered by Dahl's (1957) seminal study, scholarly debate over the Court's institutional function is more than 30 years old.[2] Although some stalwarts continue to support his essential argument that the Court acts largely as a legitimator of existing majoritarian interests, others effectively have challenged this view. In updating Dahl's study, for example, Casper (1976) argued that the majoritarian view of the Court was time bound because it could not account for the Warren Court era, and that it was tested insufficiently because Dahl only examined invalidated federal laws, excluding statutory construction. Adamany (1973), too, questioned Dahl's central thesis, finding the Court lacked the relative institutional wherewithal to legitimate existing regimes. Based on these and other analyses (see Adamany and Grossman 1983; Lasser 1985), most scholars now agree with Abraham's (1987, 95) conclusion about the Court: "Whatever one's individual views may be regarding either the wisdom or the appropriateness of the Court's role in our democratic society, one thing is clear: the Supreme Court is beyond question *the* great and ultimate defender of the basic freedoms of the American people."

This conclusion also receives support from another body of literature, a series of analyses exploring the use of litigation by interest groups to attain policy objectives and to influence judicial decision making. Underpinning this area of research is a thesis best stated by Cortner: "[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" (1968, 287). Hence, since the Court acts to protect minority interests against majority tyranny, such interests not only will flock to its corridors, but also will receive substantial protection from the Third Branch of government.

[2]The question of whether the judiciary protects minority rights or legitimizes popular will, of course, predates Dahl by 200 years. 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 against minority rights contained in the Constitution. A major mechanism by which courts could achieve this goal, Hamilton argued, was through judicial review.

At first, analysts tested these expectations vis-a-vis the highly successful litigation campaigns of civil rights organizations, which sought expanded interpretations of the Fourteenth Amendment (Vose 1955, 1959; Meltsner 1973; Greenberg 1974, 1977; Kluger 1976). Subsequently, scholars examined the ways numerous other "disadvantaged" segments of society sought and achieved favorable policy proclamations from the Court. We now know, for instance, that those seeking particular resolutions involving the First Amendment and the rights of the criminally accused use litigation with equal frequency and success (Cortner 1975; Sorauf 1976; Kobylka 1987).

The analytic strategies employed by scholars to reach these conclusions were diverse and uneven. Early studies examined specific litigation campaigns, particularly those leading to landmark decisions. Vose (1959) explored events preceding *Shelley v. Kramer* (1948); Kluger (1976) *Brown v. Board of Education* (1954); Meltsner (1973) *Furman v. Georgia* (1972); and, Manwaring (1962) *West Virginia v. Barnette* (1943). Others, largely contextually and descriptively, examined group involvement in various policy areas, such as obscenity (Kobylka 1987), women's rights (O'Connor 1980), the environment (Wenner 1982), and privacy (Rubin 1982). More recently, some have tried empirically to assess group influence through operational indicators, including "success scores" (O'Connor and Epstein 1983), "matching systems" (Epstein and Rowland 1986), and models of performance at the review stage (Caldeira and Wright 1988). Whatever the method, though, the results generally are uniform: groups representing disadvantaged elements out-litigate their majoritarian counterparts and find a receptive audience in the Supreme Court.

Still another related body of literature reinforces these conclusions. Scholars examining access to the Court have found it hospitable to disadvantaged segments; indeed, it has encouraged minorities and their organizational representatives to seek refuge in the judicial corridors (Orren 1976). In cases such as *NAACP v. Button* (1963) and *In re Primus* (1978), the Court has adopted the following position toward disadvantaged and minority interests: "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances" (*NAACP v. Button* 1963, 429–31).

In sum, the extant literature *generally* rejects the idea that the Supreme Court acts as a legitimator of existing majority regimes and, instead, reinforces the Court's role as a keeper of minority rights. Operating under and flowing from this assumption emerges this well-supported view: disadvantaged interests will use the Court with greater frequency and success than their advantaged counterparts.

Political Parties and the Supreme Court

How do political parties "fit" into a framework developed for "disadvantaged" interests? Clearly, interest groups and political parties play different roles in the American governmental process. Although both link "the citizenry to the government through collective action" (Ippolito and Walker 1978, 421), they hold different objectives. Interest groups focus primarily on "influencing public policy" through "political action" (Berry 1989, 4; Schlozman and Tierney 1986, 10). Political parties attempt to take control of the institutions of government through the electoral process. Nevertheless, we propose that the litigation efforts of political parties should comport rather nicely with the aforementioned conclusions developed for disadvantaged interests (e.g., Claude 1970).

We base this expectation on two interrelated sets of considerations. The first is that many differences between political parties and interest groups virtually disappear if we consider the vast array of activities in which both engage outside of the electoral arena. That is, "As with any other interest groups, [parties] become involved in lobbying bills through legislatures, in seeking changes in administrative interpretation . . . of statutes, and in litigating judicial interpretation of law. In doing so they are in the anomalous position of being more and less than the ordinary interest group" (Sorauf 1964, 151). This similarity may be even more attenuated for those political parties, termed "third" or "minor," which bear some resemblance to those interests we previously labeled "disadvantaged." Be they women, blacks, minor religious sects, or extreme ideologues, the disadvantaged share a common characteristic: the denial of access to the governing branches of government. Surely, we could add minor parties to this list, for, as Sorauf and Beck find: "The minor political parties, called minor because they are not electorally competitive, are only nominally electoral organizations . . . Lacking local organization, as most of them do, they resemble the major parties less than do complex, nationwide interest groups. Also, their membership base, often dependent upon a single issue, may be just as narrow, just as exclusively recruited, as that of most interest groups" (1988, 20). Moreover, many issues of concern to minor parties are not wholly different from those of other disadvantaged elements. Consider the parallel quests of blacks and Communist party members in the 1940s and 1950s: both sought meaningful political access through the legal system. When blacks found themselves condemned to lives of segregation, they took to the courts. When the "Party" found itself "outlawed," it also sought refuge in judicial corridors (e.g., Harvard Law Review 1940; Virginia Law Review 1948).

That the litigation activities of interest groups and political parties are comparable in this broad sense may be true. But, it also is reasonable to assume

that their distinct objectives would lead to an entirely different set of judicial policies and politics. Consider, for example, the litigation quests of a minor political party and a disadvantaged interest group. Because its prime objective is to elect candidates to public office, the first is concerned with attaining access to the ballot (see Hadley 1979). Because its prime objective is to influence judicial policy, the disadvantaged group is concerned with attaining access to the legal system (see Orren 1976).

To some extent, these are similar goals: because neither can fully achieve their objectives without meeting them, they are of high priority (see Yale Law Journal 1948; McCleskey 1984; Moeller 1987).[3] Indeed, in *NAACP v. Button* (1963) Justice Brennan recognized this similarity: "The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of society" (1963, 429–31).

What Justice Brennan's remark belies, of course, is differences in the breadth of action that interest groups and political parties often ask the Court to take. It would make little sense for us to claim, for example, that opening access to the ballot and easing entry into the legal system represent similar actions in a democratic society. Clearly their impact would be quite disparate.

This, then, brings us to our second consideration. Although the litigation activities of interest groups and political parties may be comparable only in a broad sense, we nevertheless argue that the overall logic flowing from the interest group literature should "fit" the activities of political parties. That is, disadvantaged groups and minor political parties may be less than analogous entities in absolute terms; yet, the Court should be favorably disposed toward minor parties *relative* to major ones just as it is toward disadvantaged interests *relative* to majoritarian ones. If we agree with reports of numerous scholars (e.g., Casper 1976; Adamany and Grossman 1983) suggesting that the Court does, in fact, protect minority interests, then this is but a logical and inescapable conclusion.

Hence, based on these considerations, we see no reason to suspect the inapplicability of the extant literature detailing the role of the Court in American society. Transposing that framework to the litigation efforts of po-

[3]That these represent priorities for minor parties and interests, without which they cannot fulfill other objectives, has been ably demonstrated. As Rada, Cardwell, and Friedman (1981, 795) noted, "Since 1860, no third party has posed a substantial threat to the major parties in presidential elections. Ballot access regulation, by limiting places on the ballot to those candidates who demonstrate popular support, effectively preserve and promote a two-party system" (see also, Hocker, 1980–81). Issues of access are equally significant to interest group litigators. As Birkby and Murphy (1964, 1039) claimed, "to curtail access to judicial power could stifle any influence on policy making by those groups who have no hope of winning in the legislative or executive process" (see also Olson 1984).

litical parties, we create two basic expectations. First, minor parties should turn to the Court with greater frequency than major parties. Second, minor political parties should achieve significantly greater success than major parties.

Research Strategy

To explore our expectations, we identified all U.S. Supreme Court cases decided between 1900 and 1986 that involved political parties as "appellants" or "appellees."[4] To accomplish this, we entered the name of each party listed in CQ's *Guide to U.S. Elections*[5] and the term "political party" into LEXIS, a legal information retrieval system. After eliminating those in which a party or its representative was not the appellant or appellee, we were left with 97 cases, spanning almost nine decades (1900–1986).[6]

Our propositions require us to distinguish between major and minor political parties. Given the time period under analysis, this was a rather straightforward task: the Democratic and Republican parties were coded as "major" and all others as "minor." "Success" was operationalized by case outcome; the Court ruled either "for" or "against" the party.[7]

Results

The Frequency of Political Party Participation

Table 1 presents the number of cases in which political parties or their representatives participated over the past nine decades, the percentage of cases in which they acted as appellants, and the percentage they won. Taken together, the data (in the *N* column) confirm our first expectation: minor parties participated in almost three times as many cases as their majoritarian counterparts. But, as we can see, the data present a far more complex picture. In all but two decades, neither party category "used" the Court with great frequency.[8] It was only during the 1950s and 1960s that minor parties

[4]*Amicus curiae* participation is excluded. We use the terms "appellant" and "appellee" as generic labels to indicate litigant posture before the Supreme Court.

[5]This list includes more than 500 political parties.

[6]A list of cases is available from the authors. To reiterate, we included only those cases involving a political party or a clearly identified party member. For example, cases in which litigants were "accused" of party membership, but never identified themselves as such, were excluded.

[7]One case resulted in a "mixed" opinion. A problem with this coding scheme involved cases in which the major parties opposed each other. We coded these separately.

[8]One possible explanation for the lack of political party litigation prior to the 1950s involves the Courts' attitudes toward such cases. As one authority explained, "Courts believe that the best forum for political party disputes is the party itself; they regard themselves as the 'last resort' in such matters" (UCLA Law Review 1975, 624). Another noted that "Until recently, the judiciary has been reluctant to consider the problem of [ballot access, in particular], adhering to the principle that the issue was a political question and therefore non-justiciable" (Duke Law Journal 1971, 451).

TABLE 1

POLITICAL PARTIES BEFORE THE U.S. SUPREME COURT: POSTURE, SUCCESS, AND FREQUENCY OF PARTICIPATION

	Minor Parties			Major Parties			Cases with Major Parties as Opponents[a]	
Years	% Appellants	% Won (total)	(N)	% Appellants	% Won (total)	(N)	% Won[b]	(N)
1900–1909	—	—	(0)	—	—	(0)	100	(1)
1910–1919	100	0	(2)	—	—	(0)	—	(0)
1920–1929	100	25	(4)	50	50	(2)	—	(0)
1930–1939	80	80	(5)	0	33	(3)	—	(0)
1940–1949	100	67	(3)	33	0	(3)	—	(0)
1950–1959	92	58	(26)	50	50	(2)	—	(0)
1960–1969	91	67	(21)	—	—	(0)	—	(0)
1970–1979	78	22	(9)	20	60	(5)	0	(2)[c]
1980–1986	0	50	(2)	40	40	(5)	0	(1)
Total	92[d]	54[e]	(72)	32	40	(20)	25	(4)

[a] Cases in which major parties opposed each other.
[b] Percentage of cases won by Democratic party.
[c] One case resulted in a mixed decision. It was excluded.
[d] Percentage of cases over the 1900–1986 period.
[e] Percentage of cases won over the 1900–1986 period.

substantially out-litigated major ones. We shall return to the possible significance of this later.

On the other hand, participation rates do not tell us if the party aggressively sought U.S. Supreme Court review (the appellant) or merely defended a lower court victory (the appellee). This distinction is crucial since the literature suggests that disadvantaged groups *purposefully* pursue their goals through the courts—they, in short, will take an offensive posture (Cortner 1968).

As we can see in table 1, the data relating to litigant posture before the Court—the percentage of cases in which political parties acted as appellants (as opposed to appellees)—lend even greater support to our expectation about political party use of the judiciary. Minor parties appeared much more frequently as "appellants," actively pursuing their goals in the judiciary's apex if only to challenge decisions of courts below. Major parties, in contrast, appeared as appellees defending victories in the lower courts.

In sum, the data generally confirm our first expectation: at least in aggregated form, they suggest that minor parties are more likely to carry their causes to the Supreme Court. This finding comports nicely with existing treatments of the Court's role in American society.

TABLE 2

SUCCESS RATES OF POLITICAL PARTIES AND SELECTED DISADVANTAGED GROUPS

Litigant	Success of Litigant		Years Included
	% won	(*N*)	
Legal Service Corporation Groups[a]	62	(119)	1966–1974
NAACP LDF[b]	70	(10)	1970–1981
Women's Rights Groups[c]	63	(46)	1969–1980
Major Political Parties	50	(10)	1970–1986
Minor Political Parties	27	(11)	1970–1986

Source: [a]Lawrence 1987.
[b]O'Connor and Epstein 1982.
[c]O'Connor and Epstein 1983.

Success in Court

Our second proposition suggests that minor parties will succeed to a greater extent than major parties. Again, as we depict in table 1, however, no significant differences exist in Court treatment of the two categories of political parties. Not only do minor parties fare poorly (at least in terms of our expectations) compared to major parties, they also do not compare favorably with other disadvantaged groups or sectors. Consider table 2, which compares the success rates of various litigators representing minority interests with those of political parties during similar time frames. Of all litigants depicted, minor parties evinced the lowest performance rates.

The only scintilla of evidence supporting the view that minor parties are significantly more successful Supreme Court players than major parties is that they perform better than their counterparts when they are appellees, not appellants (78% success versus 51%). But that finding is based on an extremely small number of cases (nine).[9] Hence, we simply are not convinced that this evidence alone is sufficient to support our expectation, particularly given other findings to the contrary.

EXPLAINING THE LACK OF MINOR PARTY SUCCESS

These findings raise two distinct, but related, questions. The first arises in marked contrast to our expectations: Why does the Court fail to differentiate minor political parties from major ones? The second, though anticipated, is equally intriguing: Why does the Court fail to treat minor political parties in the same way it treats other disadvantaged interests?

[9]Parties were appellants in 63 cases. This is a rather interesting finding, however, since the Court usually accepts cases to reverse.

One possible answer to both questions is that the aggregated data may be masking important differences in Court behavior. In other words, because the relationship between the Court and political parties may not be as straightforward as it is for other disadvantaged litigants, it is important for us to consider the effect other variables may be having on the Court's treatment of parties. Not only could such an exploration help explain why the Court fails to differentiate between the categories of parties. It also may reveal something about broader differences between Court treatment of interest groups and political parties. After consulting the extant literature describing Court decision-making processes and institutional functions, three factors emerge as particularly relevant: cycles of American politics, case issues, and Court eras.

Cycles of American Politics

One possible reason why minor parties fare no better than major ones is that the Court's role is not constant; rather it varies with the ebb and flow of American politics. For example, some argue that the Court reflects "majority will" during "normal" periods to legitimize regimes, but asserts "countermajoritarian functions" during "transitional" periods, the latter because of "holdover justices from the old regime." Operationalizing "transitional" periods as those during which realignments of the electorate occur, Funston (1975) essentially validated the Dahl-Dooley hypothesis that the Court "follows the election returns" (see also Mendelson 1959).

Although some research challenges this interpretation,[10] we cannot dismiss the entire theoretical notion. Students of constitutional law long recognized that the Court's behavior often reflects American politics in generalizable ways. It is far more likely to uphold prohibitions on political and private expression during times of international and domestic crises. Likewise, it is unusually deferential to the legislative and executive branches under similar circumstances (see Chafee 1941; Emerson 1970). Hence, cycles may exist, though not necessarily those corresponding to critical election periods.

This finding may have particular relevance to our inquiry. For one thing, since most minor parties inherently seek to disturb the political equilibrium, the Court may be particularly loathe to support them during times of external and internal threat to the system. Moreover, as shown in table 3, the vast majority of minor party litigation involved strains of radical-left parties. More

[10] After reevaluating Funston's data, Canon and Ulmer (1976, 1218) claimed that "the best interpretation that can be put on [them] is that, overall, there is no significant difference between the Court's counter-majoritarian behavior in lag periods and that in noncritical years." Later , in a diachronic investigation of cases in which the Court "invalidated a state or federal legislative enactment in a particular year from 1800 through 1973," Caldeira and McCrone (1982, 109) found that the Court's "activism" may run in cycles corresponding to "political, social, and economic change," as Funston's analysis suggests. But, once the cycle begins, it takes on a "life of its own."

TABLE 3

MINOR POLITICAL PARTIES INVOLVED IN SUPREME COURT LITIGATION

	Communist Party		Socialist Party		Other Radical Parties		Other Minor Parties	
Years	% won	(*N*)	% won	(*N*)	% won	(*N*)	% won	(*N*)
1910–1919	—	—	0	(2)	—	—	—	—
1920–1929	0	(1)	33	(3)	—	—	—	—
1930–1939	80	(5)	—	—	—	—	—	—
1940–1949	100	(2)	—	—	—	—	0	(1)
1950–1959	58	(26)	—	—	—	—	—	—
1960–1969	56	(16)	—	—	100	(2)	100	(3)
1970–1979	33	(3)	33	(3)	0	(2)	0	(1)
1980–1986	—	—	50	(2)	—	—	—	—
Total[a]	58	(53)	30	(10)	50	(4)	60	(5)

[a] Percent of the cases won over the 1910–1986 period.

than two-thirds of the cases involve the Communist party, while another 20% involve the Socialist and other radical parties. Given this fact, we have all the more reason to suspect Court negativity during "crisis" years (see Harvard Law Review, 1940).

To explore the impact of "crisis" on the Court's treatment of political parties, we could consider a number of possibilities.[11] Given that our data are dominated by decisions handed down during the 1950s, however, one "crisis" in particular seems most relevant: that often labeled "McCarthyism," a period during which political parties advocating "the violent overthrow of the government" were an extremely unwelcome part of the American scene. According to many accounts,[12] this era began with President Truman's 1947

[11] We did, in fact, consider two others. First, as the literature suggests, it seems likely that the Court might react to *international* threats by "closing rank." That is, it may be particularly unsupportive of minor parties during periods of external threat to the political system (see Harvard Law Review 1940). We measured the intensity of the perception of external threat by the percentage of individuals viewing "foreign affairs" as the nation's "most important problem" at any given time. Though these data, for the years 1935 through 1985, contain substantial variation in opinion (see Smith 1985, 264–74), they do not provide a particularly robust explanation; the probability of Court support for minor parties during crisis periods does not appreciably decrease.

We also considered two "domestic" crises relating to the party system. One, of course, is a "realignment" of the electorate: Is the Court less favorable to minor parties in years immediately before and following such domestic upheavals? During the period under analysis, too few cases occurred to address such a query. Hence, we turned to how the ebb and flow of public support for minor parties might affect Court disposition. To accomplish this, we measured public support for minor parties as the percentage of popular vote they captured during given presidential election years. Again, the results of such an analysis were discouraging. The Court's treatment of minor and major parties does not vary significantly with popular support: this variable does not increase or decrease the probability that the Court will support their claims.

[12] The literature on this era is quite vast. For a concise summary, see Schlesinger 1986.

TABLE 4

POLITICAL PARTY LITIGATION DURING THE "COMMUNIST SCARE," 1947–1954

Period	Minor Political Parties		Major Political Parties	
	% Won	(*N*)	% Won	(*N*)
"Communist Scare" (1947–1954)	25	(12)	33	(3)
All Other Periods	60	(60)	41	(17)
Total[a]	54	(72)	40	(20)

[a] Percent of the cases won over the 1910–1986 period.

executive order mandating security checks for federal employees and with the House Un-American Activities Committee's investigation of the Hollywood community the same year. It reached new heights in the period between 1950 (McCarthy's Wheeling speech) and 1954, when McCarthy was "discredited."[13]

Was the Court less favorable to minor parties during the perceived "communist scare" occurring between 1947 and 1954? Table 4, which compares Court resolution of major and minor party disputes during the McCarthy era with all other eras, reveals that the Court treated minor parties in a significantly different manner than it did major ones. Even more noticeable, it gave less-than-usual protection to minor parties, a category dominated by the Communist party (participants in 11 of the 12 cases). Minor parties won only 25% of their cases during this era, a percentage which compares unfavorably to their overall success rate of 54% and to that during the non-McCarthy period of 60%. Moreover, their nine losses during that period account for more than 25% of their total defeats. Lending further support to this finding was the Court's treatment of the Communist party, in particular. Prior to 1947, that party won 75% of its eight cases; after 1954—it succeeded

[13] It is true that McCarthyism "did not entirely end with his political career" (Schlesinger 1986, 524). By the same token, after 1954 the U.S. Supreme Court heard several cases flowing from that era (e.g., *Yates v. United States*, 1957).

We based our decision to define 1947–1954 as the parameters of McCarthyism, though, on several considerations. Most important is this: as Schlesinger (1986, 524) noted, by 1954 "the anti-Communist crusade had largely spent itself. The end of the Korean War and a thaw in the Cold War had helped ease domestic fears; then McCarthy's excesses exposed the dark side of the crusade in a way that few could overlook." In terms of our interest in McCarthyism as a "crisis," it is clear, then, that it ended in 1954. That is, even though the Court heard some cases emanating from the "red scare" period into the late 1950s, the "crisis" environment under which the Justices operated ceased to exist. Since we are measuring the effect a crisis may have had on Court disposition, it seems reasonable to define that event's parameters as its beginning and end, rather than by the cases themselves.

in 65% ($N = 34$). Yet, during the height of McCarthyism (1947-1954), it attained victory in but 27% of its 11 cases.

What do these findings reveal about the relationship between political parties and the Court? Primarily, they tell us that the Court may be distinguishing *between* minor parties, rather than between minor and major ones. That is, these data point less to differences between major and minor parties than they do to Court reaction to radicalism. During the height of McCarthyism, the Supreme Court offered less protection to the Communist party than it had provided to other minor parties, historically and since.

This finding has two important implications. First, because the period of greatest threat to the minor political parties of the day, "McCarthyism," did evoke a negative response from the Court, the data lend some credence to the theses of Dahl and Funston.[14] Indeed, the Court apparently was sensitive to the wishes of existing ruling regimes. Second, the data shed some light on the reason why the Court treats third political parties differently from politically disadvantaged interest groups. Although many organizations representing minority interests have sought legal change through the court system, only a handful have desired the radical, system-level alterations sought by the Communist party. As we alluded earlier, the Court may be willing to advance the purposes of minority interests and parties only up to the point at which those objectives threaten the foundations of the democratic process.

Case Issues

Another factor explaining the relative lack of minor party success may be the kinds of cases they litigate. The extant literature provides some reason to suspect that various types of case law of interest to political parties may evoke different responses from the Court (see Hadley 1979; Moeller 1987). To explore this possibility, we divided our cases into two issue areas: "Freedom" (cases involving free speech, expression, or association issues) and "Electoral Matters" (disputes involving internal party affairs, election laws, or ballot access).[15] Table 5 displays these data for the minor and major parties.

As we can see, table 5 further reveals the complexity of political party liti-

[14] Inherent problems exist in directly testing these theses because we lack data on the percentage of minor party grievances submitted to the courts and on the percentage the Court chose to hear.

[15] "Freedom" includes cases involving internal security (party challenges to or prosecutions under laws passed to secure internal safety such as criminal syndicalism, registration, labor affidavits, and loyalty oaths), deportation/immigration (cases involving challenges to or prosecutions under laws regulating immigration or deportation of individuals belonging to "subversive" parties), and all other cases involving free speech and association rights. "Electoral Matters" includes cases involving: patronage, the Hatch Act, internal party matters (e.g., delegate selection), campaign financing and disclosure, and ballot access.

TABLE 5

ISSUES LITIGATED BY MAJOR AND MINOR POLITICAL PARTIES, 1910–1986

Case Issues	Minor Parties		Major Parties		Major Parties as Opponents	
	% Won	(*N*)	% Won	(*N*)	% Won	(*N*)[a]
Freedom	57	(60)	50	(2)	—	—
Electoral Matters	47	(12)	39	(18)	25	(4)[b]
Total	54	(72)	40	(20)	25	(4)
Subdivision of Electoral Cases						
Election Laws	100	(1)	41	(17)	50	(2)
Ballot Access	37	(11)	—	—	—	—
Patronage	—	—	0	(1)	0	(2)
Total	42	12	39	(18)	25	(4)

[a] Denotes success of the Democratic party.

[b] One case resulted in a "mixed" outcome. It was excluded.

gation. For one thing, it is clear that minor and major parties are not litigating to accomplish the same ends. The modal category for major parties is "Electoral Matters"; for minor parties, "Freedom." What this suggests is that it may be unwise to use the *aggregated* data to draw comparisons between major and minor parties—the case stimuli are too varied to evoke meaningfully comparative responses from the Court. Instead, we can consider the possibility that our aggregated category Electoral Matters may be masking even subtler differences between the parties. To explore this, we subdivided those cases into three distinct types: ballot access, election laws, and patronage issues (see table 5).

Several findings are noteworthy. On one hand, the data once again mirror our aggregated findings that no significant differences exist in the Court's treatment of the two categories of political parties. On the other, minor parties have an extremely low success rate in cases involving ballot access, a finding of interest for two reasons. First, it brings into question recent literature suggesting the Court has wrought damage to the two-party system by opening access. As Sabato (1988, 62) noted, "the Court has been far too insistent on the 'right' of third-party and Independent candidates to easy access to the ballot, ignoring both the essential stability a two-party system brings and society's right to shore up that system." If we were to look only at a select group of cases, such a conclusion would seem reasonable (for examples, see Rada, Cardwell, and Friedman, 1981; Creighton, 1983–1984). But, in the aggregate, the data lend greater support to Moeller's (1987, 728–29) conclusion that the Court draws "lots of little lines rather than following one big

one . . . Consequently, the courts have made the ballot more accessible, but there remains a large gray area that calls for a case-by-case adjudication."

Second, the data presented in table 5 also may help to explain essential differences in the Court's treatment of minor political parties and disadvantaged interest groups. Apparently, facilitating interest group involvement and participation in the judicial system, for example, is a far different matter than providing minor parties with easy access to the ballot. Though they may be of equally high priority to the participants, the Court clearly is willing to go only so far to appease minor parties. The data, though small in number, even seem to suggest that when interest groups and political parties present cases of analogous stimuli to the Court (e.g., "freedom" issues), the Court treats them in a similar fashion. However, when minor parties attempt to pursue their primary objective—attaining ballot access—the Court is reluctant, at best, to interfere with the existing party structure.

Court Eras

A final factor possibly affecting our findings is the Court itself. Is it possible that different Courts afford different treatment to political parties? Extant literature certainly suggests the greatest variations would emerge during the Warren Court years (1952–1969) versus those of the more conservative Burger Court (1970–1986).

Table 6 presents the success rates for parties during these eras. As we can see, two interesting findings emerge. First, and most obvious, the Warren and Burger Courts treated parties quite differently. During the former pe-

TABLE 6

TREATMENT OF POLITICAL PARTIES BY THE WARREN AND BURGER COURTS

	Warren Court		Burger Court	
Party	% won	(*N*)	% won	(*N*)
Major[a]				
Democratic	50	(2)	33	(12)
Republican	—	—	100	(4)
Total	50	(2)	50	(16)
Minor				
Communist	59	(37)	33	(3)
Socialist	—	—	40	(5)
Other Radical	100	(2)	0	(2)
Other Minor	100	(3)	0	(1)
Total	64	(42)	27	(11)

[a] Includes cases in which major parties opposed each other.

riod, minor parties won 64% of their cases; only 27% during the latter period. Even more pointedly, the Warren Court accounts for 66% of the total success of minor parties; the Burger Court—for almost 25% of their total losses. Second, the Burger Court not only differentiated between minor and major parties, generally, but between the major parties as well. During the 1970 to 1986 period, the Republican party won all of its cases; the Democratic party only won 33%. What is even more interesting is that in the three cases in which the two major parties opposed each other, the Republican party always won.

What do these findings imply about the relationship between political parties and the Court? For one, they serve to reinforce conventional wisdom about the Warren and Burger Courts. Despite the fact that "McCarthyism" overlapped with the Warren Court era, that Court provided minor parties with almost two-thirds of their total victories. Moreover, these findings reinforce arguments about the temporal nature of the Court's role. Writing in 1976, Casper criticized Dahl's analysis because it failed to anticipate the Warren Court's propensity to act on behalf of minority interests. Here we find that Burger Court practices conform rather nicely to Dahl's characterization of eras prior to the Warren Court.

In sum, at the outset of this section, we suggested that other variables may be confounding our aggregated analysis of the litigation activities of political parties. Based on the data presented here, this certainly seems to be the case. The aggregated data depicted a Supreme Court that remained "neutral" toward both major and minor parties. Yet, after considering the effect three variables had on the relationship, we see that this is not necessarily the case. In fact, when we "control" for them (McCarthyism, ballot access, the Burger Court era), as shown in table 7, Court treatment of minor parties conforms to our original expectation: the Court does give such parties a "fa-

TABLE 7

SUCCESS OF MINOR PARTIES UNDER MAXIMIZED AND MINIMIZED CONDITIONS

	Minor Parties		Major Parties	
Condition	% won	(*N*)	% won	(*N*)
Maximized for Minor Party[a]	66	(47)	29	(7)
Minimized for Minor Party[b]	22	(9)	—	—
Average Success	54	(72)	40	(20)

[a]Includes: cases decided during Non-McCarthy (1947–1954) and Non-Burger Court (1970–1986) years involving Non-Ballot Access issues.

[b]Includes: cases decided during the McCarthy and Burger Court years involving Ballot Access issues.

vored" status. Under the most favorable conditions, minor parties win 66% of their cases, a percentage comparing quite favorably to other disadvantaged litigants and the major parties, as well.[16]

Conclusion

Our findings give us pause to consider two aspects of Supreme Court behavior. The first concerns the treatment the Court affords to political parties. What can we conclude about the relationship between our least political branch of government and our most political entities? Most important is that our findings relating to the parties *qua* parties shed some light on the debate over the Court's role in a pluralistic society. In particular, they help explain essential differences in the interpretation of the nature of the Court's role because they lend support to both sides. On one hand, because the Court did not accord special status to minor parties, the data suggest the Court acts on behalf of major ones. On the other, several findings, particularly the disparate treatment of minor parties by the Warren and Burger Courts, confirm Casper's argument that Dahl's analysis was largely incomplete. In short, we suggest that the Court's role varies along concrete temporal dimensions and with case stimuli. Further research must be careful to explicate those dimensions before reaching any firm conclusions about the nature of the Court and the part it plays in a "democratic society."

The second concerns why the relationship between political parties and the Supreme Court differs from that between the Court and interest groups. Despite the fact minor parties out-litigate major parties (and, thus, resemble other disadvantaged groups), the Court, in general, does not afford them an elevated status. That is, scholars looking at other groups representing minority interests have found a rather direct relationship between Court treatment and litigant status. We found some evidence of a positive relationship between minor parties and Court decisions, but only after we controlled for other variables.

That we found several factors to have some bearing on the Court-political party relationship, though, provides us with a richer understanding of why the Court treats minor political parties differently than disadvantaged groups. Indeed, the data imply that the Court is sensitive to and mindful of the distinct roles these entities play in American society. Further research ought to

[16] Given the nature of our investigation, we are somewhat hesitant to estimate a multivariate model of Court support for minor parties. For those interested, though, the results estimated through Probit, are as follows:

$$(P)Y = \phi\,(4.58 + 1.10X_1 + 1.29X_2 - .122X_3)$$
$$\text{(st. error)}\,(.185)\quad(.433)\quad(.660)\quad(.588)$$

Where: $Y = 0$ if minor party lost, 1 if minor party won; $X_1 = 0$ if non-McCarthy era, 1 if McCarthy era; $X_2 = 0$ if non-Burger Court era, 1 if Burger Court era; and, $X_3 = 0$ if non-ballot access issue, 1 if ballot access.

consider that distinction and how it affects the decision-making processes of other governmental institutions.

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